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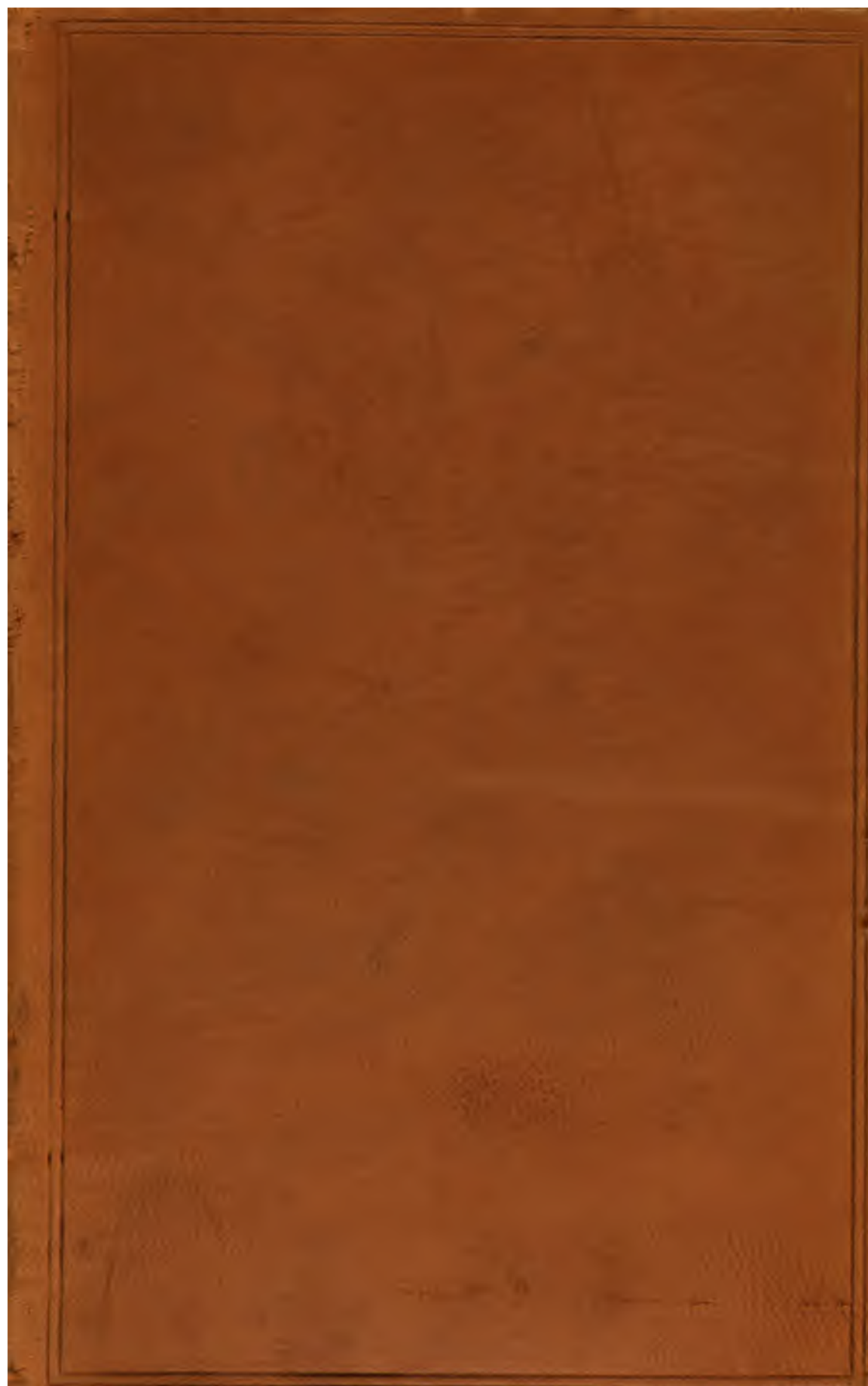
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RAILROAD REPORTS

(Vol 36 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

VOLUME XIII.

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Municipal Corporation Cases.
Banking Cases.**

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TABLE OF CASES

Alabama & V. R. Co. <i>v.</i> Livingston (Miss.)	464
Albert <i>v.</i> Boston Elevated Ry. Co. (Mass.)	779
Altgen, East St. Louis Connecting Ry. Co. <i>v.</i> (Ill.)	88
Altoona Belt Line St. Ry. Co. <i>v.</i> City Pass. Ry. Co. (Pa.)	52
Ann Arbor R. R., Dean <i>v.</i> (Mich.)	365
Arkansas Cent. R. Co. <i>v.</i> State (Ark.)	418
Arkansas Southern R. Co., Stewart <i>v.</i> (La.)	330
Baker, Georgia Ry. & Electric Co. <i>v.</i> (Ga.)	259
Baltimore & O. R. Co., Canton Co. of Baltimore <i>v.</i> (Md.)	708
Birmingham Ry., Light & Power Co., Bube <i>v.</i> (Ala.)	380
Birmingham Ry., Light & Power Co. <i>v.</i> Bynum (Ala.)	683
Bjornquist <i>v.</i> Boston & A. R. Co. (Mass.)	786
Boering, John D. and Mearlin G. Boering, His Wife, Plffs. in Err., <i>v.</i> Chesapeake Beach Ry. Co. (U. S.)	313
Boone Suburban Ry. Co., Cotant <i>v.</i> (Iowa)	320
Boston & A. R. Co., Bjornquist <i>v.</i> (Mass.)	786
Boston Elevated Ry. Co., Albert <i>v.</i> (Mass.)	779
Boston Elevated Ry. Co., Duchemin <i>v.</i> (Mass.)	679
Bottomf, Louisville & C. Packet Co. <i>v.</i> (Ky.)	263
Braymer <i>v.</i> Seattle, R. & S. Ry. Co. (Wash.)	31
Briggs, Norfolk & W. Ry. Co. <i>v.</i> (Va.)	201
Bube <i>v.</i> Birmingham Ry., Light & Power Co. (Ala.)	380
Burlington & N. W. Ry. Co., Fishburn <i>v.</i> (Iowa)	768
Burton, Illinois Cent. R. Co. <i>v.</i> (Ky.)	794
Bynum, Birmingham Ry., Light & Power Co. <i>v.</i> (Ala.)	683
Camp <i>v.</i> Chicago Great Western Ry. Co. (Iowa)	819
Canton Co. of Baltimore <i>v.</i> Baltimore & O. R. Co. (Md.)	708
Carroll, Knoxville Traction Co. <i>v.</i> (Tenn.)	707
Can. Jovite, Plff. in Err., <i>v.</i> Texas & Pacific Railway Company (U. S.)	303
Cheatwood's Adm'x, Norfolk & W. Ry. Co. <i>v.</i> (Va.)	850
Cheaves, Southern Ry. Co. <i>v.</i> (Miss.)	803
Cheetham <i>v.</i> Union R. Co. (R. I.)	292
Chesapeake Beach Ry. Co., John D. Boering and Mearlin G. Boering, His Wife, Plffs. in Err., <i>v.</i> (U. S.)	313
Chesapeake & O. Ry. Co., Hicks <i>v.</i> (Va.)	50
Chesapeake & O. Ry. Co., Ryland & Rankin <i>v.</i> (W. Va.)	279
Chesapeake & Ohio Ry. Co., Sanger <i>v.</i> (Va.)	482
Chicago & A. Ry. Co. <i>v.</i> Pulliam (Ill.)	755
Chicago, B. & O. R. Co., State ex rel. McComb <i>v.</i> (Neb.)	336
Chicago & E. I. Ry. Co. <i>v.</i> White (Ill.)	558
Chicago & G. T. Ry. Co. <i>v.</i> Hart (Ill.)	579
Chicago, I. & L. Ry. Co. <i>v.</i> Leachman (Ind.)	775
Chicago & N. W. Ry. Co., Coine <i>v.</i> (Iowa)	316
Chicago, St. P., M. & O. Ry. Co., Weed <i>v.</i> (Neb.)	797
Chicago Great Western Ry. Co., Camp <i>v.</i> (Iowa)	819
Cincinnati, N. O. & T. P. Ry. Co., Tuttle <i>v.</i> (Ky.)	333
City & Suburban Ry. Co., Dubiver <i>v.</i> (Ore.)	451
City of Harriman <i>v.</i> Southern Ry. Co. (Tenn.)	373
City Pass. Ry. Co., Altoona Belt Line St. Ry. Co. <i>v.</i> (Pa.)	52
Clarke <i>v.</i> New York, N. H. & H. R. Co. (R. I.)	53
Cleveland, L. & W. Ry. Co. <i>v.</i> Shanower (Ohio)	147
Clovers' Adm'x, Virginia & S. W. Ry. Co. <i>v.</i> (Va.)	170
Coakley <i>v.</i> Southern Ry. Co. (Ga.)	371
Coine <i>v.</i> Chicago & N. W. Ry. Co. (Iowa)	316
Confer <i>v.</i> Pennsylvania R. Co. (Pa.)	429
Connery <i>v.</i> Quincy, O. & K. C. R. Co. (Minn.)	361

Conrad v. Elizabeth, P. & C. J. Ry. Co. (N. J.)	126
Coolbroth v. Pennsylvania R. Co. (Pa.)	419
Cotant v. Boone Suburban Ry. Co. (Iowa)	320
Cully v. Northern Pac. Ry. Co. et al. (Wash.)	165
Davis, Nashville & K. R. Co. v. (Tenn.)	432
Dean v. Ann Arbor R. R. (Mich.)	365
Detroit Southern R. Co., Turner v. (Mich.)	163
Detroit, Y., A. A. & J. Ry., Harrison v. (Mich.)	187
Dougherty v. Yazoo & M. V. R. Co. (Miss.)	327
Dubiver v. City & Suburban Ry. Co. (Ore.)	451
Duchemin v. Boston Elevated Ry. Co. (Mass.)	679
Durham & C. R. Co., McNeill v. (N. Car.)	647
East Jordan Lumber Co., Hewitt v. (Mich.)	212
East St. Louis Connecting Ry. Co. v. Altgen (Ill.)	88
Eichorn v. New Orleans & C. R., Light & Power Co. (La.)	128
Elizabeth, P. & C. J. Ry. Co., Conrad v. (N. J.)	126
Elizabeth, P. & C. J. Ry. Co., Searles v. (N. J.)	781
Erie Rapid Transit St. Ry. Co., Millcreek Tp. v. (Pa.)	36
Erie R. Co., Powell v. (N. J.)	615
Fares v. Rio Grande Western R. Co. (Utah)	76
Fargo, James C., as President of the American Express Company, Appt., v. William H. Hart, Auditor of State of the State of Indiana (U. S.)	737
Fishburn v. Burlington & N. W. Ry. Co. (Iowa)	768
Foster v. Seattle Electric Co. (Wash.)	640
Freeman, Missouri, K. & T. Ry. Co. of Texas v. (Tex.)	598
French v. Grand Trunk Ry. Co. (Vt.)	426
Fullmer v. New York Cent. & H. R. R. Co. (Pa.)	817
Garlich v. Northern Pac. Ry. Co. (C. C. A.)	460
Georgia, C. & N. Ry., Nelson v. (S. Car.)	150
Georgia R. & Banking Co. v. Mayor, etc., of Town of Union Point (Ga.)	354
Georgia Ry. & Electric Co. v. Baker (Ga.)	259
Grand Rapids & I. Ry. Co., Jordan v. (Ind.)	367
Grand Trunk Ry. Co., French v. (Vt.)	429
Gulf, C. & S. F. Ry. Co. v. Howard et al. (Tex.)	175
Hailey v. Texas & P. Ry. Co. (La.)	153
Halverson v. Seattle Electric Co. (Wash.)	282
Hargadine, Omaha Bridge & Terminal Co. v. (Neb.)	827
Harp v. Southern Ry. Co. (Ga.)	342
Harrison v. Detroit, Y. A. A. & J. Ry. (Mich.)	187
Harrison, Missouri, K. & T. Ry. Co. of Texas v. (Tex.)	617
Hart, Chicago & G. T. Ry. Co. v. (Ill.)	579
Hart, William H., Auditor of State of the State of Indiana, James C. Fargo, as President of the American Express Company, Appt., v. (U. S.)	737
Havens v. Rhode Island Suburban Ry. Co. (R. I.)	549
Haynes, Memphis St. Ry. Co. v. (Tenn.)	384
Heinzle v. Metropolitan St. Ry. Co. (Mo.)	107
Hendler v. Lehigh Valley R. Co. (Pa.)	40
Hewitt v. East Jordan Lumber Co. (Mich.)	212
Hicks v. Chesapeake & O. Ry. Co. (Va.)	50
Higby v. Pennsylvania R. Co. (Pa.)	479
Hinzeman v. Missouri Pac. Ry. Co. (Mo.)	178
Holden v. Missouri R. Co. (Mo.)	440
Holly v. Southern Ry. Co. (Ga.)	308
Howard, Gulf, C. & S. F. Ry. Co. v. (Tex.)	175
Hudson v. Lynn & B. R. Co. (Mass.)	622
Huff, Missouri, K. & T. Ry. Co. of Texas v. (Tex.)	344
Hunt v. Illinois Cent. R. Co. (Ind.)	607
Illinois Cent. R. Co. v. Burton (Ky.)	794
Illinois Cent. R. Co., Hunt v. (Ind.)	607
Illinois Cent. R. Co. v. Prickett (Ill.)	139
Illinois Southern Ry. Co. v. Marshall (Ill.)	95
Indiana Ry. Co. v. Morgan (Ind.)	750

TABLE OF CASES

v

Jarrett, Tennessee Coal, Iron & R. Co. v. (Tenn.).....	589
Jones v. United Railways & Electric Co. of Baltimore (Md.).....	631
Jordan v. Grand Rapids & I. Ry. Co. (Ind.).....	397
Kansas City Southern Ry. Co. v. Marx (Ark.).....	758
Kansas City Southern Ry. Co. v. Prunty (C. C. A.).....	488
Keefe v. Norfolk Suburban St. Ry. Co. (Mass.).....	792
Kentucky & I. Bridge & R. Co. v. Shrader (Ky.)..	611
Knoxville Traction Co. v. Carroll (Tenn.).....	707
Lauterer v. Manhattan Ry. Co. (C. C. A.).....	295
Leachman, Chicago, I. & L. Ry. Co. v. (Ind.).....	775
Lehigh Valley R. Co., Hendler v. (Pa.).....	40
Lime Rock R. Co., Ulmer v. (Me.).....	724
Livingston, Alabama & V. R. Co. v. (Miss.).....	464
Louisiana Western R. Co., Marx v. (La.).....	635
Louisville, A. & P. V. Electric Ry. Co. v. Whipps (Ky.).....	744
Louisville & C. Packet Co. v. Bottorff (Ky.).....	263
Louisville & N. R. Co. v. Smith (C. C. A.).....	716
Louisville & N. R. Co. v. Sullivan Timber Co. (Ala.).....	836
Louisville Ry. Co. v. Teekin (Ky.).....	785
Lynn & B. R. Co., Hudson v. (Mass.).....	622
McCabe, Maysville & B. S. R. Co. v. (Ky.).....	459
McCabe v. Montana Central Ry. Co. (Mont.).....	564
McGraw v. Southern Ry. Co. (N. Car.).....	257
McKeown v. South Carolina & Georgia Extension R. Co. (S. Car.)..	71
McLean v. Pere Marquette R. Co. (Mich.).....	544
McNeill v. Durham & C. R. Co. (N. Car.).....	647
Magrane v. St. Louis & S. Ry. Co. (Mo.).....	1
Manhattan Ry. Co., Lauterer v. (C. C. A.).....	295
Marshall, Illinois Southern Ry. Co. v. (Ill.).....	95
Martin's Adm'r, Richmond, F. & P. R. Co. v. (Va.).....	435
Marx, Kansas City Southern Ry. Co. v. (Ark.).....	758
Marx v. Louisiana Western R. Co. (La.).....	635
Mayor, etc., of Town of Union Point, Georgia R. & Banking Co. v. (Ga.).....	354
Maysville & B. S. R. Co. v. McCabe (Ky.).....	459
Means v. Southern California Ry. Co. (Cal.).....	411
Memphis St. Ry. Co. v. Haynes (Tenn.).....	384
Metropolitan St. Ry. Co., Heinze v. (Mo.).....	107
Metropolitan St. Ry. Co., Stillings v. (N. Y.).....	773
Mexican National Railroad Company, Lena M. Slater, W. G. Slater, Jesse R. Slater, Annie E. Slater, and Henry G. Slater, Petitioners, v. (U. S.).....	759
Michigan Cent. Ry. Co., Van Camp v. (Mich.).....	260
Michigan Cent. R. Co., Wright, Internal Revenue Collector, v. (C. C. A.).....	45
Middlesex & S. Traction Co., Raritan River R. Co. v. (N. J.).....	56
Millcreek Tp. v. Erie Rapid Transit St. Ry. Co. (Pa.).....	36
Missouri, K. & T. Ry. Co. of Texas v. Freeman (Tex.).....	598
Missouri, K. & T. Ry. Co. of Texas v. Harrison (Tex.).....	617
Missouri, K. & T. Ry. Co. of Texas v. Huff (Tex.).....	344
Missouri, K. & T. Ry. Co. of Texas v. Smith (Tex.).....	573
Missouri Pac. Ry. Co., Hinzeman v. (Mo.).....	178
Missouri R. Co., Holden v. (Mo.).....	440
Mitchell v. New Orleans & N. E. R. Co. (Miss.).....	785
Montana Central Ry. Co., McCabe v. (Mont.).....	564
Morgan, Indiana Ry. Co. v. (Ind.).....	750
Nashville & K. R. Co. v. Davis (Tenn.).....	432
Nelson v. Georgia, C. & N. Ry. (S. Car.).....	150
Newcomb v. New York Cent. & H. R. R. Co. (Mo.).....	10
New Orleans & C. R., Light & Power Co., Eichorn v. (La.).....	128
New Orleans & N. E. R. Co., Mitchell v. (Miss.).....	785
New York Cent. & H. R. R. Co., Fullmer v. (Pa.).....	817
New York Cent. & H. R. R. Co., Newcomb v. (Mo.).....	10
New York, N. H. & H. R. Co., Clarke v. (R. I.).....	53
New York, N. H. & H. R. Co., Whittlesey v. (Conn.).....	104

Norfolk & W. Ry. Co. <i>v.</i> Briggs (Va.).....	201
Norfolk & W. Ry. Co. <i>v.</i> Cheatwood's Adm'r (Va.).....	850
Norfolk Suburban St. Ry. Co., Keefe <i>v.</i> (Mass.).....	792
Normile <i>v.</i> Northern Pac. Ry. Co. (Wash.).....	194
Northern Pac. Ry. Co., Cully <i>v.</i> (Wash.).....	165
Northern Pac. Ry. Co., Garlich <i>v.</i> (C. C. A.).....	460
Northern Pac. Ry. Co., Normile <i>v.</i> (Wash.).....	194
Northern Pac. Ry. Co., Sprague <i>v.</i> (Wis.).....	348
Omaha Bridge & Terminal Co. <i>v.</i> Hargadine (Neb.).....	827
Peed's Administrator, Portsmouth St. R. Co. <i>v.</i> (Va.).....	65
Pennsylvania R. Co., Confer <i>v.</i> (Pa.).....	429
Pennsylvania R. Co., Coolbroth <i>v.</i> (Pa.).....	419
Pennsylvania R. Co., Higby <i>v.</i> (Pa.).....	479
Pennsylvania R. Co., Rowdin <i>v.</i> (Pa.).....	672
Pere Marquette R. Co., McLean <i>v.</i> (Mich.).....	544
Portsmouth St. R. Co. <i>v.</i> Peed's Administrator (Va.).....	65
Powell <i>v.</i> Erie R. Co. (N. J.).....	615
Prickett, Illinois Cent. R. Co. <i>v.</i> (Ill.).....	139
Puntty, Kansas City Southern Ry. Co. <i>v.</i> (C. C. A.).....	488
Pulliam, Chicago & A. Ry. Co. <i>v.</i> (Ill.).....	755
Quincy, O. & K. C. R. Co., Connery <i>v.</i> (Minn.).....	361
Raritan River R. Co. <i>v.</i> Middlesex & S. Traction Co. (N. J.).....	56
Rawitzer <i>v.</i> St. Paul City Ry. Co. (Minn.).....	91
Reagan <i>v.</i> St. Louis Transit Co. (Mo.).....	688
Rhode Island Suburban Ry. Co., Havens <i>v.</i> (R. I.).....	549
Richmond, F. & P. R. Co. <i>v.</i> Martin's Adm'r (Va.).....	435
Rio Grande Western R. Co., Fares <i>v.</i> (Utah).....	76
Roenfeldt <i>v.</i> St. Louis & S. Ry. Co. (Mo.).....	470
Rowdin <i>v.</i> Pennsylvania R. Co. (Pa.).....	672
Ryland & Rankin <i>v.</i> Chesapeake & O. Ry. Co. (W. Va.).....	279
St. Joseph & G. I. Ry. Co., Spangler <i>v.</i> (Kan.).....	208
St. Louis & S. Ry. Co., Magrane <i>v.</i> (Mo.).....	1
St. Louis & S. Ry. Co., Roenfeldt <i>v.</i> (Mo.).....	470
St. Louis Transit Co., Reagan <i>v.</i> (Mo.).....	688
St. Paul City Ry. Co., Rawitzer <i>v.</i> (Minn.).....	91
Sanger <i>v.</i> Chesapeake & Ohio Ry. Co. (Va.).....	482
Schenectady Ry. Co., Thompson <i>v.</i> (C. C. A.).....	351
Seaboard Air Line Ry., State ex rel. Railroad Com'rs et al. <i>v.</i> (Fla.).....	266
Searles <i>v.</i> Elizabeth, P. & C. J. Ry. Co. (N. J.).....	781
Seattle Electric Co., Foster <i>v.</i> (Wash.).....	640
Seattle Electric Co., Halverson <i>v.</i> (Wash.).....	282
Seattle, R. & S. Ry. Co., Braymer <i>v.</i> (Wash.).....	31
Shanower, Cleveland, L. & W. Ry. Co. <i>v.</i> (Ohio).....	147
Shrader, Kentucky & I. Bridge & Ry. Co. <i>v.</i> (Ky.).....	611
Simpson, Southern Ry. Co. <i>v.</i> (C. C. A.).....	402
Slater, Lena M., W. G. Slater, Jesse R. Slater, Annie E. Slater, and Henry G. Slater, Petitioners, <i>v.</i> Mexican National Railroad Company (U. S.).....	759
Smith, Louisville & N. R. Co. <i>v.</i> (C. C. A.).....	716
Smith, Missouri, K. & T. Ry. Co. of Texas <i>v.</i> (Tex.).....	573
South Carolina & Georgia Extension R. Co., McKeown <i>v.</i> (S. Car.).....	71
Southern California Ry. Co., Means <i>v.</i> (Cal.).....	411
Southern Ry. Co. <i>v.</i> Cheaves (Miss.).....	803
Southern Ry. Co., City of Harriman <i>v.</i> (Tenn.).....	373
Southern Ry. Co., Coakley <i>v.</i> (Ga.).....	371
Southern Ry. Co., Harp <i>v.</i> (Ga.).....	342
Southern Ry. Co., Holly <i>v.</i> (Ga.).....	308
Southern Ry. Co., McGraw <i>v.</i> (N. Car.).....	257
Southern Ry. Co. <i>v.</i> Simpson (C. C. A.).....	402
Southern Ry. Co. <i>v.</i> Yancy (Ala.).....	466
Spangler <i>v.</i> St. Joseph & G. I. Ry. Co. (Kan.).....	208
Sprague <i>v.</i> Northern Pac. Ry. Co. (Wis.).....	348
State, Arkansas Cent. R. Co. <i>v.</i> (Ark.).....	418
State ex rel. McComb <i>v.</i> Chicago, B. & O. R. Co. (Neb.).....	336
State ex rel. Railroad <i>v.</i> Seaboard Air Line Ry. (Fla.).....	266

TABLE OF CASES

VII

Stewart v. Arkansas Southern R. Co. (La.).....	330
Stewart v. Texas & P. Ry. Co. (La.).....	158
Stillings v. Metropolitan St. Ry. Co. (N. Y.).....	773
Sullivan Timber Co., Louisville & N. R. Co. v. (Ala.).....	836
Teekin, Louisville Ry. Co. v. (Ky.).....	785
Tennessee Coal, Iron & R. Co. v. Jarrett (Tenn.).....	589
Texas & Pacific Ry. Co., Jovite Cau, Plff. in Err., v. (U. S.).....	303
Texas & P. Ry. Co., Hailey v. (La.).....	153
Texas & P. Ry. Co., Stewart v. (La.).....	158
Thompson v. Schenectady Ry. Co. (C. C. A.).....	351
Turner v. Detroit Southern R. Co. (Mich.).....	163
Tuttle v. Cincinnati, N. O. & T. P. Ry. Co. (Ky.).....	333
Ulmer v. Lime Rock R. Co. (Me.).....	724
Union R. Co., Cheetham v. (R. I.).....	292
United Railways & Electric Co. of Baltimore, Jones v. (Md.).....	631
Van Camp v. Michigan Cent. Ry. Co. (Mich.).....	260
Virginia & S. W. Ry. Co. v. Clowers' Adm'x (Va.).....	170
Weed v. Chicago, St. P., M. & O. Ry. Co. (Neb.).....	797
Whipps, Louisville, A. & P. V. Electric Ry. Co. v. (Ky.).....	744
White, Chicago & E. I. Ry. Co. v. (Ill.).....	558
Whittlesey v. New York, N. H. & H. R. Co. (Conn.).....	104
Wright, Internal Revenue Collector, v. Michigan Cent. R. Co. (C. C. A.).....	45
Yancy, Southern Ry. Co. v. (Ala.).....	466
Yazoo & M. V. R. Co., Dougherty v. (Miss.).....	327



RAILROAD REPORTS

MAGRANE v. ST. LOUIS & S. RY. CO.

(Supreme Court of Missouri, Division No. 1, May 25, 1904.)

[81 S. W. Rep. 1158.]

Carriage of Passengers—Degree of Care.*

The care which a carrier owes to its passenger is of a very high degree, but is not the utmost care that human imagination can conceive.

Negligence.

The term "slightest neglect or negligence" should be avoided in instructions, as there are no degrees of negligence.

Injury to Passenger—Degree of Care—Instruction—Harmless Error.

Where, under the undisputed evidence in an action by a passenger for injuries sustained in a railway collision, the defendant was prima facie guilty of actionable negligence, and there was no evidence tending to overcome it, an instruction that it was the duty of the carrier to carry the passenger safely as far as it was capable by human care, though imposing on the carrier a higher degree of care than the law imposed, was not prejudicial.

Injury to Passenger—Collision—Presumption of Negligence.†

The fact of a collision resulting from two cars being run in opposite directions on the same track is prima facie evidence of negligence, and the carrier has the burden of proving that the collision occurred by some act beyond its power to avoid.

Same—Same—Panic—Pushed from Platform—Proximate Cause.

Where, in an action by a passenger for injuries sustained in a railway collision, the evidence showed that, because of the crowded condition of the car, the passenger was standing on the front platform, and that when the danger of a collision was imminent a panic ensued, and he was pushed off by people attempting to escape, and fell to the ground an instant before the collision, an instruction imposing on the carrier the duty of carrying the passenger safely as far as it was capable by human care to do, making it liable for the slightest neglect, and stating that, where a collision results from two cars being run in opposite directions on a single track, the carrier is prima facie negligent, was not erroneous, because based on the theory that the passenger was injured by the collision of the cars.

Same—Same—Negligence—Sufficiency of Petition.

A petition, in an action for personal injuries sustained in a railway collision, which alleged that the servants in charge of the car on which plaintiff was riding ran it at a dangerous rate of speed, and that defendant negligently ran a car in the opposite direction on the same track, thereby causing the collision, sufficiently charged defendant with negligence in allowing the collision, so as to warrant an instruction on that theory.

*See foot-note appended to *Palmer v. Warren St. Ry. Co.* (Pa.), 10 R. R. R. 597, 33 Am. & Eng. R. Cas., N. S., 597.

†As to the presumption of negligence from mere fact of injury to passenger, see foot-note appended to *McCord v. Atlanta & C. Air Line R. Co.* (N. Car.), 10 R. R. R. 275, 33 Am. & Eng. R. Cas., N. S., 275.

*Magrane v. St. Louis & S. Ry. Co***Same—Same—Contributory Negligence—Instruction.**

An instruction, in an action for personal injuries sustained in a collision, which ignores the question of plaintiff's contributory negligence, is not erroneous, where there is no evidence that plaintiff was negligent.

Same—Standing on Platform—Care Required.

A passenger standing on the platform of a car is required to exercise the increased care the increased danger entails, and there is imposed on the carrier a corresponding duty to handle the car with increased care in view of his exposed position.

Same—Collision—Liability—Instruction—Harmless Error.

An instruction, in an action for personal injuries sustained in a railway collision, that if plaintiff, while acting as an ordinarily prudent person under the circumstances, was injured in the manner claimed by him in his petition, defendant could not escape liability, unless it proved that the accident happened from causes beyond its control, though erroneous for referring the jury to the petition for the issues, was not prejudicial, where, under the evidence of both parties, defendant was liable.

Negligence—Instructions.

It is error to submit to the jury questions of negligence, without instructing as to what constitutes negligence.

Injury to Passenger—Collision—Negligence—Instruction.

Where, in an action for personal injuries sustained in a railway collision, there was no instruction defining negligence, the question submitted to the jury should be whether defendant observed the degree of care required, and the required degree of care should be stated.

Appeal from Circuit Court, St. Charles County; E. M. Hughes, Judge.

Action by William P. Magrane against the St. Louis & Suburban Railway Company. From a judgment for plaintiff, defendant appeals. Conditionally affirmed.

McKeighan & Watts, Robt. A. Holland, Jr., and Jefferson Chandler, for appellant.

Thos. T. Fauntleroy and T. F. McDearmon, for respondent.

VALLIANT, J. The defendant owns and operates a system of street railroads in the city of St. Louis and the county of St. Louis. On September 7, 1900, a collision occurred between two cars of defendant that were running on the same track, each in the opposite direction to the other. The plaintiff was a passenger on one of the cars, and received personal injuries in the collision; that is, he was not on the car at the instant it came in actual collision with the other, but when the danger of collision was imminent there was a panic rush of the people on the car to escape, and the plaintiff, standing on the front platform, was pushed off by the mass of the escaping people, and fell to the ground an instant before the cars struck each other. He sues for damages, alleging that the collision was caused by the negligence of the defendant. The answer to the petition is a general denial and a plea of contributory negligence. This collision has been brought to the attention of this court in two other cases, where passengers were injured in it (*Malloy v. St.*

Magrane v. St. Louis & S. Ry. Co

Louis & Suburban Ry. Co., 173 Mo. 75, 73 S. W. 159; *Hennesy v. St. Louis & Suburban Ry. Co.*, 173 Mo. 86, 73 S. W. 162), and the evidence in the case at bar as to the collision, so far as its legal effect is concerned, is substantially the same as in those two cases. That part of the defendant's railroad with which we are now concerned was a single track. Just before reaching Romona Park from the west, there is a curve in the road, which prevents the motorman on a car going either way from having a long view of the track. On this occasion the car on which plaintiff was a passenger had left Kinloch Park, headed for St. Louis, and was approaching Romona Park. The car was so crowded with passengers that plaintiff, with a number of other persons, was on the front platform. It was 6:30 o'clock in the evening, about twilight. As this car was going around the curve, the headlight of another car coming from the opposite direction was seen by the motorman at the distance of 150 or 170 feet. There is a conflict in the evidence as to the speed at which the car in which the plaintiff was going when the danger appeared. Plaintiff's witness estimated it to have been 20 to 30 miles an hour; defendant's witness, 12 to 15. The motorman immediately applied the brakes and reversed the power, and by the time the collision occurred the speed was much reduced. The other car was coming about 6 miles an hour, and its motorman likewise applied the brakes and reduced the speed as much as possible. As soon as the headlight was seen a panic occurred in the car in which the plaintiff was, and a rush was made by the passengers to jump off. The motorman joined in the rush, and as the plaintiff was in the way he was pushed or carried off by the impetus and fell to the ground. He testified that just as he struck the earth he heard the crash of the cars coming together. He received a serious hurt, the nature of which we will discuss hereinafter. The case was given to the jury under instructions, some of which are complained of and will be presently considered. There was a verdict for the plaintiff for \$7,500, and judgment accordingly, from which this appeal is taken.

1. The first instruction for plaintiff is as follows: "(1) The court instructs the jury that, having received the plaintiff upon board of one of its cars as a passenger for the purpose of transportation along its line, the due obligation of the defendant railroad was to the plaintiff and its other passengers on that car, as far as it is capable by human care and foresight to carry such passenger safely, and the defendant is responsible for all injury resulting to such passenger from any, even the slightest, neglect or negligence; and, when the passenger suffers injury by a collision resulting from two cars being run in opposite directions on the same track, the presumption is that it was occasioned by some negligence of the defendant railroad, and the burden of

Magrane v. St. Louis & S. Ry. Co

proof is cast upon defendant to rebut this presumption of negligence, and establish the fact that there was no negligence on its part, and that the injury was occasioned by inevitable accident, or by some cause which human precaution or foresight could not have avoided."

The defendant contends that this instruction is erroneous in several particulars: First, that it imposes on the carrier a higher degree of care than the law justifies. The language used in this instruction, declaring it was the duty of the defendant, "as far as it is capable of human care and foresight, to carry such passengers safely, and the defendant is responsible for all injury resulting to such passengers from any, even the slightest, neglect or negligence," is copied from the opinion of the court in *Clark v. Railway*, 127 Mo. 197, 29 S. W. 1013. The court, however, in using that language, was not discussing an instruction containing those words, and was not prescribing the form of an instruction. It is not always safe to take an excerpt from an opinion and embody it in an instruction, because the opinion is addressed to lawyers, while the instruction is addressed to laymen. The care which a carrier owes to its passenger is of a very high degree. In attempting to give it definition a variety of forms of expression have been used, as the learned judge who wrote the opinion in that case mentioned, and after giving some of them he said: "The various formulas amount to the same thing in principle." It is a very high degree of care, but not the utmost care that human imagination can conceive. It is the highest degree of care that can reasonably be expected of prudent, skillful, and experienced men engaged in that kind of business. The term "as far as is capable by human care and foresight," in this connection, is liable to be misconstrued by a jury as meaning care to the utmost limit imaginable—that is, care without limit—whereas the highest degree of care practicable among prudent and skillful men in that business is all that can reasonably be expected of any men, and it is all that the law demands. The term, "even the slightest neglect or negligence," should also be avoided in an instruction. There are no degrees of negligence. There are degrees of care, and a failure to exercise the proper degree of care is negligence. The jury should not be puzzled with degrees of negligence. But whilst the language of this instruction is amenable to the criticism that is given it by appellant, it is of no injurious effect in this case, because under the undisputed facts the defendant was *prima facie* guilty of negligence, and there was no evidence tending to overcome it. The running of two cars on the same track in opposite directions is *prima facie* evidence of negligence. Judge Thompson, in his late work on Negligence, on this subject says: "It is, of course, possible in exceptional cases for the carrier to exonerate himself by showing that the collision took place through some circumstance beyond his

Magrane v. St. Louis & S. Ry. Co

control, notwithstanding the fact that he exercised the high degree of vigilance which the law imposes upon common carriers of passengers, as, for example, where it was produced by the sudden conduct of a trespasser in misplacing a switch—conduct which could not have been prevented or detected by the exercise of the extraordinary vigilance which the law imposes upon the carrier." *Thompson on Negligence*, volume 3, § 2824. There was no attempt by the defendant to show that this collision occurred by some act beyond its control or beyond its power to avoid by the exercise of the care the law imposed on it.

Appellant next contends that the instruction was erroneous, in that it is based on the theory that the plaintiff was injured by the collision of the cars, whereas he was thrown off the car before the collision occurred. The rush of the panic-stricken passengers, which threw the plaintiff off the car, was the result of the impending collision, and was in legal contemplation as much the effect of the collision as consequences which followed it.

It is also contended that the instruction is erroneous, in that it charges the defendant with negligence in allowing the collision, whereas the plaintiff in his petition predicates his case on the alleged negligence of the servant of the defendant in running the car at a dangerous rate of speed, and in not looking ahead along the track. The petition does allege that the servants in charge of the car ran it at a dangerous rate of speed and without looking ahead, but after that it also alleges that the defendant negligently ran a car in the opposite direction on the same track on which the car in which plaintiff was traveling was moving, and thereby caused the collision. The negligence in that particular is sufficiently stated in the petition.

The last complaint of the instruction is that it ignores the question of contributory negligence on the part of the plaintiff. There was no evidence that the plaintiff was guilty of any negligence. The fact that he was standing on the front platform was rendered necessary by the crowded condition of the car. That position imposed on him the duty of exercising the increased care that its increased danger entailed, and it imposed on the defendant a corresponding duty to handle the car with increased care, in view to his exposed position. But there was nothing in the evidence to show that the plaintiff did not exercise all the care that the situation required. There is nothing to the prejudice of the defendant in that instruction.

2. The second instruction complained of is as follows: "(2) If you believe and find from the evidence in this case that the plaintiff acted in this matter as an ordinary prudent person would have done, under similar circumstances and surroundings to that which surrounded the plaintiff in this case when the accident occurred, and that he was injured in

Magrane v. St. Louis & S. Ry. Co

the manner as claimed by him in his petition in this case, the defendant cannot escape liability to him for such injuries, unless the defendant has proven to you by a preponderance of the evidence that the accident happened from causes beyond its control, and to which neither its own negligence nor that of its employees in any way contributed."

That instruction was doubtless designed to carry the idea that if the plaintiff acted as an ordinarily prudent man would have done under the circumstances, yet was injured in consequence of the collision as described in the evidence, the defendant was liable, unless it showed by a preponderance of the evidence that the collision occurred from causes beyond its control; that the collision, and the injury to the passenger without fault on his part, threw the burden on the defendant to show that the collision resulted from causes beyond its control. That is a correct idea of the law, but the instruction is conveyed in language that justifies the criticism appellant makes; that is, it refers the jury to the petition to learn what the issue is, instead of stating it in the instruction. It is especially wrong in this case, because, as we have already seen, the petition does not count on the collision alone, but contains an allegation of negligence independent of the collision, and the jury, if sent to the petition to learn the issues, would not know which of the two acts of negligence to select. But the error in that instruction could not have affected the merits of this case, because on the evidence of both the plaintiff and the defendant the defendant was liable.

3. Instructions 6 and 7 are also complained of. They are as follows: "(6) The Court instructs the jury, if you shall find from the evidence in this case that the defendant railroad received or allowed such a number of passengers to get upon its car as to cause not only the car itself, but the rear and front platform of said car, to be crowded with passengers, and so as to render it likely that such passengers on its said platforms would be hurt, in case their cars collided with any object on the tracks of defendant, that then and in such case the defendant owed an increased and greater duty to such passengers on its said platforms than it ordinarily would if such danger did not exist, and under such circumstances, if you find from the evidence that such was the condition of said car and its front and rear platforms, the court instructs you that it was the duty of the defendant to so run and operate its cars as to prevent plaintiff and those who were with him on the front platform of such car from being injured by any collision which might result from or be produced by the negligence or carelessness of the defendant, or of its agents and servants who might then and there be in charge of its said car or cars. (7) The plaintiff had the right to presume and rely upon the fact, when he became a passenger on the cars of said defendant, that it would not be

Magrane v. St. Louis & S. Ry. Co

guilty of any negligence, or negligently run or allow any of its cars to be run at the same time on the same track and in opposite directions, so as to cause a collision therefrom; and if you find from the evidence in this case that the plaintiff, in what he did on the occasion in question, acted as an ordinarily prudent person would have acted under the circumstances, in riding upon the front platform of the defendant's car, and that in what he did he acted as an ordinarily prudent person would have acted, and was injured by the collision of the defendant's car, that then and in that case your verdict should be for the plaintiff and against the defendant."

The only adverse criticism to be passed on those instructions is that they submit to the jury the question of negligence of the defendant in the matter, without instructing the jury as to what constitutes negligence. Where, as in this case, there is no instruction defining negligence, the question submitted to the jury should be, not whether the act was done negligently, but whether, in doing it, the defendant observed the degree of care required; and that degree should be stated in the instruction. If, however, the term "negligence" is defined in any of the instructions, the question of whether the defendant did the act complained of negligently may be put in that form to the jury. But, for the same reason above given in regard to the other instructions, the errors in them do not affect the merits of the case.

4. Appellant complains of the refusal of this instruction: "(e) The court instructs the jury that the mere fact of the collision in question raises no presumption of negligence on the part of the defendant."

What we have above said in discussing the first instruction for the plaintiff shows our view of this instruction. It was not error to refuse it.

5. In his fall from the car the plaintiff suffered an injury to his left knee. When the surgeon reached him that evening at the hotel in the city to which he had been carried, he found him suffering great pain; the knee joint was swollen, discolored, and indicated that it was bruised on the inside; that there had been a hemorrhage under the knee joint. The surgeon caused the limb to be put in ice bandages for several days, until the swelling was reduced, and then put it in a plaster cast. He was compelled to use plaster casts until the last of November (the accident occurred September 7th), during which time he was able to go about on crutches. He suffered a great deal of pain in the limb and in his head; had never had headaches before, and his health had been perfect. Since the accident he is nervous if he sees anything that indicates possibility of an accident. If he sees a car which he fears will run over a child, he is nervous. At the date of the trial, which was about a year after the accident, the plaintiff had not recovered the full use of his knee. He could not walk as freely as formerly, had

to use a cane and stop with caution, and in changes of the weather suffered pain. A surgeon who examined him a few days before the trial was of the opinion that there was a blood clot, which impaired the use of the knee and hindered recovery. The clot might be naturally absorbed in the course of time, but that would be slow and doubtful. It might be relieved by an operation, but he would not advise it. Plaintiff had incurred about \$1,000 expense for surgical attention, etc. The jury awarded the plaintiff damages to the amount of \$7,500.

The foregoing is a brief summary of that part of the evidence relating to the plaintiff's injuries, the legality of which is not questioned; but there was other evidence, admitted over the objection of the defendant, which appellant does question. The plaintiff's injuries are thus stated in the petition: "His left knee cap was then and there seriously and permanently maimed, bruised, and injured, and plaintiff was thereby otherwise seriously maimed, bruised, and injured about his body and limbs, and his nervous system thereby likewise seriously and permanently injured and impaired." Those were the injuries to which the defendant was called to respond, and these were the only injuries to which his testimony in chief related; but after the plaintiff had been cross-examined in reference to the occurrence of the accident, he was re-examined in chief by his counsel: "What has been your condition in regard to sleeplessness, or your ability to sleep, since the accident? I have been a very nervous man since the accident. Mr. Magrane, I will ask you what has been your condition with regard to your ability to sleep since the accident? I do not sleep well since the accident. I am nervous. My head caused me a great deal of trouble for three or four weeks after the accident. I am very nervous, and I do not have the same rest at night since that accident that I had previous to that. I will ask you what your ability to sleep has been since the accident? Do you sleep as much? I don't sleep through the night like I did previous. I wake up with starts and jerks. Up to the time of the accident what was your condition with regard to sleeping sound? Sleeping like a log. I slept sound. What, if any, change have you noticed about your eyesight? My eyesight has not been as good since the accident. What was the condition of your eyesight previous to the accident and up to the time of it? I read at night, and I had good eyesight. I could see small print, and I could see as good as I could 10 years ago. Since the accident my eyes have not been good. I don't see well. My eyes are very weak. I don't see. I can't see the print at night. I don't read at all." To all this testimony timely objections, on the ground that it related to injuries other than those specified in the petition and which defendant had no opportunity to prepare to meet, were made, but

Magrane v. St. Louis & S. Ry. Co

were overruled, and exceptions taken. It was followed by the testimony of one of the surgeons, who was a witness for the plaintiff, to which there were like objections and ruling and exceptions: "You heard his statement with regard to his sleeplessness since the injury and his diminished eyesight. State whether or not in your opinion such an injury as he received on this occasion would cause diminished eyesight, such as he has testified to, and impairment of his ability to sleep. Injuries to his nervous system will produce a series of subjective symptoms which are in line with your question; that is, insomnia and nervous tremor, and in the sight, and produce an effect in the optic nerve. They are subjective. What do you mean by subjective? A symptom the patient complains of and tells you of. I never examined his eyes." The witness then went on to say that when the optic nerve becomes affected and the sight diminished the injury is usually progressive.

The effect of letting that evidence go to the jury was to authorize them to add to the damages they might award the plaintiff for injury to his knee, and his suffering therefrom, compensation for the disease of insomnia and impairment of his eyesight, which were liable to increase in injurious effect. The plaintiff was not entitled to that. In his petition he specified the injuries he had received, but insomnia and impairment of eyesight was not among them. There was a general charge of injury to his nervous system, but no suggestion that it had culminated in any particular disease; and there was really no legitimate evidence to connect those conditions with the injury to the knee. The plaintiff testified that after the accident he had not slept so well as before; but the evidence shows that he was engaged in a business which common experience teaches sometimes involves great hazards of fortune and entails intense excitement. His business may have had something to do with his restlessness at night. When the testimony in regard to his eyesight was offered, the court, before ruling on the objection, asked the counsel for plaintiff if he would trace it back to the accident; and the counsel answered that he expected to do so, and with that assurance the evidence was received. But the nearest the plaintiff came to realizing that expectation was in the testimony of the surgeon above quoted, in which he said that injuries to the nervous system will produce subjective symptoms of that kind. He then explained that subjective symptoms were symptoms for which the surgeon had to rely on what the patient said about it. This witness seemed cautious not to say in answer to the hypothetical question that under the circumstances of this case he attributed the insomnia and diminution of eyesight to the injury to the knee. This surgeon had attended the plaintiff when his injury was fresh, and had also examined him a few days before the trial, doubtless with a view to testifying, yet he

Newcomb v. New York Cent., etc., R. Co

did not say that his nervous system was injured or that insomnia and diminution of sight resulted from the injury to the knee. But, even if there had been testimony to that effect, otherwise legitimate, it should not have been received over the objection of the defendant, because it tended to prove serious injurious consequences of the accident beyond those specified in the petition, and which the defendant had no opportunity to answer with evidence to the contrary.

The receiving of this evidence in reference to insomnia and diminution of eyesight is the only error affecting the merits of the case that we find in the record, but that we consider serious, and for that reason the judgment is reversed, and the cause remanded, to be tried again in the light of the law as herein expressed. All concur, except ROBINSON, J., absent.

On Rehearing.
(June 20, 1904.)

PER CURIAM. This cause coming on to be again considered by the court on the respondent's motion for a rehearing and leave to amend petition, it is the judgment of the court that the opinion delivered herein May 25, 1904, be so far modified that paragraph 5 thereof be withdrawn, and that the judgment of that date that the judgment of the circuit court be reversed and the cause remanded for retrial be set aside, and in lieu thereof the judgment be that, if the plaintiff sees fit to remit \$2,500 of his judgment within 10 days, the judgment will be affirmed; otherwise, that the cause will be remanded to be retried.

NEWCOMB v. NEW YORK CENT. & H. R. R. CO.
(Supreme Court of Missouri, Division No. 1, June 20, 1904.)
[81 S. W. Rep. 1069.]

Return of Service.

The sheriff's return of service is conclusive.

Service of Summons.

Under Rev. St. 1899, § 570, authorizing the service of summons on a nonresident corporation by service on any officer or agent, one corporation may be the agent of another corporation for the purpose of service of the summons.

Return of Service.

Where the petition described defendant as a foreign corporation, it was not necessary for the officer serving the writ to say in his return that the defendant was a foreign corporation.

Same.

Under Rev. St. 1899, § 570, authorizing service in an action against a foreign corporation by delivering a copy of the writ to any officer or agent in charge of any office or place of business, or, if it have no office or place of business, then to any officer, agent, or employee in any county where such service may be obtained, a return show-

Newcomb v. New York Cent., etc., R. Co

ing service on an agent not in the defendant's place of business, and failing to state that defendant had no office or place of business at which the writ could be served, is defective and may be quashed on motion.

Same.

An objection to the return of service was waived by answering on the merits, although the answer also contained an objection to the sufficiency of the return.

Contributory Negligence—Alighting from Moving Car.*

Whether a person is guilty of negligence in alighting from a slowly moving train just as it is leaving the station is a question for the jury.

Injury to Passenger—Alighting from Moving Train—Greasy Platform—Question for Jury.

In an action against a railroad company for injuries to a passenger, alleged to have been caused by slipping on a greasy platform as he was alighting from a slowly moving train, evidence *held* to justify submission to the jury of the issue of defendant's negligence. **Change of Venue.**

Where plaintiff obtained a change of venue on an affidavit that the inhabitants of the city in which the action was brought were prejudiced against him, and on trial testified that when he made the affidavit he honestly believed that he could not get justice in a damage suit in the city, questions as to who he knew to be prejudiced against him were properly excluded.

Testimony.

In an action against a railroad company for injuries to a passenger from slipping on a greasy platform, a witness, being asked on direct examination if he noticed grease around where plaintiff was lying, said that there was always more or less grease there, and when asked on cross-examination if he observed oil on the track, planking, or platform, said that it was right along the side of the tracks and on the boards: *held*, that a question on redirect examination as to whether witness had any doubt that the substance which he referred to was oil, or some kind of grease, was not objectionable on the ground that it assumed that the witness had previously said that the grease was on the platform.

Injury to Passenger—Greasy Platform—Evidence.

In an action against a railroad company for injuries to a passenger from slipping on a station platform, evidence that shortly after the accident great crowds arrived at and departed from the station without accident was properly excluded.

Same—Negligence—Pleading and Proof—Instruction.

In an action against a railroad company for injuries to a passenger from stepping off a moving train, the petition charged negligence in failing to direct plaintiff what train to take. An instruction stated that if plaintiff got on the wrong train through failure of defendant to have any one there to direct him, being told by a porter on that train that it was the train he desired to take, and afterwards, on further explanation, told that it was not and directed to jump off, etc., he was entitled to recover: *held* not objectionable on the ground that it authorized a recovery upon the misdirection of the porter, when the petition alleged a failure to give any direction.

Same—Same—Instruction.

The instruction was not objectionable on the ground that it declared the act of the porter to be negligence as a matter of law.

Same—Contributory Negligence—Instruction.

In an action against a railroad company for injuries to a passen-

*As to whether it is contributory negligence for a passenger to alight from a moving car, see foot-note appended to *Lee v. Elizabeth, P. & C. J. Ry. Co. (N. J.)*, 8 R. R. R. 923, 31 Am. & Eng. R. Cas., N. S., 923, where all the preceding authorities in this series are collected.

Newcomb v. New York Cent., etc., R. Co

ger, caused by falling on a greasy platform as he was stepping off a train which he had boarded, thinking it the train he wanted, defendant alleged that plaintiff was negligent in stepping off the train while in motion, and also in failing to make proper inquiry as to whether it was his train. The court instructed that, on proof of certain facts, plaintiff was entitled to recover, if not guilty of any want of ordinary care in stepping from the train. In another instruction the two acts pleaded by defendant as contributory negligence were distinctly defined, and in still another the jury were told that, while it was the duty of defendant to furnish plaintiff information to enable him to find his train, it was also his duty to use ordinary diligence to obtain such information, and if defendant furnished such service, and plaintiff failed to avail himself of it, defendant was not responsible for his getting on the wrong train: *held* that, taken as a whole, the instruction first quoted was not objectionable as limiting plaintiff's contributory negligence to one of the acts pleaded by the answer, and excluding the question of his negligence in not making proper inquiry for his train.

Same—Failure to Direct to Train—Instruction.

Testimony by plaintiff and a person who was with him, when he was looking for his train, that there were no ushers to direct plaintiff to his train, was sufficient to justify a charge that defendant was liable if it failed to make reasonable arrangements for directing him to his car.

Same—Same—Remote Negligence.

Defendant's negligence in failing to direct plaintiff to the right car was not too remote to justify a recovery, since the fact that the danger attendant upon alighting from the train was increased by the further negligent act of the defendant in reference to the condition of the platform did not relieve defendant from liability for its first act of negligence on the ground of remoteness.

Same—Greasy Platform—Negligence.†

The failure of a railroad company to keep its station platform in a condition reasonably safe for use by a person stepping from a moving train while in the exercise of ordinary care is negligence.

Same—Same—Jumping Off Moving Car by Direction of Porter—Who Are Employees.

In an action against a railroad company for personal injuries caused by plaintiff's slipping as he stepped from a moving train, it appeared that plaintiff had asked the porter if that was the train to New York, and, on being told that it was, had gotten on, only to discover that it went by a different route from that over which his ticket entitled him to travel, though defendant railroad company operated both routes. On discovering the mistake, the porter told plaintiff to jump off, and in doing so plaintiff slipped on a greasy platform and was injured: *held*, that it was proper to instruct that the porter should be regarded as an employee of the company, so far as concerned the rights and duties of plaintiff and defendant towards each other, and that if, after plaintiff discovered he was on the wrong train, the porter told him to jump off, and the train was going at such speed that it was dangerous to do so, plaintiff being unaware of the fact, and not able to learn of it by the exercise of ordinary care, though the porter could by such care have known of the danger, and the porter by such conduct omitted to exercise ordinary care, defendant was guilty of negligence.

Same—Contributory Negligence—Instruction.

In an action against a railroad company for personal injuries, defendant alleged that two separate acts of plaintiff each constituted

†Carrier's duty with respect to safety of stations, platforms, and stopping places, see foot-note appended to *Leveret v. Shreveport Belt Ry. Co. (La.)*, 9 R. R. R. 611, 32 Am. & Eng. R. Cas., N. S., 611, where all the preceding authorities in this series are collected.

Newcomb v. New York Cent., etc., R. Co

contributory negligence, and an instruction stated that the burden was on defendant to prove them. Other instructions, however, treated the two acts separately, and stated that, if plaintiff was guilty of negligence in either respect, he could not recover: *held*, that defendant was not prejudiced by the form of the instruction first quoted.

Same—Negligence—Instruction.

In an action against a railroad company for injuries to a passenger, alleged to have been caused by the negligence of defendant in failing to have servants at a station to direct plaintiff to his train, so that he got on the wrong train, and, in attempting to leave it while in motion, slipped on a platform which defendant had negligently allowed to become greasy, there was evidence in support of both allegations of negligence, and defendant requested an instruction that, if there was no grease at the point where plaintiff fell, his fall was due to some other cause than grease, the verdict must be for defendant: *held*, that this instruction was properly modified, so as to state that under such circumstances the verdict must be for defendant "as to this specification of negligence."

Excessive Verdict.

Plaintiff had the bones of his left leg below the knee crushed, so as to necessitate amputation five or six inches below the knee, after which there was a chronic tendency to ulceration on the inside of the knee, and difficulty in wearing an artificial limb, which compelled him to frequently use crutches, and one surgeon was of the opinion that the ulcerous condition might require another amputation. Plaintiff at the time of trial was 62 years old, and though, before the accident, he had been a man of bright and buoyant spirits, he was thereafter sad and dispirited: *held*, that a verdict for \$20,000 was excessive, and should be reduced to \$10,000.

Appeal from Circuit Court, Lincoln County.

Action by George A. Newcomb against the New York Central & Hudson River Railroad Company. From a judgment for plaintiff, defendant appeals. Conditionally affirmed.

Everett W. Pattison and Norton, Avery & Young, for appellant.

Shepard Barclay, Thos. I. Fauntleroy, G. T. Dunn, Chas. Martin, and E. B. Woolfolk, for respondent.

VALLIANT, J. Plaintiff, in attempting to alight from a moving train within the precincts of the passenger station of defendant railroad company, at Buffalo, N. Y., fell and received injuries to his person. He alleges that the negligence of the defendant caused his fall, and he sues for damages. This is the second appeal in this case, and we now refer to our opinion on the former appeal to show the view we took of the case at that time, and the extent to which the controversy was then adjudicated. *Newcomb v. Railroad*, 169 Mo. 409, 69 S. W. 348.

At the threshold is a question to be disposed of before the merits of the case are reached. Did the trial court have jurisdiction? The petition alleges that the defendant is a New York corporation. The suit was begun in the circuit court of the city of St. Louis, and was carried by change of venue to the circuit court of Lincoln county, from whence comes this appeal. The point is made that the original sum-

Newcomb v. New York Cent., etc., R. Co

mons was not served on the defendant in such manner as to bring the defendant into court and give the court jurisdiction over it. The sheriff's return is as follows: "Executed this writ in the city of St. Louis, Missouri, this 21st day of May, 1898, by delivering a copy of the writ and petition to the Wabash Railroad Company, a corporation, agent of the within-named defendant, by delivering a copy of the said writ and petition to A. M. Harrison, assistant treasurer of said Wabash Railroad Company, in charge of the main office of said Wabash Railroad Company in said city of St. Louis, the president or other chief officer of said Wabash Railroad Company being at the time absent; and further executed this writ in the city of St. Louis, Missouri, this 21st day of May, 1898, by delivering a copy of the writ and petition to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, a corporation, agent of the within-named defendant, by delivering a copy of said writ and petition to W. P. Deppe, assistant general passenger agent of said Cleveland, Cincinnati, Chicago & St. Louis Railway Company, in charge of the main office of said Cleveland, Cincinnati, Chicago & St. Louis Railway Company in said city of St. Louis, the president or other chief officer being at the time absent; and further executed this writ in the city of St. Louis, Missouri, this 28th day of May, 1898, by delivering a copy of the writ and petition to C. Meade Saffarans, freight contracting agent of the within-named defendant, in charge of the office of the White Line Central Transit Company." The record at the return term shows the following: "Now at this day comes the defendant, and enters its appearance for the purpose of this motion only, and not upon the merits, and upon its motion is granted ten days' time to plead to the jurisdiction of the court." Within the prescribed time the defendant filed this plea: "Now this day comes the New York Central & Hudson River Railroad Company, and, appearing for said purpose only, files this its plea to the jurisdiction of the court over it, and says that, as appears from the return of the sheriff herein and the affidavits filed herewith, there has been no service upon it which requires it to appear and answer the petition of George A. Newcomb filed in this cause. Wherefore," etc. Along with the plea was filed an affidavit of the vice president of the Wabash Railroad Company stating that the Wabash was not the agent of the defendant railroad company, and the affidavit of W. P. Deppe saying that the Cleveland, Cincinnati, Chicago & St. Louis Railway Company was not the agent of the defendant, and the affidavit of C. M. Saffarans that he was not the agent of the defendant. The court on March 6, 1899, overruled the plea, and defendant excepted, and preserved the exception in a bill of exceptions filed March 8, 1899. On March 10th defendant filed an answer which repeated the former plea to the jurisdiction, and then denied "each and every

Newcomb v. New York Cent., etc., R. Co

allegation of the plaintiff's petition," and further alleged that the plaintiff's injuries were due to his own negligence, without specifying in what the negligence consisted. The last paragraph of the answer was on motion of the plaintiff struck out. Defendant then filed an amended answer, in which it reiterated its plea to the jurisdiction, denied the allegations of the petition, and averred that the plaintiff's injuries, if he sustained any, were caused by his own negligence, in that he failed to act "with the ordinary care and prudence of a reasonably and ordinarily careful man." Plaintiff moved to strike out the last clause of the answer. Pending that motion the court record shows that on application of defendant the cause was continued to the next term at defendant's cost. At the next term defendant withdrew its amended answer, and filed a second amended answer, which differed from the one next preceding only in that it stated in what the plaintiff's negligence consisted. In the amended answer and the second amended answer the form of the plea to the jurisdiction varied from that of the first plea in this: that instead of saying, as in the first plea, "that as appears from the sheriff's return and the affidavits filed herewith there has been no service," etc., it says the court has no jurisdiction for the reason that neither of the railroad companies nor of the individuals named in the return was then or at any time the agent of the defendant for the purpose of receiving service of process, or for any purpose, "and for the further reason that it appears on the face of the return of the sheriff to the writ herein that no legal or proper service has been had on said defendant whereby," etc. Plaintiff moved to strike out that part of the second amended answer denying that either of the railroad companies or of the individuals named in the return was the agent of the defendant, which motion the court sustained, and defendant excepted, and filed its second bill of exceptions. Plaintiff's reply was a general denial. The cause was tried on those pleadings at the February term, 1900. There was a verdict and judgment for the defendant, from which the plaintiff appealed. The appeal was heard in this court, the judgment of the circuit court was reversed, and the cause remanded for a new trial. A reading of the opinion of the court by Judge Marshall will show the views of the court on the points presented on that appeal. When the cause was returned to the circuit court the plaintiff filed an amended petition, to which the defendant answered, reiterating its former plea to the jurisdiction, denying the allegations of the petition, and pleading that the plaintiff's injuries were caused by his own negligence in jumping from a train while it was in motion, and in failing to make proper inquiry for the location of his sleeping car. Plaintiff replied by general denial. The plaintiff then applied for a change of venue, and the venue was changed to Lincoln county. In March, 1903, the cause was tried in the

Newcomb v. New York Cent., etc., R. Co

Lincoln circuit court on its merits. The trial resulted in a verdict for plaintiff for \$20,000 damages, and a judgment in accordance therewith, from which the defendant prosecutes this appeal. The foregoing is so much of the record as bears on the question of jurisdiction. That which bears on the merits of the controversy will be referred to hereinafter.

1. The plea to the jurisdiction rests on two propositions: First, that the statements in the sheriff's return are not true, as the affidavits filed show; second, on the face of the return the defendant is not legally summoned. The return of the sheriff, for the purposes of the suit, is conclusive on the parties to it. This rule of law is founded in the necessity of the case. This court, in *Hallowell v. Page*, 24 Mo. 590, said: "To permit the parties to an action to controvert the truth of the return of the officer deputed by law to serve the process would produce great delay and embarrassment in the administration of justice." This court has always adhered to that ruling. *Stewart v. Stringer*, 41 Mo. 400, 97 Am. Dec. 278; *Jeffries v. Wright*, 51 Mo. 215; *Burgert v. Borchert*, 59 Mo. 80; *Phillips v. Evans*, 64 Mo. 17; *Heath v. Railroad*, 83 Mo. 617; *Decker v. Armstrong*, 87 Mo. 316. If the statements in the return are not true, and the defendant suffers by reason thereof, the officer will answer in a suit against him for a false return. The court in this case, therefore, properly ignored the affidavits filed denying the facts stated in the return.

As to the return itself there are several points urged against its sufficiency, viz.: That a corporation is not an agent for another corporation, within the meaning of section 570, Rev. St. 1899, relating to service of process on a foreign corporation; therefore the alleged service on the two railroad companies named as agents in the return is illegal. That the return does not show that defendant is a foreign corporation, or that it has no office or place of business in this state, or that Saffarans is the kind of agent contemplated by the statute. The statute in question is part of section 570, Rev. St. 1899: "Fourth, when defendant is a corporation or joint-stock company organized under the laws of any other state or country and having an office, or doing business in this State [the summons may be executed] by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business, or, if it have no office or place of business, then to any officer, agent or employee in any county where such service may be obtained," etc. The object of this statute is to bring foreign corporations who do business in this state within the reach of process here, so that a citizen dealing with it, or brought into contact with it, and having any affair to settle with it in court, need not be sent out of the state to prosecute his suit. It is a statute that, in a certain sense, is rather repugnant to what might be presumed to be

the foreign corporation's preference in the matter. No one desires to be sued, and corporations are not different from individuals in that respect. Therefore, if we should depend on the voluntary action of a corporation to appoint an agent here to receive service of process, it is probable there would be no one appointed. For that reason the law makes the appointment, and designates as the agent for that purpose the agent through whom the corporation transacts its business here. If the statute is construed to mean that only an individual can act as the agent to receive service of process for the foreign corporation, then the foreign corporation, by selecting another corporation through whom to transact its business here, may escape service of process altogether. The statute is comprehensive enough to include a corporation in the term "agent," and, if the writ is to be served on a corporation as agent, it must be served in the manner of serving corporations in their own behalf, for there is no other way in which to serve them. We hold that, if a foreign corporation transacts business here through the agency of another corporation, it may under section 570, Rev. St. 1899, be served with process through that agency.

The petition describes the defendant as a New York corporation. The sheriff assumed that that was a correct description, and undertook to serve the writ in the manner prescribed by statute for serving a foreign corporation. He does not say in his return that the defendant is a foreign corporation, and it was not necessary that he should do so. Any judgment the plaintiff may recover in this case is founded on his petition. If there is a Missouri corporation of the name New York Central & Hudson River Railroad Company, a judgment founded on this petition will not affect it. But the statute does not authorize the service of the writ on "any officer, agent or employee in any county," unless the fact is that the defendant has no office or place of business here, and the return is not sufficient which shows a service on an agent not in the defendant's place of business, unless it states that the defendant had no office or place of business at which the writ could be served. For this reason this return was not sufficient to bring the defendant into court, and if a motion to quash it had been made the court should have sustained it. But what could be said in defense of a Code of Procedure that would require or permit a court, in the face of this record and after all these years of litigation, to quash the whole proceeding, on the ground that the return of the sheriff on the original writ was not sufficient to bring the defendant into court, if it had willed not to come? The defendant would have made a special appearance for the purpose, and moved to quash the return for the insufficiency appearing on its face, and, if the court had overruled the motion, the defendant could have preserved its exception and have withdrawn; and if the court had then proceeded to

render judgment for the plaintiff the judgment would have been reversed on appeal. But a plea to the merits is a general appearance and after that the character of the return is immaterial. There is no injustice in requiring a party, in a matter of procedure, to make his election and abide by his choice.

Appellant says that under our system of pleading it was bound to include in one answer every matter of defense it had. Therefore it did not waive the plea to the jurisdiction by its plea to the merits. It is true that under our system a plea in abatement is not waived by a plea in bar in the same answer, and the defendant must include all his defenses in one answer. But the insufficiency of this return was not a point to be presented by plea at all. It was out of place in the answer. A question of jurisdiction may arise on the face of the return on the summons, or on the face of the petition, or by reason of some fact not appearing either in the return or in the petition. If it arises on the face of the return, it is only a question of whether the defendant has been properly served, and that is met by a motion to quash. If it arises on the face of the petition, it is a question of law, and is met by a demurrer. If it arises from some fact that appears neither in the return nor in the petition, it is presented by a plea. If defendant had filed a motion to quash the return, and it had been overruled, and it had then answered to the merits, could there be any doubt that the point was waived? Is there any difference in effect because it attempted to reach the defect in the return by plea? True, the plea attempted to put in issue the facts stated in the return; but that could not be done, as we have above seen, and all that was left of the plea was that the return was not sufficient. If the defendant was of the opinion that the return was not sufficient to bring it into court, and had confidence in its own opinion, it could have remained away and let the plaintiff take his own course. That was a station in the progress of the case where the law requires a party to rely on his own judgment and take the risk of being sustained in the end. He may keep out if he chooses; but, if he elects to come in and plead to the merits, he submits his person to the jurisdiction of the court, and will not be heard afterwards to say that he was not properly called into court. This ruling is in conformity to the previous decisions of this court, as will be seen by reference to the cases cited in the brief for respondent on this subject.

After the cause was returned from this court to the circuit court of the city of St. Louis to be retried, an amended petition was filed by the plaintiff, and defendant filed its answer, containing its so-called plea to the jurisdiction and its two pleas to the merits. When the cause came on for trial, the parties entered immediately into the merits of the case. Defendant made no effort to have a trial or ruling on his plea to

the jurisdiction, did not call the attention of the court to it, and offered no evidence in support of it, not even its affidavits, until after it had called and examined a number of witnesses on the merits. Then it offered as evidence its former answers only. The court whose judgment we are now reviewing made no ruling on the subject and was not requested to do so. We are referred to some decisions of the federal courts holding that a question of jurisdiction, properly raised and decided adversely to the defendant, is not waived by his subsequent plea to the merits; but those decisions are founded on the law peculiar to federal courts. Those are courts of limited jurisdiction, and the particular jurisdictional fact that brings the case into a federal court must be shown and cannot be waived. Those decisions have no application to a court of general common-law jurisdiction. The able and interesting arguments of the learned counsel have enticed us into a very much longer discussion of this subject than we intended.

2. The plaintiff's evidence at the trial tended to prove as follows: The plaintiff was a passenger from St. Louis, destined to New York over a route of connecting railroads of which the defendant's road was one. The defendant's part of the route was from Buffalo to New York. Plaintiff arrived in the train at the defendant's passenger station in Buffalo at 6:30 p. m. August 8, 1897. Having 20 minutes to wait there, he went into a restaurant in the station and took supper, after which he started to return to the train. On coming out of the restaurant he met Mr. Knox, a friend who lives in St. Louis, and who had come from St. Louis on the same train that had brought the plaintiff, although the plaintiff came in one sleeper and Mr. Knox in another. The two friends walked on together; plaintiff assuming that they were to pursue their journey together, as both were aiming for New York. But it turned out that in this the plaintiff was mistaken. The sleeping car in which Mr. Knox was traveling was to go by what was called the "West Shore Line," and that of the plaintiff by the New York Central. The West Shore train was to leave at 6:45 and the New York Central at 6:50 p. m. They saw no usher or other person in the service of the railroad company to direct them to their trains, or of whom they could inquire. But Mr. Knox had, before leaving his car, inquired and was informed on what track he would find his train. The plaintiff had made no such inquiry, but on coming out of the restaurant did notice that the train he came on had moved from the track on which he had left it. Mr. Knox met another acquaintance, with whom he stopped to speak, and thus he and the plaintiff became separated. The plaintiff came alongside a train that seemed about to move, and, looking for the sleeping car in which he had come, but not seeing it, he inquired of a sleeping car porter, who was on the platform of a car in the train

Newcomb v. New York Cent., etc., R. Co

about to move: "Is that the train to New York?" The porter answered, "Yes," and the plaintiff then got on it. It had just begun to move slowly. Looking into the car, and noticing that it did not look like the one on which he had come, he again asked the porter if that was the train for New York, to which the porter responded, "How do you want to go, sir"? The plaintiff said, "I want to go by the New York Central." Then the porter said: "This is the West Shore; jump off." The train was then moving very slowly. Plaintiff went down on the steps of the car, and jumped off to the platform. But the platform at that particular place had an incline to it. The incline was about 15 feet long, descending about a half inch to the foot, and on that incline was oil or grease of some kind. The plaintiff lit on the incline, his foot slipped, and he fell, and slid under the cars in such a way that his leg was run over by the wheels and the bones were crushed. Some bystanders immediately pulled him up and laid him on the incline. He was soon removed to a hospital, and his leg was amputated that night. There was a lateral open space of about seven inches between the edge of the platform and the step of the car, and expert witnesses testified that that was an unsafe arrangement, and increased the danger to persons getting off the train. The defendant's testimony tended to show that it was the custom of the defendant (who was the owner of this station) to have ushers in uniform about the platforms and tracks to show people to their trains, and also to have placards with large letters posted on the trains to indicate what trains they were; but the plaintiff's testimony tended to show that on this occasion there were no ushers and no placards. The station itself was a very important terminal point. The average number of cars in and out daily at that time was 900 to 1,000. It was admitted at the trial that the West Shore line was held by the defendant under a lease, and was then being operated by defendant. The above are substantially the facts in the case. The only points disputed are those relating to oil or grease on the incline, the absence of ushers and placards, and the dangerous construction of the platform, on which points the testimony of defendant contradicted that of plaintiff. At the close of the plaintiff's case defendant asked the court to instruct the jury that plaintiff was not entitled to recover, but the court refused the instruction, and that is assigned for error.

That point was practically decided against the defendant in the former appeal. It was said by the court: "It is conceded that there was a conflict in the evidence as to whether there was or was not grease upon the platform, and therefore the plaintiff was entitled to go to the jury." The evidence for the plaintiff was at least as strong for the plaintiff on that point at the last trial as it was at the former, and, besides, now there is evidence tending to show negligence of

defendant in other points, where there was none before. The act of the plaintiff in attempting to alight from a moving train, under the circumstances, was not so palpably negligent as to justify the court in so pronouncing it as a matter of law, but was properly left to the jury. Appellant thinks that the evidence does not connect the plaintiff's fall with the grease on the incline. The evidence was that, as he lit on the greasy incline, his foot slipped and he fell. And the evidence goes much farther than to show that it was a mere insignificant spot where grease had been. One witness said that the incline was "very greasy and terribly slippery." Another said that he frequented the station, and the platforms were usually greasy. He had frequently seen men oiling the journals, and carelessly setting the oil can, dripping with oil, on the platform. He had seen men scraping the grease off the platforms with a spade; had himself stepped in grease and soiled his shoes. Another said that on this incline he noticed a "blotch of grease." It was also shown that the plaintiff's clothes, which before were clean and new, were much soiled with grease. There was grease on his coat, waistcoat, and trousers. True, he might have come in contact with grease when he fell to the ground; but there was grease on the incline, and it was for the triors of the fact to decide where he probably came in contact with it. Besides, the evidence of Mr. Link, an architect, and of Mr. Moore, a civil engineer, was that the lateral space between the platform and the step of the car was negligent construction and dangerous to a passenger alighting. That is not very hard to understand, even without the aid of science. When a passenger attempts to alight from a moving train, the farther he is required to aim his footing to reach the platform, the more out of perpendicular he throws his body, and the greater the risk of his falling. There was no error in sending the case to the jury.

3. There had been a change of venue granted the plaintiff on his application, based on his affidavit that the inhabitants of the city were so prejudiced against him, and that defendant had such an influence over them, that plaintiff could not have a fair trial in that city. When the plaintiff was on the witness stand at the trial, in his own behalf, on cross-examination he was asked: "State who you know in the city of St. Louis who has a prejudice against you." The plaintiff's counsel objected, and the court sustained the objection. In answer to further cross-questions he stated that when he made the affidavit he honestly believed that he could not get justice in a damage suit in the city, when he was again asked: "Who did you know were prejudiced against you?" His counsel objected, and the court sustained the objection. That ruling is assigned for error. An adverse party has a right, within the limits of the court's sound judicial discretion, to ask a witness questions to elicit answers calculated

Newcomb v. New York Cent., etc., R. Co

to discredit or degrade him as a witness. But the question should relate to matters that would rightly tend to lower the witness in the estimation of the jury. If the witness in this case had answered that he could name no person, or no considerable number of persons, whom he knew to be prejudiced against him, it would not fairly have impeached him as swearing falsely in the affidavit for a change of venue. The affidavit referred, not to individuals, but to the inhabitants of the city as a body, and the prejudice was not to the plaintiff as an individual, but to him in the capacity of plaintiff in a damage suit. A community sometimes has a sentiment on a given subject as pronounced as that of an individual, and a party feeling that he will encounter that sentiment to his prejudice in the trial of his suit may with perfect honesty of intention say that the community is prejudiced against him, meaning against him, not as an individual, but as a party to that suit. The court ruled correctly on that point.

4. Flannigan, a policeman, who came to the relief of the plaintiff, tied up the bleeding artery, and assisted in sending him to the hospital, was asked where the plaintiff was when he first saw him. He said: "I can't exactly state that. I didn't pay much attention to where he was. I was so anxious to get him to the hospital." Asked if he noticed grease around, and about where plaintiff was lying, he said: "Well, right close to the track, you know, there is always more or less grease there, you know. Did you take any notice of the condition of the incline? No, I didn't." Cross-examined by defendant's attorney: "You spoke of observing oil. Do you mean that you observed oil on the track, planking, or platform, or on the stones that lie there next to the platform? It was right alongside the tracks. On the boards? Yes. * * * Did you personally and closely examine to see whether this that you saw there was water or oil? Well, no, I didn't; but I would naturally think that it was oil. Did you put your finger in it at all? No, sir. You didn't use either the sense of touch or smell? You could smell it easily enough. I did not put my hand on it to see what it was." On redirect examination the plaintiff's attorney asked this question: "This substance which you refer to on the incline near which Mr. Newcomb was lying, and which you have called oil, do you have any doubt, from its appearance, that it was oil or some other kind of grease?" This question was objected to, and the objection was overruled. The witness answered: "I haven't the least doubt at all but what it was grease or oil of some kind." That ruling is assigned as error. The objection to the question was that it assumed that the witness had previously said that the oil was on the incline. Whilst the witness had not in so many words said that the oil or grease that he saw was on the incline, yet that was the effect of what he had said. He

Newcomb v. New York Cent., etc., R. Co

was asked about the place where Mr. Newcomb was lying when he came to him, which was the incline. There was no other place in question. In answer to plaintiff's attorney, he said that he paid little attention to the place, as his anxiety was to relieve the suffering man; but he said that right close to the track there was grease. Then, in answer to defendant's question, he said he meant that the grease was on the boards, by which we understand that the grease was on that part of the boards next to the track. Then the cross-examination pressed him to say if it was water or oil, and he said that, whilst he did not put his hand in it, yet he judged it to be oil. The question so seriously complained of was in effect only, "have you any doubt of its being oil?" There was no error in that ruling.

5. The defendant offered to prove that shortly after this accident, and while the platforms were in the same condition, the Grand Army of the Republic held a meeting at Buffalo, and that some years after that the Pan-American Exposition was held there, and on both occasions great crowds arrived and departed at and from this station, and no accident occurred. The court sustained plaintiff's objection to that testimony, and that ruling is complained of. The court ruled correctly in that particular. To have admitted such evidence would only have confused the jury and led them away from the issues they were to try.

6. The defendant complains of several of the instructions given at the request of the plaintiff, the first of which is as follows: "The court instructs the jury that if you believe, from the evidence, that the plaintiff was a through passenger from St. Louis, Mo., to New York City, in the state of New York, by way of Buffalo, in said state of New York, and that on August 8, 1897, the through sleeping car from St. Louis to New York City on which plaintiff was being carried as such passenger reached the Exchange Street station at Buffalo, N. Y., in the progress of said journey to the city of New York, and that said station was then managed and controlled by defendant; and if you further believe from the evidence that said car arrived at said Buffalo station at 6:30 p. m. of said day on track No. 6, and was to leave said station on the way to New York at 6:50 p. m. over defendant's main line, the New York Central & Hudson River Railroad, and that plaintiff during said interval of time between 6:30 and 6:50 p. m. visited the restaurant in said station to obtain refreshments, and upon his return to the train shed of said station, before 6:45 p. m. discovers that the said sleeping car on which he had been traveling as a passenger as aforesaid was no longer standing upon said track No. 6, on which plaintiff had left it, and that plaintiff did not know where said sleeping car was, and thereupon endeavored to find the said car, and in so doing observed a train headed towards the east upon track No. 4 in said station, and that said train contained

several sleeping cars and had the general appearance of a through train, and that, on asking the porter on one of said sleeping cars of said train, plaintiff was told by him that said train was the train for New York, and that plaintiff thereupon and in consequence of said statement of the porter got on said train, believing it to be the train of which said sleeping car on which he rode from St. Louis was a part, and that afterwards plaintiff was informed by said porter that said train was the West Shore train and that he then was directed by said porter to jump off, and that plaintiff then stepped to the platform adjacent to track No. 4 of said station from the step of said sleeping car of said West Shore train while the latter was in motion, and in so doing plaintiff slipped upon said platform and fell underneath said train and was run over, whereby he received personal injury in the loss of part of his leg; and if you further find that said injury was so received by plaintiff as a direct consequence of negligence on the part of defendant as defined in other instructions, and that plaintiff was not guilty of any want of ordinary care on his part contributing to his said injury, in so stepping from said West Shore train—then your verdict should be for the plaintiff." On this instruction defendant makes the following criticisms:

(a) That it is not based on the pleadings; and that, whilst the petition alleges that the defendant was negligent in not using reasonable care for directing passengers in plaintiff's situation to the trains they were to take, it does not allege that any employee of defendant misdirected him. The distinction drawn is between nondirection and misdirection. When the plaintiff arrived in the station at that hour, with 20 minutes to wait, the defendant's restaurant in the station was an invitation to him to go to it for refreshments. The business was such that at that point incoming trains were broken up and new trains made to go out. It was a place of great activity in that business. The train in which the plaintiff had come divided. Some cars were to go thence over one route, and some over other routes. Two trains were leaving for New York, within five minutes of each other, on tracts side by side, in the same station, and both under defendant's control. Under those conditions the duty devolved on the defendant to direct passengers to their proper trains. The defendant recognized that this duty devolved on it, and it introduced evidence to show that its custom was to have ushers there in uniform to so direct passengers, and also to have placards posted on the trains giving the necessary information, and its evidence tended to show that ushers and placards were there on this occasion; but in that respect it conflicted with the plaintiff's evidence and raised a question of fact for the jury. The plaintiff's petition charges negligence in that respect, but does not charge negligence in that he was misdirected. This instruction, however, conforms to

the charge in the petition. The failure to direct the plaintiff to his proper train left him to wander in search of it, and in his search he fell in with the porter, who gave him misdirection. It was the absence of direction that rendered him liable to the misdirection. If there had been no porter on the platform, and plaintiff had boarded the car to inquire, the consequence in legal effect would not have been different. The proximate cause of his boarding the wrong train was the neglect of the defendant to point out the right train to him. And the instruction does not place the negligence on the misdirection of the porter, but describes the situation and the catastrophe, and then says that if it was caused by the negligence of defendant as defined in other instructions the defendant was liable. The other instructions referred to limit the negligence to the allegations in the petition.

(b) It is said that the instruction declares the act of the porter to be negligence as a matter of law. That is a misconception of its meaning. The porter's part was only stated in the description of the catastrophe.

(c) The last objection made to the instruction is that it omits one of the acts charged in the answer as negligence on the part of the plaintiff, requiring the jury to find for the plaintiff on the finding of the facts named, and also finding "that the plaintiff was not guilty of any want of ordinary care on his part, contributing to his injury in so stepping from the West Shore train." It is contended that it should also have required the jury to find that the plaintiff was not guilty of negligence in the matter of making proper inquiry for his train. The plaintiff couched that part of the instruction in language more favorable to defendant than he need have done. It would have been more accurate to have said that on the finding of the facts mentioned the verdict should be for the plaintiff, unless the jury should find from the evidence that the plaintiff was also guilty of negligence in the particulars named which contributed to the injury. But the form used was to the defendant's advantage, inasmuch as it seemed to place on the plaintiff the burden to prove that he was not guilty of negligence. The instruction, however, is not amenable to the objection made. It does not authorize a verdict for the plaintiff until he has proven to the satisfaction of the jury that his injuries were the result of defendant's negligence as defined in other instructions. The other instructions defined the acts that would constitute negligence on the part of the defendant; and in instruction 6 for plaintiff the two acts pleaded in the answer as constituting contributory negligence are distinctly defined; and in instruction 4 given for defendant the jury are told in effect that, whilst it was the duty of defendant to furnish such service as would afford the plaintiff convenient information to enable him to find his train, yet it was also the duty of the plaintiff to use ordinary diligence to obtain such information, and if the jury

should find that the defendant furnished such service, and the plaintiff failed to avail himself of it, the defendant was not responsible for his getting on the wrong train, and that should not be taken into account against the defendant; and in instruction 8 for defendant the jury are told that if the plaintiff was negligent in either of the particulars stated in the answer, and such negligence contributed to his injury, the verdict should be for the defendant. The first instruction referred the question of negligence to all the other instructions, and on the whole we find no fault with it.

7. The second instruction for plaintiff is to the effect that, if the jury should find that when the plaintiff returned to the train shed after leaving the restaurant he discovered that the car in which he had arrived was not on the track where he left it, and he did not know where it was, and defendant had failed to make reasonable arrangements for directing him to his car, or use ordinary care to do so, and that as a direct result of that failure the plaintiff got on the wrong train, and on discovering that fact got off while the train was in motion, and while exercising ordinary care on his part slipped in doing so and was injured, "then such omission or failure of defendant to exercise ordinary care as aforesaid was negligence on the part of defendant." Appellant contends that there was no evidence on which to base that instruction, and that the instruction asked by defendant, declaring that there was no evidence to support the allegation in the petition that defendant had failed to exercise reasonable care to furnish means for directing a passenger to his train, should have been given. The defendant's testimony was that uniform ushers were there, and that a placard was on the New York Central train; but both Mr. Newcomb and Mr. Knox testified that they saw neither usher nor placard. Counsel for defendant draw the conclusion from the testimony of plaintiff and Mr. Knox that they did not see the ushers or the placard because they were interested in each other's conversation and did not look; but those witnesses do not say that, and whether that was so or not was a question for the jury. The plaintiff was pressed on this point in cross-examination, and he said that the porter on the sleeping car "was the only man that I saw around there that was a railroad man that I might ask it of if that train was for New York." When two intelligent men say that they were in the train shed looking for their train, and saw no one to point them to it, it is evidence tending to show that there was no one there, and it was for the jury to weigh the evidence.

Another objection made to this instruction is that the negligence referred to therein was not the proximate cause of the accident. It was the cause of the plaintiff's getting on the wrong train. It was the cause of the plaintiff's being in the position from which in trying to extricate himself the injury resulted. Unless, therefore, between the getting into that

position and the accident, some other cause intervened, the act of the defendant which led the plaintiff into the position was the direct cause of the accident. And if there was another cause intervening, which combined with the former act to produce the injury, and if the defendant was responsible for that cause also, it cannot be held to be such an independent cause as to relieve the defendant from liability for its initial act of negligence; that is to say, if the defendant's negligence was the cause of the plaintiff's getting on the wrong train, and he was injured in trying to get off without any negligence on his part, the fact that the danger attendant upon his alighting was increased by the further negligent act of the defendant in reference to the condition of the platform would not relieve the defendant from liability for its first act of negligence, on the ground that it was remote from the accident. In *Thompson on Negligence*, Vol. 1, § 69, it is said: "The question of proximate cause does not arise in an action for personal injuries occasioned by an accident resulting from two or more causes, for all of which defendant is responsible." There was no error in that instruction.

8. The third instruction told the jury that it was the duty of the defendant to exercise ordinary care to keep the platforms mentioned in the evidence "in a condition sufficiently free of grease or other slippery material to be reasonably safe for use by a person in stepping thereon from a train in motion on track No. 4 in said station while exercising ordinary care in so doing," and if the defendant failed to do so, and suffered grease or other slippery material to remain on the platform after lapse of a reasonable time to remove the same, so as to render it dangerous to a person stepping from a moving train while exercising ordinary care, and that while using ordinary care in attempting to alight from the moving train plaintiff stepped and fell in consequence of the greasy condition of the platform, then the defendant was negligent, providing the train was "not moving at such a rate of speed as would have deterred an ordinarily prudent and careful person from so attempting to alight from said train." The complaint of this instruction is that there was no evidence that the incline was greasy and that defendant was under no obligation to furnish a safe platform upon which to alight from a train in motion. As to the evidence of grease on the incline we have nothing more to say. Every one knows, and probably railroad men know it better than other people, that in this age of hurrying men do jump on and off trains while they are in motion. Whilst a railroad company is not expected to provide appliances to be safe against the danger incurred by one acting in disregard of his own safety—for example, jumping from a train moving so fast that common prudence would forbid the act—yet it is expected to know that men of ordinary prudence do jump on and off trains moving slowly, and whilst it is not as safe as to get on or off

Newcomb v. New York Cent., etc., R. Co

a train that is not moving at all, yet it is a very common practice, and the railroad company, knowing that it is likely to occur, should take reasonable care to render it not more dangerous than necessary. That is all the care that this instruction says the law requires, and we find no fault with it.

9. The fourth and fifth instructions for the plaintiff are discussed together. The fourth, referring to the admitted fact that the West Shore train was being operated by the defendant, told the jury that the porter of the sleeping car above referred to should be regarded by the jury as an employee of the defendant "so far as concerns the rights and duties of plaintiff and defendant towards each other, on account of the facts and circumstances shown by the testimony in this action." The fifth was to the effect that if, after the plaintiff discovered that he was on the wrong train, the porter told him to jump off, and if the train was going at such a rate of speed that it was dangerous to do so, that plaintiff was unaware of the fact and under the circumstances could not by the exercise of ordinary care have discovered it, but that the porter by the exercise of ordinary care would have known of the danger, but nevertheless gave the plaintiff direction to get off, and the porter's direction influenced the plaintiff's action in getting off, "and that in the aforesaid conduct of the porter he omitted to exercise ordinary care for the plaintiff's safety in the circumstances, then defendant was guilty of negligence." We see no objection to those instructions. The West Shore train, under the admission, was as much the defendant's train as was the New York Central train. True, the plaintiff was not a passenger on the West Shore; but he was under the defendant's roof, looking for his train. This porter was the only person, according to plaintiff's evidence, to whom he could apply for information. Such information was in the line of such a servant's duty. The porter knew, but the plaintiff did not know, that two trains were to leave that station about the same time for New York. The plaintiff's question indicated that he thought of only one train: "Is that the New York train? Yes." The answer was true as far as it went, but was deceptive, by not going as far as it should have gone. Then when the plaintiff was on the train, and it was moving, and the mistake was discovered, the porter told him to jump off, and, acting on that advice or direction or suggestion, whichever it may be called, the injury was received. Of course, if the train was moving at such a speed that it was obviously dangerous to attempt to alight, what the porter said would not relieve the plaintiff from the imputation of negligence. But the purport of the instruction is that if the plaintiff did not know the danger, and by the exercise of ordinary care could not have discovered it, yet if the porter knew it, or by the exercise of ordinary care he could have discovered it, then he was negligent in giving the direction, and his negligence was

the defendant's negligence. The plaintiff was a man of intelligence and education, and we may assume that the porter in that respect was inferior to him; but, concerning the particular thing then to be discerned, the porter may well be presumed to have had more knowledge or better judgment. At least, that was a question of fact, and the jury was the judge.

10. The sixth instruction for the plaintiff mentions the two acts of the plaintiff alleged in the answer to have been negligence, and informs the jury that the burden is on the defendant to prove them, and unless they are proven by the preponderance of the evidence the jury should find against the defendant on that issue. The criticism is that the instruction means that defendant must prove both acts of negligence in order to entitle it to a verdict. The instruction is liable to that interpretation; but so, also, is instruction 8 given at defendant's request on the same point: "* * * If you believe from the evidence that the plaintiff's injury was caused in part by defendant's negligence, and in part by the neglect or imprudence of plaintiff himself in the particulars mentioned in the answer, your verdict must be for the defendant." But whatever doubt there might have arisen on a very close adherence to the form of expression, either in the plaintiff's or the defendant's instruction on this point, is removed by instructions 4 and 7 for defendant. In those two instructions the two acts of alleged contributory negligence are treated separately. In 4 it is said that if the defendant had servants in charge to direct people to the trains, and plaintiff got on the wrong train because he neglected to ask the defendant's servants there for information, then defendant was in no way responsible for his getting on the wrong train; and in 7 the jury are told that if, under all the circumstances, they believed the plaintiff, in attempting to alight from the moving train, did not exercise ordinary care, the verdict must be for the defendant. The defendant was not prejudiced by the form of the sixth instruction.

11. The court refused a number of instructions asked by the defendant, which were to the effect (a) that there was no evidence that defendant failed to use ordinary care so to arrange, manage, and construct its station as to avoid injury to the plaintiff; (c) no evidence to support the charge that the space between the platform and the car was negligent construction; (e) that, though the porter was negligent in giving plaintiff information which led him to get on the wrong train, yet it should not be considered by the jury in determining upon their verdict; that there was no evidence (d) that a servant of defendant directed the plaintiff to get off the moving train, or (f) that the porter had authority to give such direction, and therefore all evidence on that point should be disregarded. These instructions were but repetitions of the same points occurring in other phases of the case

already discussed, and we have said all that we care to say about them.

In an elaborate instruction asked by defendant, the issue as to grease or other slippery material being on the platform is presented, and it contains this sentence: "If the jury find that there was no grease or slippery material at that point, or that plaintiff's falling was not caused by his slipping when he jumped from the car, but that his fall was due to some cause other than his slipping on gease or oil, then there verdict must be for the defendant." The court modified the instruction, so as to make it read, "then their verdict as to this specification of negligence must be for the defendant," and gave it with that modification. There was no error in so modifying the instruction. If it had been given in the form as asked, it would have limited the question of defendant's negligence to the subject of grease on the platform, which the court had no right to do under the evidence in the case.

12. The last point presented by appellant is that the amount assessed as the plaintiff's damages is so excessive that it evinces passion or prejudice on the part of the jury. The plaintiff's injuries are very severe, and his suffering has been great. The bones of his left leg below the knee were crushed, and the leg was amputated about five or six inches below the knee. He now uses an artificial leg, but because of the suffering he is compelled to take off the artificial limb frequently and use crutches. There is a chronic tendency to ulceration on the inside of the knee, owing to some displacement or misplacement of nerves at the point of the amputation, and one of the surgeons was of the opinion that that condition might require another amputation. At the date of the trial he was 62 years old. Before the accident he was a man of bright spirit, bouyant and hopeful. Now he is sad and dispirited, he avoids the companionship of his friends, which he sought before, and his life is blighted. The jury assessed his damages at \$20,000. The assessment of damages in such a case is a very difficult matter. There is no certain criterion by which they can be estimated. The question is addressed to the conscience and judgment of the jury, and the law can give the jury little assistance. Compensation in money is what the law proposes to give, yet in many cases we well know that no amount of money will compensate. It will not do to say, "Put yourself in his place," because you cannot put yourself in his place. On the other hand, it will not do to give way to fanciful ideas of compensation, without regard to the rights of the defendant whose want of care has brought about the condition. Though the defendant has been to blame, yet reasonable compensation for the injury he has done is all that the law demands. Going through the decisions of this court on this subject, lists of which the learned counsel on both sides have furnished us,

Braymer v. Seattle, etc., Ry. Co

we find that the juries and courts in this state have always been conservative, and that is a gratifying history. No verdict has been approved by this court in which the damages for an injury of the kind and degree now in question has been placed at so large an amount as was awarded by the jury in this case, and we are not willing now to depart from our hitherto conservative course and give this award our approval. We do not attribute the award to passion or prejudice on the part of the jury, but as a matter of judgment we think it is excessive. Guided by our precedents, we think \$10,000 would be a fair compensation (so far as money can compensate) for the plaintiff's suffering and loss of limb. In addition to that amount, he should also be repaid the \$762 which he has paid out for surgeon's bills, etc. If plaintiff sees fit to remit \$9,238 of his judgment, within 10 days, as of the date of its rendition, we will affirm the judgment; otherwise, the judgment will be reversed, and the cause remanded to be tried anew.

BRACE, P. J., concurs. MARSHALL, J., concurs in all except paragraph 1, as to which he holds that the sheriff's return was sufficient to bring the defendant into court. ROBINSON, J., not sitting.

BRAYMER v. SEATTLE, R. & S. RY. CO.

Supreme Court of Washington, July 12, 1904.)

[77 Pac. Rep. 495.]

Street Railways—Carriage of Passengers—Extent of Contract—Boarding Wrong Car.

Where a street car company operated some of its cars on a certain line from A. to C., and others only from A. to B., a point intermediate between A. and C., and plaintiff, whose destination was C., boarded a car bound only for B., without asking the conductor whether the car went to C. or not, and there was no system of transfers from cars going only to B. to those going beyond to C., and plaintiff did not ask for any such transfer, even if there had been such a system, there was no contract to carry plaintiff beyond B. Same—Same—Contract—Statement of Officer.

A statement by the superintendent of the company, who was on the car, after arriving at B., that he would tell the conductor on the car bound for C. to pick plaintiff up, did not constitute a contract to carry plaintiff to C. without additional fare, at least in the absence of evidence of any custom to so transfer passengers without the payment of additional fare.

Same—Same—Same—Same.

A further statement by the superintendent, made the next day, that he had intended to tell the conductor to pick plaintiff up, but had forgotten to do so, was no part of the original contract, and showed, at most, no more than an intention to authorize gratuitous carriage of plaintiff to C.

Expulsion of Passenger—Liability.

The expulsion, without excessive force or inexcusable negligence of one who presents no evidence of a right to free passage, and who does not pay his fare, affords such a one no cause of action.

Braymer v. Seattle, etc., Ry. Co

Same—Evidence—Character of Conductor.

In an action by a passenger for ejection from a street car, evidence as to the general character and disposition of the conductor who ejected plaintiff was properly excluded, as the only subject for inquiry was the character and disposition of the conductor on the particular occasion.

Same—Same—Same.

Where a complaint for the ejection of a passenger from a street car was based merely on the breach of the contract of carriage, and did not allege the employment of an incompetent conductor, evidence of the general character and disposition of the conductor who ejected plaintiff was properly excluded.

Passengers—Contract of Carriage—Evidence.

Where a street car bound only for B. was boarded by a passenger for C., who made no inquiry as to the destination of the car, it was immaterial, on the question of his contract of carriage, that the car which he boarded left at about the time that the car for C. ordinarily left.

Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by A. E. Braymer against the Seattle, Renton & Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Tucker & Hyland, for appellant.

Peters & Powell, for respondent.

HADLEY, J. Appellant sued respondent to recover alleged damages. The complaint avers that appellant, for hire, became a passenger upon respondent's road, paid the fare demanded of him, and rode in one of respondent's cars to a point near Brighton Beach, his destination being Fairview, upon said line of road that at said point near Brighton Beach the respondent, through its officers and agents, with force and without any cause whatsoever, ejected appellant from respondent's car. He avers that he was thereby greatly humiliated, and was damaged in the sum of \$2,500, for which amount he demands judgment. The answer of respondent denies the material allegations of the complaint, and affirmatively alleges that appellant boarded one of respondent's cars at or near Brighton Beach; that he refused to pay the fare demanded of him by the conductor as necessary to entitle him to ride as a passenger in said car, and upon such refusal he was by said conductor, without unnecessary force or violence, ejected from the car. The cause was tried before the court and a jury. At the conclusion of the plaintiff's testimony the defendant moved for a nonsuit, which was granted, judgment was thereupon entered dismissing the action, and the plaintiff has appealed.

The evidence shows that on Sunday, February 1, 1903, appellant boarded one of respondent's cars at the corner of Second Avenue South and Washington street, in Seattle. It appears that he desired to go to his home, at Fairview, a station on the line of said road outside of the city of Seattle.

Braymer v. Seattle, etc., Ry. Co

The conductor demanded his fare, and he paid five cents, the customary amount. He did not inform the conductor that he desired to go to Fairview, and he made no inquiry as to how far that car would go. It also appears by the evidence that the company intended that the car upon which appellant was riding should go no further than Hillman City, which is a station nearer Seattle than Fairview, where appellant desired to go. It appears that appellant did not know that the car would stop at Hillman City, and inasmuch as a car, by schedule, should have left at 4:30 p. m., bound for a point on the line beyond Fairview, he supposed that this car, which left about that time, would go beyond his station. Before the car reached Hillman City, a Mr. Brown, the superintendent of respondent company, boarded it, and directed the motorman of this car to take another to the barn while he (Brown) acted as motorman of the car which carried appellant until it reached Hillman City. Upon reaching the latter place, Brown concluded that he had time to carry a few passengers as far as Brighton Beach, a station beyond Hillman City, while waiting for the next car to come. He seems to have made this run as a matter of mere accommodation to certain Brighton Beach passengers, it being no part of the regular run of the car. Appellant remained upon the car until it reached Brighton Beach. At the latter point he was requested by Brown to retire from this car and take the next one coming from the city. Appellant testified as follows: "I says, 'All right,' and after he got on his car, and I got off, he says, 'I will tell the conductor on the other car to pick you up and take you on.' I says, 'All right,' and he went back and went into the switch, and just then the other car came along." After appellant boarded the other car the conductor demanded fare, which he refused to pay; stating as a reason that he had paid his fare once, and was entitled to ride through. He also testified that he attempted to explain, and ask if Brown had not spoken to the conductor, but the latter would hear no explanation, and informed him that he must pay fare or get off. Appellant then said: "'Well,' I says, 'not quite so fast. I have paid my fare once. If you want me off this car, you will have to put me off.'" Thereupon the conductor called the motorman, and, without violence, they removed appellant from the car. No injury was done to his person or clothing.

Appellant's complaint, in effect, alleges a contract on the part of respondent to carry him to Fairview Station for the price of a fare which he then paid; that respondent afterwards refused to carry him beyond an intermediate station, demanded further fare from him, and, upon his failure to pay, ejected him. If there was a contract to carry appellant as far as Fairview, then the minds of appellant and respondent's agents must have met upon that subject. Noth-

Braymer v. Seattle, etc., Ry. Co

ing, however, was said to the conductor upon the subject of appellant's destination. The conductor knew this his car was bound to Hillman City, and not beyond. Under such circumstances, it was impossible for their minds to have met in an agreement to carry appellant to Fairview for the fare he then paid. The evidence shows that it was a common thing for cars to go no further than Hillman City, and there is no evidence that there was any system of issuing transfer tickets to passengers upon those cars which were good for passage upon others going beyond there. Even if such system obtained, there is no evidence that appellant asked for such transfer ticket. He contends, however, that if his contract was not, in the first instance, sufficient to carry him beyond Hillman City, it became sufficient when the superintendent said to him: "I will tell the conductor on the other car to pick you up and take you on." It will be observed that Brown did not say that appellant would be carried upon the other car for the fare already paid. Doubtless appellant so inferred, but the language used was not sufficient to make a contract to that effect, at least when unaided by any custom of the company to transfer passengers from one car to another to be carried further without additional fare. We therefore think appellant had no contract except one for carriage as far as the car he first boarded was intended to go, viz., to Hillman City. When he was carried to the latter place, the contract was at an end. His carriage beyond that point, as we have seen, was a mere gratuity—a license to him, revocable at pleasure, until he should pay fare, and thus effect a contract for further carriage upon another car. Appellant sought to show by a witness that Brown, the superintendent, said to him the next day after the incident that it was more his (Brown's) fault than that of the conductor, as he intended to tell the conductor to pick appellant up and take him out, but that he forgot to do so. The witness did so testify, and it is not clear, from the sweeping motion to strike testimony in connection with the motion for nonsuit, whether the court intended to strike this part of the testimony or not. But for the purposes of this discussion, we shall treat that evidence as before the jury. If one may infer from what Brown said the next day that he intended to have appellant carried further without additional fare, still it does not appear that such a course of transferring fare-paying passengers was authorized by any custom or regulation of the company. What Brown said to appellant, or what he may have said the next day, of his intentions, was no part of the original contract, and amounted to no more than an intention to authorize gratuitous carriage of appellant from Brighton Beach out. Such intention was, however, not carried out; the conductor was not so authorized; appellant presented no evidence of right to free passage; and, in any event, such passage would have been

Braymer v. Seattle, etc., Ry. Co

without consideration from appellant to support a contract, and, in the absence of injury from excessive force used to expel him from the car, or from other inexcusable negligence, would furnish no ground for recovery. We regard this case as wholly unlike that of *Lawshe v. Tacoma Railway & Power Co.*, 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350, cited by appellant. In that case the system of transferring from one car to another under payment of a single fare prevailed, and an actual contract for such a transfer and passage was made; but, the conductor of the first car having made the transfer check read over the wrong line, the second conductor ejected the passenger. It was held that the passenger had, in consideration of the fare paid and of his application for a proper transfer check, an actual contract for continuous passage, and was therefore wrongfully ejected. We have seen, however, that in the case at bar there was no contract for continuous passage, and it was therefore limited to the extent of the run of the car upon which the fare was paid. We believe the court did not err in granting the nonsuit.

Error is assigned upon the court's refusal to admit evidence touching the general character and disposition of the conductor who ejected appellant. We think this was properly rejected, since his conduct and disposition as manifested upon the particular occasion were the only proper subjects for inquiry. Moreover, appellant's complaint does not allege as a ground of recovery the employment of an incompetent conductor, but it is based merely upon an alleged breach of contract for carriage.

It is assigned that the court erred in striking certain evidence relating to car schedules. Even if we consider all of that evidence, we are unable to see that it affects the actual contract hereinbefore discussed, and which the court must have considered in granting the nonsuit. While it may be true that the car appellant boarded left Seattle about the time a car ordinarily left for points beyond Hillman City, still there is, we think, no room for argument, under the evidence, that this particular car was started for points beyond Hillman City, and appellant made no inquiry as to the destination of the car.

The judgment is affirmed.

FULLERTON, C. J., and ANDERS and MOUNT, JJ.,
concur.

MILLCREEK TP. et al. v. ERIE RAPID TRANSIT ST. RY. CO.

(Supreme Court of Pennsylvania, May 23, 1904.)

[58 Atl. Rep. 613.]

Street Railroads—Grant of Rights in Street—Breach of Condition—Injunction—Parties.

The supervisors of a township granted to a street railway company the right to lay its tracks on a highway, but stipulated, as a condition of the grant, that the company should not charge a fare exceeding a certain amount: *held*, that where the company, after the construction of its road, charged a fare exceeding the amount stipulated, owners of property abutting on the road, who had no contract with the company as to the rate of fare, were not proper parties to a bill by the township authorities to restrain the company from collecting a greater rate of fare than that stipulated in the contract.

Same—Same—Same—Forfeiture.

Where a township granted a franchise to a street railway company to occupy a highway, the grant providing that, if the road was not built within a time specified, "then this franchise and all the rights thereunder to be null and void," no action on the part of the township to complete the forfeiture was required where the road was not built within the time designated.

Appeal from Court of Common Pleas, Erie County.

Bill by Millcreek township and another against the Erie Rapid Transit Street Railway Company for an injunction. From a decree dismissing the bill, plaintiffs appeal. **Affirmed.**

The following is the opinion of WALLING, P. J., in the court below:

"The bill in above case was filed to restrain the defendant from collecting a greater rate of fare than five cents for the transportation of each passenger from any points between the west line of Harborcreek township and Seventh and State streets in Erie city. The case was heard upon bill, answer, replication and testimony. The facts are found as follows:

"(1) The defendant is an electric street railway corporation duly organized with the chartered right to construct a street railway, inter alia, from Erie city, easterly along the Buffalo Road to the borough of North East, passing through the township of Millcreek, which adjoins said city. The charter of said corporation was granted in 1898, and gave the defendant also the right to extend its line of railway upon certain streets in Erie city.

"(2) That the above-named plaintiffs, other than the township of Millcreek and its road commissioners, are the owners of real estate abutting upon the Buffalo Road in said township. That about March 10, 1899, they, with other like owners of real estate, met at the schoolhouse in their neighborhood to discuss the question of the right of way and franchise for said company upon said road, and the terms thereof;

at which meeting a committee of three was appointed to meet with the township road commissioners and officers of the defendant company to determine the question of the proposed franchise and the terms thereof, etc.

"(3) That on March 18, 1899, said committee met with said commissioners and officers and discussed and agreed upon the terms of a franchise, which afterwards, to wit, on March 25, 1899, was duly granted by the road commissioners of said township to the defendant, for the construction, etc., of an electric car line upon the Buffalo Road in said township.

"(4) That said franchise was accepted by the defendant, and contains clauses, inter alia, as follows:

"'14th. The said road shall be commenced by actual operation upon the streets by grading and laying ties and rails thereon on or before June 1, 1899, and having the same fully completed in compliance with this franchise and in full operation on or before December 1, 1899. And in case said road is not built and in operation from the east city line to Harborcreek township on or before December 1, 1899, in compliance with this franchise, then this franchise and all the rights thereunder to be null and void and of no effect. And the said road commissioners are to take up and remove any track or work done by said company along said street, and the entire cost and expense thereof to be collected by the road commissioners from the said company on its bond to be given therefor.'

"'19th. This franchise is granted upon the express further condition that the said street railway company shall carry its passengers (or furnish transportation for the same) from the west Harborcreek township line, to a point at or near Seventh and State streets, in the city of Erie, and to any and all other points in the said city of Erie, reached by said company's tracks, for a fare not exceeding five cents for each person, each way.'

"(5) That after the granting of said franchise the said owners of abutting property who are named as plaintiffs in the bill made no objection to the construction of said railway in front of their respective properties. Some of them had in 1898 granted formal permits for the building of said railway in front of their properties, and it does not appear that any of them gave the defendant any express permission to build the road because of anything done at either of said meetings, or because of said franchise. They desired the road built, and wanted a five-cent fare from their homes to the business part of the city, and seemed to depend on the road commissioners and the franchise to protect their interest.

"(6) That the defendant proceeded slowly with the building of the railroad; did some grading, etc., in the open season of 1899, and finished the grading nearly all the way through the township and laid the ties and rails in the sum-

Millcreek Tp. v. Erie Rapid Transit St. Ry. Co

mer of 1900. At the request of the defendant the road commissioners extended the time for the completion said railway until January 1, 1901, and on March 4, 1901, the road commissioners passed resolutions ordering the defendant to remove the ties and rails from said road, and to restore it to its original condition within thirty days, of which defendant had notice, but nothing was done under it, and on May 6, 1901, said resolutions were reconsidered; but nothing further was done to give new life to the old franchise.

"(7) That on said May 6, 1901, the road commissioners of Millcreek township granted the defendant a new franchise, which it accepted, and which is attached to defendant's answer and contains, inter alia, clauses as follows:

"'17th. This franchise is granted upon the express further conditions that the said street railway company shall carry passengers from the west Harborcreek township line to any and all points in the said city of Erie, reached by said company's tracks, for a fare not exceeding five cents for each person, each way.'

"'20th. It is further agreed that the Erie Rapid Transit Street Railway Company shall pay to the road commissioners, individually, the sum of \$4.00 per day for each and every day necessarily engaged in overseeing the construction of the said road on the Buffalo Road, in Millcreek township, Erie county, Pennsylvania.'

"Pursuant thereto the defendant completed its railway through said township, and the same has been in use and operation since August 31, 1901.

"(8) The defendant never abandoned said Buffalo Road since it began work therein in 1899, although some work was taken up and afterwards replaced.

"(9) The defendant built about one mile of track in Erie city, but was restrained by this court from the use of certain city streets included in its charter, but which were already occupied by another street railway company. And in March, 1901, the city councils ordered the defendant to remove the track already laid in the city, which defendant did, and later, in January, 1902, formally abandoned all its rights in Erie city, and has no railway therein.

"(10) That the defendant's railway connects with the tracks of the Erie Electric Motor Company at the eastern limits of the city, and by agreement with the latter company the defendant uses its tracks and motive power to run cars into the city to and beyond Seventh and State streets; by which agreement the defendant pays the said motor company three cents for each passenger that defendant carries in the city, and said passengers have transfer privileges to and from the motor company's city lines.

"(11) That the defendant charges and collects from each passenger five cents for transportation, each way, from the west line of Harborcreek township to the P. & E. crossing, which

Millcreek Tp. v. Erie Rapid Transit St. Ry. Co

is a short distance west of the city limits, and five cents more from P. & E. crossing to Seventh and State streets, which entitles the passenger to transfer privileges as above stated. And the defendant company refuses to carry passengers, or to provide them with transportation, from said township line, or from intermediate points in Millcreek township, to Seventh and State streets, for a single fare of five cents, as provided in the original franchise; but the fare charged is not a violation of the new franchise.

"(12) That the road commissioners of Millcreek township are each entitled to receive from the township \$2 for every day necessarily spent in the discharge of official duties, and that said road commissioners spent some time in overseeing the completion of said railway after the granting of the new franchise, but have never asked or received any compensation therefor from the defendant.

"Legal Conclusions.

"(1) That on the question of fare charged by defendant the above-named plaintiffs, aside from Millcreek township, have no interest different from that of the general public, and are improperly joined as plaintiffs.

"(2) That, the railroad not having been built within the time specified in the original franchise, as granted or extended, the same, by its express terms, became null and void, and neither of the parties has any rights thereunder, except the right of the road commissioners to remove the defendant's track, etc., from the street.

"(3) That the question of the validity of the new franchise is not material to this case.

"(4) That a decree should be entered dismissing plaintiffs' bill, but without prejudice, and that plaintiffs pay the record costs.

"Discussion.

"The franchises were granted by the road commissioners for the township, and, in my opinion, the rights of the public can only be carried out through the township. The property owners had no contract with defendant as to the rate of fare, and they have no different interest therein from the general public. The property owners are not parties to the franchise, and have no such interests as to enable them to join with the township in an action against the defendant for an illegal breach of the franchise. *Coatsville & Downingtown, etc., Street Railway Company v. West Chester Railway Company*, 206 Pa. 40, 55 Atl. 844. The owners of property on the side of the road where the railway was built were in a position to protect their interests by special contract, or to prevent the building of the railway; but property owners on the other side of the street had no standing to contest the building of the railway. *North Penna. R. R. Co. et al. v. Inland Traction Co.*, 205 Pa. 579, 55 Atl. 774. When the

Hendler v. Lehigh Valley R. Co

railway was not built within the time specified in the original franchise, it became void. The language is plain: 'Then this franchise and all the rights thereunder to be null and void and of no effect.' It required no action on part of the township to complete the forfeiture. *Commonwealth ex rel. v. Lykens Water Co.*, 110 Pa. 391, 2 Atl. 63. See, also, *Kebr's Petition*, 23 Pa. Co. Ct. R. 460. In fact, the defendant is not claiming any rights under the old franchise.

"The question of the validity of the new franchise is not directly brought in issue by the pleadings, and as it would not change the result of this case, and may be the subject of future litigation, I decline to here pass upon it.

"As an individual I believe the rate of fare charged between Wesleyville and the business part of the city is excessive, and, now that the new bridge at the P. & E. crossing is finished, I hope to see the fare reduced. If the local traffic between said points could be accommodated by return-trip tickets, or tickets sold in bulk, at reduced rates, it would be a great favor to the public, and, in my opinion, would not reduce the income of the defendant. At the same time it should not be overlooked that since the original franchise was granted the defendant has lost the city end of its line, and has to pay three cents for each person carried in the city. Under all the circumstances it is to be hoped that some satisfactory adjustment may be had in this matter. While plaintiffs are not, in my opinion, entitled to the relief prayed for, they may have some other remedy, and therefore the bill should be dismissed without prejudice. And now, January 25, 1904, the prothonotary is directed to enter a decree nisi in accordance with this opinion, to become absolute unless exceptions are filed sec. reg."

Argued before MITCHELL, C. J., and DEAN, BROWN, THOMPSON, and MESTREZAT, JJ.

Charles P. Hewes, John S. Rilling, and Henry E. Fish, for appellants.

Frank Gunnison, for appellee.

PER CURIAM. The decree is affirmed on the opinion of the court below.

HENDLER *v.* LEHIGH VALLEY R. CO.

(Supreme Court of Pennsylvania, May 23, 1904.)

[58 Atl. Rep. 486.]

Deeds—Reservation—Minerals.

A mineral, in the commercial sense, is any inorganic substance found in nature, having sufficient value, separated from its situs as part of the earth, to be mined, quarried, or dug for its own sake, or its own specific purposes; and the term is so used commonly in conveyances and leases of land, and must be presumed to be so used in

Hendler v. Lehigh Valley R. Co

a deed reserving all coal and other minerals in, under, and upon said land.

Same—Same—Same.

Common mixed sand, which can be used only as a material for grading, is not a mineral, within a provision in a deed reserving all coal and other minerals.

Right of Way—Right to Use Material.

A railroad company can use without further compensation all suitable material, except timber, on the right of way which it has acquired for the construction of its road through the property of the landowner; but, where it takes material for its own use from a point outside of its right of way, it is liable to the landowner for the value thereof.

Appeal from Court of Common Pleas, Luzerne County.

Action by Joseph Hendler against the Lehigh Valley Railroad Company. From an order dismissing exceptions to the report of the referee, plaintiff appeals. Affirmed.

It appeared that on March 3, 1877, the Northern Coal & Iron Company conveyed the land from which the sand was taken to Peter Jumper, "excepting and reserving, however, to the said the Northern Coal and Iron Company, their successors and assigns, all the coal and other minerals in, under, or upon said lot of land, and also reserving, as aforesaid, the unrestricted right and privilege of mining and removing all of said coal and minerals, or any part thereof."

On December 7, 1887, Peter Jumper and wife conveyed the land to the Lehigh Valley Railroad Company, "excepting and reserving, however, to the Northern Coal and Iron Company, its successors and assigns, all the coal and other minerals under, in or upon said lot of land."

On September 30, 1890, the Lehigh Valley Railroad Company conveyed the land in question to Joseph Hendler. The deed, after the description, continued as follows:

"Being part of the same property conveyed to the party of the first part by Peter Jumper and wife by deed dated 7th December, 1887, and recorded in the Recorder's Office in Luzerne County, in Deed Book No. 266, page 394," etc.

"Excepting and reserving as fully and entirely as in the said indenture is excepted and reserved and further excepting and reserving all the gravel necessary for any fill or ballast for the railroad of the party of the first part, and the right to build a dam upon the said premises and flood the same with water, and to lay pipes across and under said premises, and to construct and maintain thereon such pump house or houses as may be necessary for the enjoyment of the rights and estate hereby reserved. Being also the same premises designated on the draft hereto annexed and made part of this indenture.

"Together with all and singular the ways, waters, water courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging, or in anywise appertaining, and the reversions and remainders, rents, issues and profits thereof; and all the estate, right, title, interest,

Hendler v. Lehigh Valley R. Co

property, claim and demand whatsoever of the party of the first part in law, equity, or otherwise howsoever of, in and to the same and every part thereof."

By an agreement of June 1, 1901, Hendler sold to the Lehigh Valley Railroad Company a right of way 50 feet in width over the land in question.

The railroad company used a large quantity of sand taken from plaintiff's land, outside of the right of way. Plaintiff claimed treble damages for the taking of this sand. The referee refused to allow treble damages, and entered judgment in plaintiff's favor for \$1,859.90.

Argued before MITCHELL, C. J., and DEAN, FELL, MESTREZAT, and POTTER, JJ.

Stanley Woodward, for appellant.

F. M. Nichols and F. C. Sturges, for appellee.

MITCHELL, C. J. The first question presented by this case is whether the sand, the taking of which is the trespass sued for, is a mineral, within the meaning of the deed between the parties. In the broadest sense, as belonging to one of the three great divisions of matter—animal, vegetable, and mineral—sand, of course, is a mineral. In the more restricted scientific sense, sand may or may not be a mineral, according to what it is composed of. In the language of mineralogists, air and water are minerals, while granite and similar rocks are not minerals, but aggregations of minerals. So it is of sand. It may be wholly of grains of silex or other mineral, or it may be of several mixed together, and therefore in the technical sense only grains of rock. It is perfectly clear that the parties here did not use the word "mineral" in either of the foregoing senses. The first grantor with whom we are concerned, the Northern Coal & Iron Company, conveyed the land to Jumper, reserving "all coal and other minerals, in, under and upon said land"; Jumper conveyed to defendant with a similar reservation; and the subsequent deed by defendant to plaintiff conveyed the "surface" of the land, "excepting and reserving as fully and entirely as in the said [preceding] indenture is excepted and reserved, and further excepting and reserving all the gravel necessary for any fill or ballast for the railroad," etc. If the word "mineral" had been used in either of the senses already mentioned, it would, as a matter of course, have included gravel, and the additional special reservation of the gravel shows that the parties did not consider it as included in the preceding general reservation. But there is another, and what may be called the commercial, sense, in which the word "mineral" is used, and in which, having reference to its supposed etymology of anything mined, it may be defined as any inorganic substance found in nature, having sufficient value, separated from its situs as part of the earth, to be

Hendler v. Lehigh Valley R. Co

mined, quarried, or dug for its own sake or its own specific uses. That is the sense in which it is most commonly used in conveyances and leases of land, and in which it must be presumed that it was used by these parties in the deed in question. "Coal and other minerals"—the expression used—indicate substances which, like coal, have a value of their own, apart from the rest of the land, sufficient to induce the expense and labor of severance for their own sakes. These the grantor intended, and expressed the intention, to except from his grant and reserve to himself. While coal was the principal and perhaps the only thing clearly in view, yet the reservation was not meant to be limited to that, for then the addition "and other minerals" would be superfluous and misleading. A vein of fine marble would clearly be reserved, and so, probably, if near enough a market to have a value, would be granite or limestone, or other building material, potter's or porcelain clay, and the like. Sand might or might not be in this category. A vein of pure white quartz sand, valuable for making glass or other special use, would be within the reservation, while common mixed sand, merely worth digging and removing as material for grading, would not be. The referee has found that the sand which is the subject of the present contention was of this latter character, and was taken and used, not for any intrinsic value or use of its own, but as part of earth and other material to fill up the road-bed to the proper grade. So regarded and used, it was not within the reservation.

The next question is the estate of the plaintiff in the land. The conveyance to him was of "the surface of all that certain lot of land," with a reference to the deed in the line of title from Jumper to the Lehigh Valley Railroad Company, already discussed, and "excepting and reserving as fully and entirely as in the said indenture is excepted and reserved and further excepting and reserving all the gravel necessary for any fill or ballast for the railroad of the party of the first part, and the right to build a dam upon the said premises and flood the same with water," etc., followed by the usual grant, "together with all and singular the ways, waters, water courses, rights, liberties, privileges, hereditaments and appurtenances whatsoever thereunto belonging, or in any wise appertaining, and the reversions and remainders, rents, issues and profits thereof; and all the estate, right, title, interest, property, claim and demand whatsoever of the party of the first part in law, equity, or otherwise howsoever of, in and to the same and every part thereof." It is not a fair construction of this grant to limit it to such mere superficieses of the land as may be required for agricultural purposes, even including in such use the building of houses and barns, digging of wells, etc. The words used, especially those descriptive of the hereditaments and appurtenances, including "all the estate, right, title, interest, property," etc., of the

Hendler v. Lehigh Valley R. Co

grantor, are too broad to make such construction reasonable. The fairly apparent intent was to convey to the grantee the entire fee in the land, to use for all purposes except mining or taking the excepted minerals, or interfering with the grantor's reserved right to do so. The learned referee was therefore right in his conclusion that plaintiff had such estate as enabled him to maintain this action.

The remaining question is the extent of appellant's right to use the materials on the right of way without compensation. The right of way was acquired by agreement with the landowner, and it was practically conceded in the argument here that the learned referee was correct in his conclusion that the railroad acquired the same right, title, and interest under the agreement that it would have acquired by condemnation under the statute. By the railroad act of February 19, 1849, § 10 (P. L. 79), the railroad company is authorized to enter upon lands surveyed and located for its right of way, and thereon to "dig, excavate and embank, make, lay down and construct" the road. The use of the materials so dug, excavated, etc., is necessarily implied in the authority to construct, and compensation for them is included in the assessment of compensation or damages for the land taken. This is made still more plain by the further provision in the same section that "it shall in like manner be lawful * * * to enter upon any lands adjoining or in the neighborhood of their railroad so to be constructed and to quarry, dig, cut, take and carry away therefrom, any stone, gravel, clay, sand, earth, wood or other suitable material, necessary or proper for the construction of any bridges, viaducts or other buildings which may be required for the use, maintenance or repair of said railroad," with proviso that compensation shall be made for such materials, and an exceptional proviso as to timber—that it shall be obtained from the owner only by agreement or purchase. When, therefore, a railroad company obtains a right of way, either by condemnation, or, as in this case, by an equivalent agreement, it has the right to use without further compensation all the suitable materials, except timber, within the lines of its way, for the construction of its road through the property of the landowner. Whether such materials are above or below the grade of the road makes no difference. The language of the act is not limited by any such considerations. If it is necessary to go outside the lines of their way for sufficient width to support an embankment, they may do so, but must pay for the additional land occupied; and so, if it is necessary to go outside the lines to give the walls of a cut the slope required to prevent sliding or washing down, they may do so, on paying for the additional materials taken outside. But within the lines the materials are part of the land taken, and compensation for it includes the whole. The right, however, extends no further, as against each owner, than the

Wright v. Michigan Cent. R. Co

boundaries of his own land. His land has been subjected to a servitude for the construction and maintenance of a railroad through it, but not for construction or maintenance through any other land. For the use of his land or materials for the latter purpose he has not been compensated, and, if they are taken for that purpose, it must be under the clause of the act as to adjoining or neighboring land already quoted, and upon additional compensation. The referee in the present case has found that the defendant "took, carried away, and converted to their own use, from the lands of the plaintiff described in the declarations, sand to the amount of 3,542½ cubic yards, equal to 5,314 tons," and entered judgment for this quantity at the valuation of 35 cents a ton. As that quantity was taken from plaintiff's land, carried away, and used on other land, defendant was responsible for its value. Under the circumstances of the taking and use, the place—whether above or on or below the grade of the road, and whether within or outside the limits of the right of way—was immaterial. Though not reached for exactly the reasons indicated in this opinion, the referee's conclusion was correct.

Judgment affirmed.

WRIGHT, Internal Revenue Collector, v. MICHIGAN CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit, June 16, 1904.)

[130 Fed. Rep. 843.]

Internal Revenue—Stamp Tax on Bills of Lading—Duplicates.

In paragraph 6 of Schedule A. of the war revenue act of June 13, 1898 (30 Stat. 458, c. 448 [U. S. Comp. St. 1901, p. 2304]), which requires a stamp to be affixed to each bill of lading, manifest, etc., "and to each duplicate thereof," the word "duplicate" is to be defined in accordance with the meaning given it generally in business, as one of two instruments, each of which is original, and intended to have the force of an obligation irrespective of the other, and not as meaning merely a copy.

Same.

A railroad company issued bills of lading marked "Original," to each of which was attached a detachable copy, marked as such, and containing a statement thereon that it was not an original bill of lading, but merely a memorandum for filing, as an acknowledgment that a bill of lading had been issued for the goods described: *held*, that such copies were not duplicate bills of lading, within the meaning of paragraph 6 of Schedule A of the war revenue act of June 13, 1898 (30 Stat. 458, c. 448 [U. S. Comp. St. 1901, p. 2304]), and were not required to be stamped; nor were they rendered such by the fact that in some instances the company recognized them in making deliveries to the consignee, waiving the production of the original.

Evidence—Expert Testimony—Construction of Instrument.

The question whether a written instrument is a duplicate of another, within the meaning of a statute, is not one upon which expert testimony is competent, but is one for the court.

Wright v. Michigan Cent. R. Co

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

Wm. D. Gordon, U. S. Atty., and James V. D. Willcox, Asst. U. S. Atty., for plaintiff in error.

O. E. Butterfield (Henry Russel, of counsel), for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This writ of error brings up the record of a case wherein the Michigan Central Railroad Company brought suit against the plaintiff in error to recover the sum of \$6,838.12, which had been levied against the company as an internal revenue tax by the Commissioner of Internal Revenue, and paid by it under protest.

Between July 1, 1898, and June 30, 1901, during which period the internal revenue act of June 13, 1898, c. 448, 30 Stat. 448 [U. S. Comp. St. 1901, p. 2286], was in force, the railroad company issued 683,812 bills of lading marked "Original" to shippers of freight over its lines, to each of which was detachably annexed a copy (or duplicate) thereof, marked "Copy," and containing transversely along the left-hand margin thereof the following words:

"Take notice, that this is only a copy of a bill of lading or shipping receipt issued for the property herein described or referred to, and it is not itself to be regarded or considered as a bill of lading or contract of any kind under any circumstances, but merely an acknowledgment that a bill of lading or shipping receipt for said property has been issued."

This was the general form as prepared for use. But as each was issued the following words were inserted in the body of the instrument by a rubber stamp:

"This is not the original bill of lading or shipping receipt, nor a copy or duplicate covering the property named hereon. It is intended solely for filing or record as a memorandum acknowledgment that a bill of lading or shipping receipt has been issued."

A form of shipping order to be filled in by the shipper was also in like manner annexed, and all three were arranged side by side, so as to be folded together, and a carbon interleaf inserted to impress the special matter, such as the name of the shipper, description of the articles, destination, etc., upon the other instruments; the whole being a patented form and arrangement of such instruments. The shipping order was signed by the shipper and retained by the company, and the original bill of lading was signed by the company, and, together with the copy or duplicate, which bore a copy of the company's signature, was given to the shipper. The company put upon each of the instruments, which, for distinction, we will now call the original, a one-cent stamp, but put none upon the copy or duplicate. And the failure to do this

is the cause of action. The case was tried by a court and a jury. Evidence was given to prove the above-stated manner of doing business as between the company and the shipper, which was not disputed, and there was also evidence that in some instances the shippers sent to their consignees the copy or duplicate of the bill of lading, instead of the original, and that the company recognized the same in making delivery; and a witness, who was an internal revenue agent, but had formerly been employed as an official in railroad business, testified, under objection of the plaintiff in that court, that, in his opinion, the copy was a duplicate bill of lading, and performed all the functions of the other. At the close of the testimony, counsel for the respective parties requested peremptory instructions to the jury to render a verdict in favor of their party. The court refused the instruction prayed by counsel for the defendant, and granted that prayed for the plaintiff. A verdict was rendered accordingly, and, judgment having been rendered thereon, this writ of error was sued out by the collector.

The statute under which it is sought to charge the company reads as follows:

"Express and Freight: It shall be the duty of every railroad or steamboat company, carrier, express company, or corporation, or person whose occupation is to act as such, to issue to the shipper or consignor, or his agent, or person from whom any goods are accepted for transportation, a bill of lading, manifest, or other evidence of receipt and forwarding for each shipment received for carriage and transportation, whether in bulk or in boxes, bales, packages, bundles, or not so inclosed or included; and there shall be duly attached and canceled, as in this act provided, to each of said bills of lading, manifests, or other memorandum, and to each duplicate thereof, a stamp of the value of one cent: provided, that but one bill of lading shall be required on bundles or packages of newspapers when inclosed in one general bundle at the time of shipment. Any failure to issue such bill of lading, manifest, or other memorandum, as herein provided, shall subject such railroad or steamboat company, carrier, express company, or corporation or person to a penalty of fifty dollars for each offense, and no such bill of lading, manifest, or other memorandum shall be used in evidence unless it shall be duly stamped as aforesaid." 30 Stat. 459 [U. S. Comp. St. 1901, p. 2304].

The decisive question in the controversy, and the one to which the argument of counsel has been mainly directed, is that of the construction to be given to the word "duplicate" in this paragraph. For the company it is insisted that, as here used, it means another original bill of lading—one having the same legal effect as the other original. The construction contended for in behalf of the government is that stated in an opinion given by the Commissioner of Internal Revenue, which is here transcribed:

Wright v. Michigan Cent. R. Co

"The act does not make it obligatory that the technical bill of lading should be issued in any case. * * * It is not a duplicate bill of lading that is referred to alone, but equally a duplicate manifest, duplicate memorandum, or a duplicate of any other instrument of writing which should contain evidence of receipt and forwarding. The question of tax turns upon the meaning of the word 'duplicate.' Webster's Dictionary, the accepted authority of this department in the definition of words, gives the following—the first being the ordinary meaning, and the second the technical meaning: 'Duplicate. (1) That which exactly resembles or corresponds to something else. Another: Correspondent to the first. (2) Law. An original instrument repeated. A document which is the same as another in all essential particulars, and differing from a mere copy in having all the validity of an original.' It will be seen that the ordinary meaning of the word 'duplicate' is a copy, and it has been the rule of this office to construe words in statutes according to their ordinary meaning and acceptation, unless the intent of the statute imperatively requires that a technical significance should be given them. * * * I therefore rule that the word 'duplicate,' as used in the paragraph of Schedule A, 'Express and Freight,' includes all copies, and every copy of any instrument evidencing the receipt and forwarding of goods issued by the carrier or his agent must bear a one-cent stamp, and any memorandum made on the same, that it is 'merely a copy,' 'not a bill of lading,' 'not a duplicate,' 'not a contract,' 'not negotiable,' 'merely acknowledgment,' etc., will have no effect to exempt the copy from taxation as a duplicate." Treasury Dec. Int. Rev. Dept. 1900, pp. 88, 89.

The opinion of the Circuit Court was in accord with the insistence of the company, apparently not accepting the ruling of the Commissioner of Internal Revenue as a correct interpretation of the statute. And with great respect for the opinion of the commissioner, we are notwithstanding constrained to think the ruling of the Circuit Court was right. We cannot help thinking that in the business world there is a plain distinction recognized between a duplicate and a copy, and that the former is understood to be one of two instruments, each of which is original, and intended to have the force of an obligation irrespective of the other, and that a copy is understood to be a transcript of an original; having the form, but not the essence, of an obligation. As the law is addressed to business men and business matters, we may well suppose that Congress intended the word to bear the meaning given it in the sphere of its operation. It is true that in a loose sense the word "duplicate" is sometimes used with the meaning of "copy," but that is only by a license quite common in the use of language. As a rule, the language of a statute is chosen with regard to its fitness for expres-

sion. The meaning of the word in legal phraseology is the same as that in its use among business men. It is tersely and correctly stated in 10 Am. & Eng. Encycl. of Law, 318, as follows: "'Duplicate' is defined as a document which is the same in all respects as some other instrument, from which it is indistinguishable in its essence and operation." And many authorities are there cited in confirmation. A substantially like definition is given of the word in all the law dictionaries in common use. In Burrill's Dictionary, *verbum* "Duplicate," is given the following ample definition:

"A duplicate is sometimes defined to be a copy of a thing, but, though generally a copy, a duplicate differs from a mere copy, in having all the validity of an original. Nor, it seems, need it be an exact copy. Defined also to be the counterpart of an instrument; but in indentures there is a distinction between counterparts executed by the several parties, respectively, each party affixing his or her seal to only one counterpart, and duplicate originals, each executed by all the parties."

It is the privilege of contracting parties to determine what instrument shall be the repository of their agreement, and that another shall not be. If the original is lost, a copy is admissible in evidence, not because it imports the engagement, but to make proof of an original which did. In the case of duplicates, each is original evidence, and the loss of the other need not be shown. *Totten v. Bucy*, 57 Md. 450.

If these reasons and authorities were not sufficient, and the matter were still in doubt, we might refer to the rule applicable to this subject, that in such case the statute will be construed favorably to the taxpayer, "because it is fairly and justly presumable that the Legislature, which was unrestrained in its authority over the subject, as so shaped the law as, without ambiguity or doubt, to bring within it everything it was meant should be embraced." In *United States v. Mullins*, 119 Fed. 334, 56 C. C. A. 238, we applied this rule to another provision of the internal revenue laws, upon the sanction of numerous authorities there cited.

We do not think the reasons which lead to the conclusion already indicated are much affected by the circumstance that upon some occasions the company has recognized these so-called copies in making deliveries to the consignees. Undoubtedly they amounted to acknowledgments that bills of lading of the character recited had been issued, and the company might in some circumstances think it reasonable to waive the production of the actual bill of lading. We agree that if the transaction involved the use of duplicate bills of lading, or of instruments of equivalent legal character, though of slightly different language, the company could not escape the tax by protesting that the instrument was not in fact a bill of lading. And on the other hand, it must be admitted that the company had the right to adopt an otherwise lawful

Hicks v. Chesapeake & O. Ry. Co

method of doing business, whereby it would not fall under the obligation to pay the tax on a duplicate. The question in every such case would be, what is the essential character of the instrument employed—is it a duplicate, or is it a copy?

Nor do we think the opinion of an expert is competent to determine the construction to be put upon such an instrument. It is for the court to construe it and define its character, and thereupon compare it with the statute.

The views which we have expressed lead to the conclusion that the judgment should be affirmed. It is so ordered.

HICKS v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of Virginia, Dec. 9, 1903.)

[45 S. E. Rep. 888.]

Bridges—Duty of Railroad Company to Repair.

The duty of a railway company to keep a bridge in repair arises not from any statutory obligation, but from its duty not to interfere with the public highway.

Same—Same—Power of Municipal Corporation to Assume Duty.

A municipality, having power, under Code 1887, § 1038, to control and keep its streets in order, has authority by contract to release a railway company from, and itself to assume, all obligation to keep in repair a bridge constituting a part of the public highway.

Error to Circuit Court, Fluvanna County.

Action by one Hicks against the Chesapeake & Ohio Railway Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

D. Harmon and F. C. Moon, for plaintiff in error.

A. K. Leake, H. T. Wickham, and Henry Taylor, Jr., for defendant in error.

HARRISON, J. This action was brought by the plaintiff in error to recover damages for an injury alleged to have been sustained in consequence of the negligent failure of the defendant in error to keep in repair a certain bridge located within the corporate limits of the town of Scottsville. There was a demurrer to the declaration and each count thereof, which was overruled as to the first and second, and sustained as to the third count. There was no error in this action of the court.

The third count was based upon the theory that the defendant company rested under some statutory or charter obligation of its predecessors in title to maintain the bridge. The act of Assembly relied on to support this view has been construed by this court in the case of another bridge on this same road, not within the limits of the town of Scottsville; and it has held that the obligation, if any, to maintain and keep in repair the bridge then in question, arose not from a

Hicks v. Chesapeake & O. Ry. Co

charter obligation, but from the common-law liability growing out of the interference by the James River & Kanawha Canal Company with the public highway. *Ches. & Ohio R. Co. v. Jennings*, 98 Va. 70, 34 S. E. 986.

In addition to the general issue, the defendant company filed three special pleas. The court having overruled a motion to exclude these pleas, the plaintiff cravedoyer of the deed mentioned in plea No. 1, and demurred to that plea. The court overruled this demurrer, and rendered judgment for the defendant company.

The defense set up by plea No. 1 is that the bridge in question is, and was at the time the James River & Kanawha Canal was constructed, within the limits and jurisdiction of the town of Scottsville, a municipal corporation chartered under the laws of Virginia, and that on the 29th of April, 1886, before the commencement of this suit, the town of Scottsville, under and by virtue of an ordinance of its council, made, sealed, and delivered to the Richmond & Alleghany Railroad Company, the predecessor in title of the defendant company, a deed wherein it released and discharged the Richmond & Alleghany Railroad Company, its successors and assigns, from all duty, obligation, or liability to keep in proper order and repair the bridge in question, and the highway upon which it was located, and agreed to assume, and did thereafter assume and take upon itself, the duty, obligation, and liability from which it released the predecessor in title of the defendant company, its successors and assigns. The truth of these averments is admitted by the demurrer to the plea, and shown by the deed mentioned, from which it appears that, for a valuable consideration, the town of Scottsville did release the Richmond & Alleghany Railroad Company from all obligation to maintain the bridge in question, and did assume and take upon itself all duty, obligation, and liability with respect thereto.

The second and third pleas aver that the Richmond & Alleghany Railroad Company in 1886 dedicated the highway on which the bridge is located to the town of Scottsville, and that it was accepted by the town for the public use. And plea No. 3 further avers that the town, after such dedication and acceptance, erected the bridge in question.

The general law of the state confers upon the town of Scottsville, as upon all municipalities, the power to control and keep its streets in order. Code 1887, § 1038. When a municipality is empowered to control and keep its streets in order, it is charged with a positive duty to do so, and it cannot be relieved from this duty by any act of its own. *Noble v. City of Richmond*, 31 Grat. 271, 31 Am. Rep. 726.

The contention that the contract between the town of Scottsville and the Richmond & Alleghany Railroad Company is ultra vires is not tenable. The town cannot deed away the rights of the public to its streets, or transfer to others its

Altoona Belt Line St. Ry. Co. v. City Pass. Ry. Co

duties and obligations with respect thereto; but it is not unlawful for the municipality, as in the case at bar, to assume the exclusive control and responsibility for its streets. The town of Scottsville had the lawful right to terminate the divided authority over the street in question, existing between itself and the railroad; and in making the contract under consideration, by which it assumed the exclusive and undisputed control over its highway, it was only taking upon itself the duty and responsibility imposed upon it by the common law and by statute. The contract in question constitutes a dedication of the bridge by the railroad to the town for the public use, and a complete and formal acceptance thereof by the town, and the defendant in error is thereby released from all responsibility to the public in the premises.

The judgment complained of must be affirmed.

BUCHANAN, J., absent.

ALTOONA BELT LINE ST. RY. CO. v. CITY PASS. RY. CO

(Supreme Court of Pennsylvania, May 23, 1904.)

[58 Atl. Rep. 477.]

Street Railways—Location of Route.

Where an act under which a street railway company incorporated provides that it shall have a continuous route, and it locates a portion of it on a street already occupied by the tracks of another company, in constant use, over which tracks it has no right to run, it has no continuous route, within the provision of its charter.

Appeal from Court of Common Pleas, Blair County.

Action by the Altoona Belt Line Street Railway Company against the City Passenger Railway Company. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before MITCHELL, C. J., and DEAN, BROWN, POTTER, and THOMPSON, JJ.

W. H. Sponsler and A. V. Dively, for appellant.

Silas W. Pettit, A. J. Riley, and D. J. Neff, for appellee.

BROWN, J. When the Altoona Belt Line Street Railway Company applied for its charter, issued to it on June 19, 1901, a portion of its proposed route was over certain streets on which the City Passenger Railway Company of Altoona had laid its tracks, and they were "in constant daily use for the transportation of passengers." The charter of the appellant gave it no power to occupy in the construction of its railway the streets already occupied and used by the appellee. A charter assuming to confer such power would be nugatory, for it would be "in hostility with the law of its creation." *Homestead Street Railway Co. v. Pittsburg & Homestead Electric Street Railway Co.*, 166 Pa. 162, 30

Clarke v. New York, etc., R. Co

Atl. 950, 27 L. R. A. 383. That law authorized a charter for the construction of a street railway only on streets and highways "upon which no track is laid, under any existing charter, and in constant daily use for the transportation of passengers at the time of the application by another company for a charter to use such street."

If the appellant cannot construct its railway on the street occupied by the appellee at the time its charter was issued, neither can it use the tracks of the latter on those streets, for, although the Legislature undertook to confer such power upon a subsequently incorporated street railway company, we have held that it cannot be exercised, as the legislation granting it is violative of the Constitution. *Philadelphia, Morton & Swarthmore Street Railway Company's Petition*, 203 Pa. 354, 53 Atl. 191, and *Commonwealth ex rel. v. Uwchlan Street Railway Company*, 203 Pa. 608, 53 Atl. 513.

The requirement of the act under which the appellant was incorporated is that it shall have a continuous route. This is impossible, because it adopted as part of its continuous route, recited in the application for its charter, certain streets upon which it can neither construct its railway, nor run its cars over the tracks already laid. As it cannot, then, construct or operate the whole of its charter route, the construction or operation of any portion of it would be without warrant of law. *Hannum v. Media, Middletown, Aston & Chester Electric Railway Co.*, 200 Pa. 44, 49 Atl. 789. It is therefore manifest that the appellee is not interfering, and will not interfere, with any right possessed by the appellant, and the bill ought to have been dismissed.

Decree affirmed at appellant's costs.

CLARKE v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Rhode Island, March 25, 1904.)

[58 Atl. Rep. 245.]

Removal of Timber—Revocable License—Damages—Evidence.

An agreement to remove standing timber, being only a revocable license, and conveying no interest in the land, plaintiff, in an action for damages to the woodland, may show the damages to growing trees, which were not removed under the agreement.

Same—Damages.

Where plaintiff had given a third person license to cut and remove timber, he was entitled to recover, in an action for damages to the woodland, damages to wood cut and not removed within the time of the license.

Same—Same.

In an action for damages to woodland by fire, plaintiff was entitled to the damages to the soil and standing wood, though she had given a license to a third person to cut and remove the timber.

Fires—Presumption.

Where a railroad company's employees aided in putting out a fire, no presumption arose therefrom that the company set the fire.

Clarke v. New York, etc., R. Co

Same—Instruction—Harmless Error.

Where, in an action for damages alleged to have been caused by sparks from defendant's engine, no evidence was offered by defendant showing a different cause for the fire, the refusal of an instruction that the fact that the defendant's employees aided in putting out the fire did not show that defendant's engine set the fire, was harmless.

Action by Mary D. Clarke against the 'New York, New Haven & Hartford Railroad Company. Heard on petition of defendant for a new trial. New trial denied.

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Albert B. Crafts, for plaintiff.

John W. Sweeney and Henry B. Agard, for defendant.

STINESS, C. J. The defendant petitions for a new trial of an action wherein a verdict has been rendered for the plaintiff for damage to woodland, which was set on fire by defendant's engines. The first point set out in the petition, as to remarks of plaintiff's counsel in opening, needs no consideration. It contained nothing improper or prejudicial. The second, as to the allowance of certain questions alleged to be leading, is equally unimportant.

1. The third is that the court erred in admitting testimony as to the damage done by the fire to growing trees. The plaintiff had made an agreement in writing whereby a Mr. Camp had authority to cut and remove all the wood and timber standing on said land. A similar agreement, but in the form of a deed, acknowledged and recorded, was held in *Fish v. Capwell*, 18 R. I. 667, 29 Atl. 840, 25 L. R. A. 159, 49 Am. St. Rep. 807, to convey no interest in the land, and to be an executory and revocable license only. Whatever trees were not cut and removed under this agreement belonged to the plaintiff, and therefore she had the right to show the damage to growing trees.

The fourth point is that damage to the soil by burning the leaves thereon is not included in the declaration. An inspection of the declaration shows the contrary.

The fifth point is that the court erred in allowing testimony of the damage to wood cut and lying on the ground. As we have stated above, the wood not cut and removed within the time of the license belonged to the plaintiff, and so the testimony was properly admitted. Later in the trial the judge ruled that no allowance could be made for such wood, and thus the defendant has no ground for complaint.

The sixth point is a claim of erroneous instruction. The plaintiff requested an instruction that she was entitled to recover all damage done by the fire to the soil, standing wood, etc., if communicated by sparks from defendant's engines, and that Camp had no right to any of the cut wood not removed from the lot within the time named in the contract or

Clarke v. New York, etc., R. Co

some verbal extension thereof. The first part of the above request the judge allowed, and charged, but refused the latter part. The part charged was within the rule of ownership already stated, and under it the plaintiff was entitled to the latter part of the request. The defendant, therefore, was not prejudiced by the instruction that was given.

2. The seventh point is that the court erred in denying requests to charge made by defendant. One was that the fact that the defendant's servants aided in putting out the fire does not tend to support the fact that the defendant's locomotive, carriage, and engine caused the fire. The judge refused this request, and added: "I charge you just the contrary." We think that this was erroneous. The fact that a body of employees join in putting out a fire raises no presumption, of law or fact, that their employer set the fire. It would be the natural and expected act of every man to do what he could to stop a fire to save his neighbor's property or to protect his own. *Denver & R. G. R. R. Co. v. Morton*, 3 Colo. App. 155, 32 Pac. 345.

The request should have been granted, but we do not think that its refusal is a sufficient ground for a new trial. It could only bear upon the question of fact whether the fire was started by sparks from the defendant's engine. Upon this point it was shown that the fire started almost immediately after the engine had passed, and that there was no other apparent cause for the starting of a fire than from the sparks from the engine. There was no adverse testimony offered by the defendant, nor anything to show a different cause for the fire. The only natural inference was that drawn by the jury. *Kenney v. Hannibal & St. J. R. R.*, 70 Mo. 252; *MacDonald v. N. Y., N. H. R. Co.*, 25 R. I. 40, 54 Atl. 795; *Smith v. Old Colony*, 10 R. I. 22. The refusal to grant the request was, therefore, harmless error; and, where the evidence is such that a new trial would be of no avail, it will be denied, although there may have been error in the trial. *Dyer v. Union R. R. Co.*, 25 R. I. 221, 55 Atl. 688.

Requests to charge in regard to allowance for wood sold to Camp are embraced within what we have said in regard to the plaintiff's title, and hence there was no injury to the defendant. We are of opinion that the verdict was warranted by the evidence and the natural and proper inferences therefrom, and that the damages were not excessive.

Petition for new trial denied.

RARITAN RIVER R. CO. v. MIDDLESEX & S. TRACTION CO.

(Court of Errors and Appeals of New Jersey, June 20, 1904.)

[58 Atl. Rep. 332.]

Contract between Railroads—Maintenance and Use of Bridges—Consideration.

A railroad company, incorporated under the general railroad law of 1873 (Gen. St. p. 2638), was maintaining certain bridges whereby the highway was carried over its tracks at an elevation; the duty to maintain the bridges being imposed upon the railroad company in behalf of the public by statute (P. L. 1891, p. 169; Gen. St. p. 2661). A traction company proposed to construct a line of tracks along the highway, and to that end desired to strengthen and reinforce the bridges, so that they would sustain the increased weight of traffic placed upon them by reason of the maintenance and operation of the traction road. By agreement between the railroad company and the traction company, the former gave consent that the latter might strengthen and reinforce the bridges, and the parties agreed thereafter to share equally the cost of their maintenance and repair; the traction company being given the right to repair the bridges on default of the railroad company to do so, and the railroad company agreeing to pay one-half the cost thereby incurred: *held*, that this consent and agreement of the railroad company furnished a valuable consideration to support reciprocal covenants on the part of the traction company.

Same—Same—Validity.

An agreement made between a railroad company and a traction company, whereby the former gives consent that the latter may construct a traction road across the line of the railroad at grade, and settling as between these parties the mode of crossing, is not void because made without application to the chancellor to define the mode of crossing under the statute. P. L. 1895, p. 462; Gen. St. p. 2717.

Crossing of Railroad—Application of Statute.

The prohibition of the act regulating the crossing of steam railroads by steam or electric railroads thereafter to be constructed (P. L. 1895, p. 462; Gen. St. p. 2717) is intended for the benefit of the parties named in it; the railroad company, the traction company, and the municipal authorities being made by the act the representatives of different public interests.

Freight and Fare Charges.

Section 15 of the general railroad law of 1873 (Gen. St. p. 2643) vests in the railroad company an uncontrolled discretion to establish such rates of freight and fare as its own interests may from time to time require, subject, only, to the maximum rates prescribed by the section, and to the reserved right of repealer and modification by the Legislature.

Same—Jurisdiction.

The courts have no general supervisory jurisdiction over the question of freight and passenger rates.

Same—Contract between Competing Lines.

An agreement, made between a railroad company and a competitor, that during a limited period the former company "will not reduce its present rates of fare, unless required by law," is not contrary to public policy as established in this state.

Dixon, Garrison, Vredenburg, and Vroom, JJ., dissenting.
(Syllabus by the Court.)

Error to Supreme Court.

Action by the Raritan River Railroad Company against the

Raritan River R. Co. v. Middlesex & S. Traction Co

Middlesex & Somerset Traction Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Robert H. McCarter, Atty Gen., and Willard P. Voorhees, for plaintiff in error.

Charles L. Corbin, for defendant in error.

PITNEY, J. This writ of error brings under a review a judgment of the Supreme Court in favor of the defendant in error (plaintiff below), based upon findings of law and fact by Mr. Justice Collins, before whom the cause was tried without a jury. The action was based upon one of the stipulations of a tripartite agreement, dated September 17, 1895, made between the Raritan River Railroad Company, of the first part, the New Brunswick City Railroad Company, of the second part, and the Brunswick Traction Company, of the third part. The stipulation in question was made by the latter company. That company was subsequently merged into the Middlesex & Somerset Traction Company, the present defendant, and by a subsequent agreement made between it and the plaintiff, dated June 1, 1900, the defendant undertook to perform all the covenants and agreements of the Brunswick Traction Company contained in the tripartite agreement. The latter instrument has a dual aspect; some of its stipulations being made between the railroad company and the New Brunswick City Railway Company, and the remaining stipulations being made between the railroad company and the Brunswick Traction Company. The connection of the New Brunswick City Railway Company with the transaction needs no particular mention, since the clauses that relate to it would throw no useful light upon the questions to be discussed.

The Raritan River Railroad Company was incorporated in the year 1888, under the provisions of the general railroad law of 1873. Gen. St. p. 2638 et seq. The Brunswick Traction Company was organized under the general traction act of 1893. Gen. St. p. 3235 et seq. From the recitals of the tripartite agreement, and from the findings of the trial justice, it appears that the railroad company owned and was operating a steam railway in the county of Middlesex, extending from New Brunswick to South Amboy, crossing a number of streets and highways at grade, and was maintaining a number of bridges, by means whereof certain highways were carried across its tracks at an elevation; that the traction company was about to construct a street railroad operated by the trolley system, extending along the highway from New Brunswick to South Amboy, crossing the steam railroad at various points, some at grade and others above grade, and proposed to use the bridges of the railroad company for the latter purpose; and that the agreement was made for the purpose of avoiding litigation, and in order to establish the respective rights of the parties. It provided that the trac-

Raritan River R. Co. v. Middlesex & S. Traction Co

tion company should strengthen and reinforce two bridges that had been constructed by the railroad company for highway crossings, so that the bridges would carry and sustain the increased weight and traffic placed upon them by reason of the maintenance and operation of the trolley railroad. The railroad company agreed thereafter to keep the bridges in repair, and the traction company to pay to it one-half the cost of so doing. On default of the railroad company to keep the bridges in repair, the traction company was given the right to make the repairs; the railroad company agreeing to pay to it one-half the cost thereof. The agreement gave the traction company the right to cross the steam railroad in two places at grade; the railroad company agreeing to construct and maintain the necessary frogs and crossings for the trolley company, at the expense, however, of the latter. The agreement contained specific stipulations on the part of the traction company as to the mode of guarding the safety of the grade crossings. It was further provided that, in case at any future time gates or flagmen, or both, should be required upon said crossings by any public law of the state, or by municipal action, the cost of construction, maintenance, and operation of gates, and the wages of flagmen, should be borne equally by the railroad company and the traction company. The stipulation upon which the present action was based is this: that the traction company should pay each year to the railroad company 50 per centum of any decrease in the annual passenger earnings of the latter company below its passenger earnings during the fiscal year next preceding the making of the agreement; this stipulation to go into effect at the completion of the traction road and the commencement of operations thereon between New Brunswick and South Amboy, and to continue in force for the period of 10 years hereafter, or until the payments made thereunder should equal the sum of \$14,000, in which event further payments should cease. Pending the life of the stipulation just mentioned, the railroad company agreed that it would not "lower its present rates of fare unless required by law," and, if it should be required by law to lower its present rates of fare for passengers, the loss to be made up by the traction company should be computed upon the basis of the regular rates of fare in force at the date of the agreement. When the total payments made by the traction company to the railroad company under this stipulation should equal the sum of \$14,000 the payments were to cease, and the agreement as to rates of fare should also cease. The agreement at the same time reserved to the railroad company the right, on notice to the traction company, to abrogate the agreement as to rates of fare by giving up all claim to the portion remaining unpaid of the \$14,000. The agreement of June 1, 1900, contains nothing necessary to be now men-

Raritan River R. Co. v. Middlesex & S. Traction Co

tioned, beyond an express assumption by the Middlesex & Somerset Traction Company of the covenants and agreements of the Brunswick Traction Company contained in the instrument of September 17, 1895.

By the judgment under review the railroad company recovered damages equivalent to 50 per cent. of the decrease in its passenger receipts for the first year that the traction road was in operation, as compared with the receipts of the fiscal year that by the agreement was made the standard for purposes of comparison. Reversal of this judgment is sought on the ground that the agreement to pay to the plaintiff one-half of the decrease in its annual passenger earnings is void for want of lawful consideration moving from the plaintiff, and on the ground that an inseparable part of the consideration is illegal as contravening public policy. In our opinion the stipulation of the railroad company to bear one-half the cost of maintaining the overhead bridges, when strengthened in such a manner as to provide for the increased burden of traffic caused by the operation of the traction road, furnishes a lawful consideration for the reciprocal stipulations of the traction company. The general duty of the railroad company to maintain those bridges arose from the fourteenth section of the general railroad law, as amended in 1891. P. L. 1891, p. 169; Gen. St. p. 2661. Aside from the liability to indictment for nonrepair, and the liability to damages at the suit of parties specially injured through such nonrepair, the only direct methods of enforcing the obligation of the railroad company were those prescribed by section 14, viz., either by proceedings in chancery at the instance of the municipal authorities to compel specific performance of the duties imposed upon the company, or by action of those authorities in proceeding to repair the bridges on the company's default so to do, recouping the cost from the company by action at law. It is not necessary now to question whether the continuing obligation of the railroad company to keep up the bridges in accordance with the growing demands of travel extends to their reinforcement and maintenance under the extraordinary weight of trolley tracks and roadbed and the operation of trolley cars. Assuming that to be so, the traction company was still (in the absence of agreement of the railroad company) left in the situation of a member of the general public having a great practical interest in the proper performance of this public duty by the railroad company, but without direct means of its own to specifically enforce such performance, and without redress for non-performance unless it should be specially damned. Under these circumstances, an agreement settling as between these parties that they would equally bear the expense of maintaining the improved bridges, and giving to the traction company the right to do the repairs and charge one-half the

cost to the railroad company, tended to avoid litigation between the parties about the matter, and had such value to the traction company as to furnish consideration for its reciprocal stipulations. With the adequacy of that consideration we are not in this action concerned.

For like reasons it seems to us that the consent of the railroad company to the grade crossings, and its stipulation to share in the expense of maintaining the same, furnish a valuable consideration to the agreement. But that consent and stipulation are attacked as void in law and contrary to public policy, in that they contravene the provisions of the act of 1895 for regulating the crossing of steam railroads by steam or electric railroads thereafter to be constructed. P. L. 1895, p. 462; Gen. St. p. 2717. That act declares in substance that "whenever the route of any steam or electric railroad shall cross at points outside of the limits of cities the line of any steam railroad, such crossing shall be made in such a way as will inflict the least injury upon the rights of the company owning or operating the railroad intended to be crossed, and as will afford proper protection to the public; and no company shall hereafter construct any electric railroad across the line of any steam railroad except within the limits of a city until it shall have first made application to the chancellor to define the mode in which such crossing shall be made; and it shall thereupon be the duty of the chancellor, after causing reasonable notice of such application to be given to the municipal authorities, and also to the corporation owning or operating the railroad intended to be crossed, to define by his decree the mode in which such crossing shall be made, and if in his judgment it is reasonably practicable and public safety so requires to avoid a grade crossing, he may in his discretion by his decree define and regulate the mode and manner of such crossing, and thereupon such crossing shall be made in the mode defined by such decree, and in no other way." Crossings in cities are left subject to the existing laws. In our view, however, the prohibition of this statute is intended for the benefit of the parties named in it. There is no penalty imposed as for a public offense. The railroad company, the traction company, and the municipal authorities are all made by statute the representatives of different public interests. The functions of the chancellor under this statute, as we regard it, are purely judicial. He is to hear and judicially determine the cause *inter partes*. It is a statutory extension of the general jurisdiction of the court of chancery, exercised over parties having conflicting easements upon the same soil, to so regulate them that the enjoyment by each party shall not be unduly detrimental to the interests of the other. Instances of the exercise of the general jurisdiction may be noted. *National Docks Ry. Co. v. Pennsylvania R. R. Co.*, 54 N. J. Eq. 142, 33 Atl. 860; *Pennsylvania R. Co. v. Railway Co.*, 55

Raritan River R. Co. v. Middlesex & S. Traction Co

N. J. Eq. 820, 41 Atl. 1116; Consolidated Traction Co. v. South Orange, etc., Traction Co., 56 N. J. Eq. 569, 584, 40 Atl. 15; Jersey City H. & P. Ry. Co. v. N. Y., etc., Ry. Co., 62 N. J. Eq. 390, 53 Atl. 709. The act of 1895 provides a more summary method of procedure, and gives a definite status in court to the public authorities.

The argument for the plaintiff in error is to the effect that the statute makes it a public offense to construct a grade crossing without first obtaining an order of the chancellor, and that an agreement to construct such a crossing is therefore not only void, but a breach of the law. But, suppose the crossing is constructed without such consent; what penalty is the wrongdoer to suffer? A statute that denounces an act as a public offense ought to provide some sanction for its enforcement. 1 Black. Com. 54; Bouv. Law Dict. title "Sanction." Is the chancellor of his own motion to issue an injunction? Is he to constitute himself the guardian of the general public interests? That would render him both actor and judex. It would require clear statutory language to impose upon a high judicial officer duties so incongruous. We find none such in the act before us. But, if the statute were to be so construed as to render it a public offense to construct such a crossing without previous application to the chancellor, the result now to be reached would not be different. The agreement under consideration contains no language that either expressly or by implication forecloses such an application. It contains no stipulation that the parties will proceed to construct the crossing without the chancellor's consent. There is nothing in it that tends to impede, much less debar, action by the municipal authorities, by the Attorney General, or by the chancellor towards the protection of the safety of the public. It simply confers the right of crossing as between the parties, so far as they have power to confer it, and evinces their consent to the method of crossing as defined by them. In our opinion the railroad company and the traction company, notwithstanding the act of 1895, were at liberty to make such an agreement between themselves, and the agreement, if otherwise lawful, cannot be held void because made without proceedings first taken in chancery to define the mode of crossing.

It is further insisted that the stipulation of the railroad company (the plaintiff) "not to lower its present rates of fare unless required by law" furnishes an inseparable part of the consideration for the covenant of the defendant now sued on, that the stipulation quoted is contrary to public policy and void, and that this illegality vitiates the defendant's covenant. Section 15 of the general railroad law (under which act the plaintiff was incorporated) declares in substance that "any such company shall have power and be authorized to demand and receive such sums of money for the transportation of persons and property as it from time to time shall

think reasonable and proper: provided, that said company shall not charge more than three cents per mile for carrying each passenger, and tickets for passengers shall be good until used, but no charge shall be required in the aggregate to be less than ten cents, nor shall said company charge more than ten cents per mile per ton for the transportation of any description of property," etc. Gen. St. p. 2643, § 15. A similar provision as to passenger fares is found in the recent revision of the general railroad law. P. L. 1903, p. 665, § 38. If a similar phrase, "and such sums of money as it from time to time shall think reasonable and proper," were embodied in legislative instructions to public trustees acting without legitimate interests of their own, we should have no difficulty in ascribing to the language the meaning that is suggested here; that is, that the trustees must act in view of what the public interests require, and must not foreclose themselves, by any consideration of personal benefit, from the free exercise of their judgment from time to time, in view of what may be reasonable and proper, as well from the standpoint of the public as from that of the corporation. The case would be nearly parallel to *Barrett v. Bloomfield Savings Institution*, 64 N. J. Eq. 425, 54 Atl. 543, where Vice Chancellor Pitney pointed out, at pages 433, 441, 64 N. J. Eq., pages 546, 549, 54 Atl., et seq., that under our statutory system the managers of savings institutions are trustees of a public franchise, held for the benefit of the public at large, so that, when the Legislature authorized them to dissolve the institution if they should deem it advisable, it intended to say, advisable from the standpoint of the interests of the depositors and of the public, and not from the standpoint of the interests of the managers. His reasoning was adopted by this court on appeal. So, this court held, in *Hope v. Linden Park Ass'n*, 58 N. J. Law, 627, 34 Atl. 1070, 55 Am. St. Rep. 614, that an agreement which tends to control or restrict the free exercise of a discretion for public good, vested in one acting in a public official capacity, is illegal.

The argument for the plaintiff in error would have us to apply the same doctrine to the discretionary power that the Legislature has conferred upon railroad companies to establish from time to time, within certain limits, the rates of fare to be charged for transportation of passengers and merchandise. Now, while it is true that railroad corporations are, in a general sense, a public agency, their property being impressed with a public use, and its administration being subject to regulation by law in the interests of the people at large, it is not in this aspect that power is conferred upon the company by the section above quoted to fix the rates to be charged for transportation. That section touches upon a matter in which there is, in every given case, a direct antagonism between the legitimate interests of the railroad company and the interests of the public. The companies are

organized primarily for the purpose of making a profit out of the transportation of freight and passengers. The general railroad law is based upon the theory that the public good is promoted by inviting capital to embark in such enterprises, the control and management of the roads being vested in the proprietors thereof, to the end that their capital may receive adequate returns. In fixing the rates of freight and fare, it is manifest that the primary interest of the company is in the direction of higher rates, while the primary interest of the passenger or shipper lies in a direction diametrically opposite. The construction of section 15 suggested by the learned counsel for the plaintiff in error attributes to the Legislature a design to establish a quasi judicial tribunal for the purpose of determining what is reasonable and proper from the standpoint of the public, as well as from that of the company, and to make the company itself the sole member of that tribunal. The legal impossibility of such an arrangement results from its practical futility. "No man may be made a judge in his own cause." This maxim results, not from any constitutional limitation, but from the inherent limitations of human nature, that are necessarily present in all systems of human government.

It follows that language which would require the exercise of a judicial discretion, if it were addressed to a party so situated as to be able to act impartially, must mean something very different when knowingly addressed to a party that by reason of its legitimate and inevitable interest in the subject-matter of arbitrament can by no possibility act without bias. Thus, when the Legislature, in framing this general act for granting and regulating railroad franchises, having within its hands full power to impose specific conditions respecting rates and terms for carriage of freight and passengers, representing in itself the people whose interests were in a sense antagonistic to those of the railroad companies in the matter of rates, instead of fixing a specific scale or establishing an impartial tribunal for their regulation, said to the companies: "We reserve the right to repeal and modify the power and authority now conferred upon you. In the meantime we limit your passenger fares to three cents per mile per passenger, and your freight charges to ten cents per mile per ton; and subject to those limitations we authorize you to demand such sums of money for the transportation of persons and property as you—the party whose interests are opposed to those that we represent—shall from time to time think reasonable and proper"—it expressed as emphatically as possible the notion that an uncontrolled discretion was vested in the company to establish such rates as its own interests should from time to time require, subject, only, to the maximum rates prescribed, and to the right of repeal and modification that was expressly reserved in the act. Gen. St. p. 2647, § 39.

Any construction of section 15 of the act that places the railroad company in the attitude of an impartial arbiter, as between it and the public, being thus found inadmissible, because it runs counter to fundamental principles, we have before us a statutory scheme which in terms confers upon the company an uncontrolled discretion to subserve its own interests in making, and from time to time changing, the rates of fare and freight, subject, only, to the maximum rates prescribed and to further legislative action from time to time thereafter. It is too plain for argument that the policy of the law, so far as expressed in this statute, is not violated by an agreement, made between the railroad company and a would-be competitor, that during a limited period the former company will not reduce fares unless required by law. Where, then, shall we look for any public policy to the contrary? Public policy is to be sought for in the rules of the common law, as modified by the acts of the Legislature. It is for the lawmaking authority, and not for the courts, to declare it. Certainly the courts have no general supervisory authority over the question of freight and passenger rates. Their concern in the matter is confined to cases where the question of "reasonable rates" is raised, incidentally, in the ordinary course of judicial inquiry. Railroad companies, as common carriers, pursuing a public calling under such circumstances that the public must of necessity deal with them, are limited by the rules of the common law, in the absence of any statute, to the imposition of reasonable rates of fare and toll. On the additional ground that their property is devoted to a public use, they are subject to the like limitation, and their use of the property is subject to be controlled by the public for the common good, within limits fixed by the Constitution. Where controversies arise inter partes, the courts judicially determine what are reasonable rates. In so doing they follow common-laws rules, in the absence of statute. Where there is a statute, the courts follow the rule of law thus prescribed. Where the statute violates the Constitution, as by prescribing rates so low as to be unremunerative, so as to amount to a taking of property without compensation or without due process of law, the courts follow the Constitution, disregarding the statute. *Munn v. Illinois*, 94 U. S. 113, 134, 24 L. Ed. 77; *Chicago, etc., R. R. Co. v. Iowa*, 94 U. S. 155, 162, 24 L. Ed. 94; *Peik v. Chicago, etc., Ry. Co.*, 94 U. S. 164, 178, 24 L. Ed. 97; *Ruggles v. Illinois*, 108 U. S. 526, 2 Sup. Ct. 832, 27 L. Ed. 812; *Chicago, etc., Ry. Co. v. Wellman*, 143 U. S. 339, 12 Sup. Ct. 400, 36 L. Ed. 176; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 397, 399, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *St. Louis & S. F. Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567; *Smyth v. Ames*, 169 U. S. 466, 522, 18 Sup. Ct. 418, 42 L. Ed. 819.

But the power to require a public service to be performed

Portsmouth St. R. Co. v. Peed's Adm'r

for a limited rate is but a branch of the power to regulate, in the public interest, property that is devoted to the public use. This is primarily the function of the lawmaking body. The courts may, in a given instance, be called upon to decide, in the course of litigation, whether a certain rate is reasonable or unreasonable, or to declare that a given statutory limitation is confiscatory; but the courts have no power to declare in general what rates shall not be exceeded. In view of the positive statutory declaration contained in section 15 of the general railroad law, construed as we construe it, we are unable to conceive on what rational ground the court can properly declare that any public policy requires that the rates shall be maintained below the maximum rates fixed in the statute. That limitation, and the discretion that is conferred upon the company with respect to lesser rates, are the deliberate expression of the lawmaking power, and the measure of its regulation in this behalf of property devoted to public use under the general railroad law. That statute binds the courts, unless it transcends some constitutional limitation. Nothing of this sort is suggested. We are of the opinion, therefore, that the defendant's covenant on which this action is based was founded on a good and lawful consideration, and is not vitiated by illegality of consideration.

The judgment under review will be affirmed.

DIXON, GARRISON, VREDENBURGH, and VROOM, JJ., dissent.

GARRISON, J. (dissenting). I vote to reverse, upon the ground that the power granted to the railroad company to receive such sums as fare "as it shall from time to time think reasonable and proper" is not one of which it can deprive itself for a stated period for a pecuniary consideration.

PORTSMOUTH ST. R. CO. *v.* PEED'S ADMINISTRATOR.

(Supreme Court of Appeals of Virginia, June 16, 1904.)

[47 S. E. Rep. 850.]

Pleading.

Where a declaration is in two counts, and there is evidence to sustain one of them, so that defendant cannot demur to the evidence, and the one not sustained by the evidence is good in form, the court, on request of defendant, should instruct the jury to disregard the count not sustained.

Accident on Street Car Track—Instructions.

Where, in an action against a street railroad for the death of one killed by being run over by a car, the negligence alleged in the declaration was excessive speed, it was error to instruct on failure to give warnings.

Variance.

Code 1887, § 3384, declares that, where there appears to be a vari-

Portsmouth St. R. Co. v. Peed's Adm'r

ance between the declaration and proof, there may be an amendment of the declaration, if it will not prejudice the opposite party, or the jury may find the facts, and the court give judgment according to the right of the case: *held* that, in case of a variance between the evidence and allegations, the correct practice is to object to the evidence when offered, or move to exclude it; the attention of the court being thereby called to the variance, and an opportunity afforded to meet the emergency under the statute.

Instructions.

It is proper to refuse an instruction where there is no evidence to support it.

Accident at Street Railway Crossing—Care Required of Pedestrian—Instruction.

In an action against a street railroad for the death of one run over by a car, an instruction that failure to look for an approaching car by a person about to cross a street railway track, especially at a street crossing, was not negligence, as a matter of law—the street car having no superior right to that of a pedestrian, and the question being whether a prudent person, acting prudently, would have thought it necessary to do so—was erroneous, as misleading.

Same—Same.*

While, generally speaking, one who is about to cross a street railroad should look and listen for cars, it is not an inflexible rule; and the question is whether a prudent man, acting prudently, would have thought it unnecessary to do so.

Damages.

Where, in an action for death, there is no evidence of payment by plaintiff of doctors' bills and burial expenses, an instruction authorizing their recovery is erroneous.

Same—Elements—Wrongful Death.

In an action for death, evidence that deceased left a family, and followed a trade which gave practically constant employment, is sufficient to warrant an instruction that the jury, in estimating the damages for his death, may take into consideration compensation for the loss of his care, attention, society, and comfort to his family, and for solace to them for the sorrow, suffering, and mental anguish occasioned by his death.

Accident on Street Car Track—Care Required of Deaf Pedestrian—Instructions.†

In an action against a street railroad for the death of one run over by a car, plaintiff's evidence showed that deceased was walking outside defendant's track, with his back turned to an approaching car, when he attempted to cross the track, and that he had not taken more than two steps when he was struck, and that he was deaf. Defendant requested an instruction that it was the duty of a person approaching a street car track to exercise the care which ordinarily prudent persons would exercise, and make such use of his faculties as ordinarily prudent persons would make use of under the circumstances, and that, if such person were deaf, it was more incumbent on him to exercise his sight, and that if deceased failed to exercise such care, and his failure contributed to the accident, the jury should find for defendant. The instruction was given, with the addition that if the jury further found that the motorman saw or might have seen deceased go on the track, or approach it with apparent intention

*See foot-note appended to *Wilman v. People's Ry. Co. (Del.)*, 9 R. R. R. 384, 32 Am. & Eng. R. Cas., N. S., 384.

†As to the contributory negligence of deaf persons when walking on or crossing railroad tracks, see foot-note appended to *Roach v. Atlanta, etc., Ry. Co. (Ga.)*, 10 R. R. R. 97, 33 Am. & Eng. R. Cas., N. S., 97, where all the preceding authorities in this series are collected.

Portsmouth St. R. Co. v. Peed's Adm'r

to cross it, and thereafter used ordinary care to stop the car, they should find for defendant: *held*, that defendant was entitled to the instruction, and its modification was error.

Same—Contributory Negligence.†

It was error to refuse the charge that, if deceased stepped in front of a moving car of defendant when the car was so close on him that a collision could not be avoided by the utmost care on the part of defendant's servants, the jury must find for the defendant.

Same—Speed of Car—Evidence.

In an action for the death of one run over by a street car, it was not error to receive testimony of a witness objected to as giving the rate of speed 80 feet from the scene of the accident.

Same—Same—Same.

The testimony of the witness was not inadmissible because of the fact that at the time he observed the car he was in his storehouse, 25 feet from the door.

Witnesses—Refreshing Memory.

A witness may be allowed to refer to the stenographic report of his evidence at a former trial for the purpose of refreshing his memory.

Same—Evidence to Contradict.

Stenographer's notes of testimony on a former trial may not be referred to for the purpose of contradicting a witness.

Error to Hastings Court of Portsmouth.

Action by the administrator of Leroy L. Peed against the Portsmouth Street Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Richard B. Tunstall and T. J. Wool, for plaintiff in error.
John W. Happer and Frank L. Crocker, for defendant in error.

WHITTLE, J. On the afternoon of March 3, 1899, plaintiff's intestate, Leroy L. Peed, while attempting to cross Crawford street at or near its intersection with Columbia street, in the city of Portsmouth, was struck by a passing car of the defendant company, receiving injuries from which he died. Thereupon the defendant in error instituted this action against the plaintiff in error to recover damages for the alleged negligent killing of his intestate, which resulted in the judgment now under review.

The declaration contains two counts. The first count alleges that the accident was due to the negligence of the defendant in running its cars "at such a great, high, and rapid rate of speed as to become thereby unmanageable and incapable of being stopped when occasion for stopping the same should arise," whilst the second count attributes the accident to the negligence of the defendant in failing to equip its cars with suitable fenders.

At the trial, after the evidence had closed, the defendant moved the court to strike out an ordinance of the city of

†As to the mutual rights and duties of street railways and other users of streets, see foot-note appended to *Hayden v. Fair Haven & W. R. Co.* (Conn.), 10 R. R. R. 32, 33 Am. & Eng. R. Cas., N. S., 32.

Portsmouth with respect to car fenders, on the ground that there was no evidence tending to show a failure of duty on the part of the defendant in that regard, which motion the court sustained. Whereupon the defendant submitted a further motion that the jury be instructed to disregard the second count of the declaration, as there was no evidence to support it, which motion the court overruled. Sustaining the second motion was a corollary to granting the first, and the court erred in overruling it.

The jury returned a general verdict, and it cannot be affirmed that their finding was not influenced by the ruling of the court with respect to the second count, notwithstanding the fact that there was no evidence to sustain it. The court, in the presence of the jury, had refused to instruct them to disregard the count, and they may naturally have interpreted that ruling to mean that they must regard it.

The only remedy which a defendant has in such case is to move the court to instruct the jury to disregard the unsustainable count. Being unobjectionable in form, it is not amenable to demurrer; and the defendant cannot demur to the evidence where, as in this case, there is another count in the declaration with some evidence tending to uphold it. The rationale for disregarding such a count is the same as in case of a variance between the evidence and allegation. Both rest upon the fact of a failure to prove what is alleged. *Roe v. Crutchfield*, 1 Hen. & M. 361; *Bush v. Campbell*, 26 Grat. 431; *B. & O. Ry. Co. v. Whittington*, 30 Grat. 810; *Richmond Ry. & Elec. Co. v. Bowles*, 92 Va. 738; *Eckles v. N. & W. Ry. Co.*, 96 Va. 69, 25 S. E. 545; *Richmond Ry. & Elec. Co. v. West*, 100 Va. 184, 40 S. E. 643; *West v. Richmond Ry. & Elec. Co.*, 102 Va. —, 46 S. E. 33.

While that error alone might not warrant a reversal, the ruling involves a question of practice which ought to be settled.

The next assignment of error relates to the ruling of the court on instructions.

The objection to the first instruction given at the instance of the plaintiff is that it was not justified by the pleading. As remarked, the declaration sets out two grounds of negligence, namely, excessive speed and a defective fender. There being no evidence to support the second charge, the only ground upon which the plaintiff could recover, if at all, was for the alleged excessive speed; yet the instruction injected into the case a new element, and told the jury that either a failure to give warning of the approach of the car, or its excessive speed, would entitle the plaintiff to recover. Under the authorities cited above, the court erred in instructing the jury that they could find a verdict on a case not made by the declaration. It should be observed, however, in that connection, that, in case of a variance between the evidence and allegations, the usual and correct practice is to object to

the evidence when offered, or move to exclude it. Attention is thus called to the discrepancy, and opportunity afforded the trial court to meet the emergency, in a proper case, in one of the modes prescribed by section 3384 of the Code of 1887.

Plaintiff's second instruction is subject to the same objection as the first, and that part of the instruction predicated on the jury's belief from the evidence that the deceased used ordinary care in looking and listening before attempting to cross Crawford street is liable to the further objection that there was no evidence on which to base it.

The third instruction told the jury that failure to look for an approaching car by a person about to cross a street railway track, especially at a street crossing, is not negligence, as a matter of law, the street car having no superior right to that of a pedestrian; the question being whether a prudent person, acting prudently, would have thought it necessary to do so.

While the qualifying language lessens the vice of the instruction, it does not entirely remove its misleading tendency. The doctrine on the subject is thus stated in 2 Shearman & Redfield on the Law of Negligence (5th Ed.) at pp. 869, 870:

"While, generally speaking, one who is about to cross a street railroad should both look and listen for cars, this is not an inflexible rule; nor is it to be enforced with any such strictness as in the case of an ordinary steam railroad. It is not negligence, as a matter of law, to omit to do so. The question is whether a prudent man, acting prudently, would have thought it unnecessary to do so."

The above statement of the law is quoted with approval by this court in the recent case of *Bass v. Norfolk Ry. Co.*, 100 Va. 1, 40 S. E. 100. The statement of a part of the rule, without the context, was calculated to mislead the jury, and therefore ought not to have been given.

The remaining instruction of the plaintiff to which objection is made relates to the measure of damages. The instruction told the jury that, "if they shall find for the plaintiff, in estimating his damages they may take into consideration compensation for the loss of his care, attention, and society to his family, together with such sum as they may deem fair and just by way of solace and comfort to them for the sorrow, suffering, and mental anguish occasioned by his death (and for such pecuniary sum as may have been expended for the purpose of securing his recovery and expenses of burial), not to exceed, however, the sum of \$10,000."

In the absence of evidence of payment by the plaintiff of doctors' bills and burial expenses, that part of the instruction in parentheses ought to have been eliminated. With respect to the rest of the instruction, the evidence shows that the deceased was 64 years of age; that he left a family con-

sisting of a wife, three sons, and two daughters; and that he was a ship calker by trade, with practically constant employment. This evidence was sufficient to warrant the court in giving the instruction. *Baltimore & Ohio R. R. Co. v. Noell's Adm'r*, 32 Grat. 394.

The next assignment of error is the refusal of the trial court to give the third instruction asked for by the defendant, and the modification of that instruction.

The instruction told the jury that it is the duty of a person approaching a street car track to exercise the care which ordinarily prudent persons would exercise, and make such use of his faculties as ordinarily prudent persons would make use of under similar circumstances, and, if such person is deaf, it is more incumbent upon him to exercise his sight; and if they believe from the evidence that the deceased failed to exercise such care, and his failure to do so contributed to the accident in which he met his death, *and if they further find from the evidence that the motorman saw, or by ordinary care might have seen, the decedent go upon the track, or approach the track with apparent intention to cross it, and thereafter used ordinary care to stop the car, they must find for the defendant.* The addendum of the court is italicized.

The instruction, as offered by the defendant, is a correct exposition of the law applicable to the evidence of the only witness for the plaintiff who saw the accident. The car was running on Crawford street, which runs north and south, and is intersected by Columbia street, running east and west. The deceased, who was proved to have been deaf, started from the southeast corner of Columbia street, and crossed that street, walking outside the track until he passed a delivery wagon in front of a store on the northeast corner, when, with his back toward the approaching car, and his head bent forward, he attempted to cross the track, and had not taken more than two steps before the car struck him. The witness further testified that he did not think the deceased was going on the track, and, if he had thought so, he would certainly have called out to save him. The testimony of several of the defendant's witnesses also tends to sustain the theory that the deceased gave no indication of his intention to cross the track until the car was so close upon him that it could not be stopped in time to avert the accident. Upon this evidence the defendant was entitled to the instruction asked for, without the qualification made to it by the court.

The same objection obtains to the court's addition to defendant's instruction No. 4. The amendment involves the principle embodied in the qualification to instruction No. 3, and, for the reason stated in that connection, ought not to have been given.

Instructions 5 and 6, which the court rejected, told the jury that, if they believed from the evidence that the deceased

McKeown v. South Carolina & Georgia Ex. R. Co

stepped in front of a moving car of the defendant when the car was so close upon him that a collision could not be avoided by the utmost care on the part of defendant's employees, they must find for the defendant.

The evidence referred to tended to sustain that theory, and the court erred in refusing to give the instructions. *Richmond Traction Co. v. Martin*, 102 Va. —, 45 S. E. 886.

There are two other assignments of error which may be briefly noticed. The first assignment is to the admission of the testimony of a witness for the plaintiff with respect to the speed of the car. His evidence was objected to as giving the rate of speed 80 feet from the scene of the accident, and because the position of the witness, who was standing in his storehouse, 20 or 25 feet from the door, was not such as to enable him to determine the rate of speed of the car.

Of both objections it may be remarked that they affect the weight, rather than the admissibility, of the evidence. There is therefore no error in that assignment.

The remaining assignment is the refusal of the court to permit a witness who had testified on a former occasion to refresh his memory from the stenographer's minutes of his testimony.

It was permissible to allow this reference to the minutes for the bona fide purpose of refreshing the memory of the witness, but not to contradict him. The rule in such case does not require that the paper should have been made by the witness. *Harrison v. Middleton*, 11 Gratt. 527, 544; *Greenleaf on Ev.* (16th Ed., Wigmore) § 439c.

For the foregoing reasons, the judgment of the trial court must be reversed and annulled, the verdict of the jury set aside, and the case remanded for a new trial to be had, not in conflict with the views expressed herein.

McKEOWN v. SOUTH CAROLINA & GEORGIA EXTENSION R. CO.

(Supreme Court of South Carolina, April 19, 1904.)

[47 S. E. Rep. 713.]

Nonsuit—Accident to Person on Track.*

In an action to recover for the death of plaintiff's decedent by being struck by defendant's cars, where the evidence showed that he was hard of hearing, and was walking on a part of the track where pedestrians were accustomed to walk when he was struck by a freight train running at night without a headlight, nonsuit was improper.

Appeal from Common Pleas Circuit Court of York County;
Dantzler, Judge.

*As to the contributory negligence of deaf persons in walking on or crossing railroads, see foot-note appended to *Roach v. Atlanta, etc., Ry. Co.* (Ga.), 10 R. R. R. 97, 33 Am. & Eng. R. Cas., N. S., 97, where all the preceding authorities in this series are collected.

McKeown v. South Carolina & Georgia Ex. R. Co

Action by John G. McKeown, administrator of J. W. McKeown, against the South Carolina & Georgia Extension Railroad Company. From order of nonsuit, plaintiff appeals. Reversed.

Wilson & Wilson, for appellant.
C. P. Sanders, for respondent.

JONES, J. This action was brought to recover damages for alleged wrongful death of plaintiff's intestate, J. W. McKeown, through the negligence and wantonness of the defendant. This appeal is from a nonsuit.

The complaint alleged: "(4) That on the night of the 5th day of February, 1901, about 9:30 o'clock, the said J. W. McKeown was walking along the side of the track of defendant railroad between Yorkville and Sharon, in said county and state, and which, with the knowledge and acquiescence of defendant, had long been used by the public as a traveled way, when one of defendant's freight trains, going toward Sharon, and negligently running without any headlight on its engine, recklessly and negligently ran upon and against the said J. W. McKeown, knocking him down on the side of said track, and inflicting severe, but not necessarily fatal, injuries; and that, although the engineer and fireman running and operating said train for defendant at the time knew, or had good cause to know, or by proper care and inquiry would have known, that the said J. W. McKeown had been so struck and injured, they recklessly, wantonly, and negligently failed to stop said train and take care of him, but continued on their way. (5) That the said J. W. McKeown was hard of hearing, and so could not hear the approach of said train; but, if said engine had been supplied with the proper headlight, the reflection therefrom would have warned him of its approach, so that he could have avoided the same. (6) That the injury so inflicted upon the said J. W. McKeown would not have resulted in his death if said train had been stopped and proper care and attention had been given to him; but, owing to the recklessness and wanton negligence of the defendant, as aforesaid, the said J. W. McKeown was allowed, in said condition, to lie on the side of said track, in the wet and cold, for hours, without any aid or assistance, thereby causing his death."

The motion for nonsuit was based upon the following grounds: "(1) Because there is no evidence tending to show that the place where the deceased was killed was a street, highway crossing, or traveled place, but, on the contrary, the evidence shows that the place where the deceased was killed was on the track of the defendant at a point other than a street, highway, or traveled place, and where neither the public nor the deceased had a legal right to be. (2) Because there is no evidence tending to show that the deceased was seen, or might have been seen, by the engineer,

McKeown v. South Carolina & Georgia Ex. R. Co

or those in charge of the engine or train, even if there had been a headlight, or that the employees of the defendant company knew, or might have known, that the deceased was in a place of apparent danger, from which he could not have extricated himself. (3) Because there is no evidence tending to show that the employees of the company were guilty of any willfulness, wantonness, or of any such negligence or want of care, as would make the defendant liable for injuring or killing one who was using its tracks at a point where he had no legal right to be. (4) Because there is no evidence which tends to show any breach of duty by the defendant to the deceased, even assuming him to have been a licensee. (5) Because there is no evidence that deceased was killed by the defendant. (6) Because there is no evidence tending to show that the train could have been stopped in time to avoid injuring the deceased, even if it had been equipped with a headlight. (7) Because there is no evidence tending to show that the want of a headlight was the proximate cause of the injury."

Judge Dantzler, in his order of nonsuit, sustained the first, second, third, sixth, and seventh grounds, but overruled the fourth and fifth. The appellant alleges error in granting nonsuit on the grounds stated, and respondent has given proper notice that the court would be asked to sustain the nonsuit also upon the grounds overruled.

First, as to whether there was any evidence tending to show that deceased was killed by the defendant. In what we shall say hereafter we do not mean to express any opinion whatever as to the force or sufficiency of the evidence, but intend only to indicate our view as to whether there was any evidence tending to prove the allegations of the complaint, and which the jury should have been permitted to consider. There was testimony that on the night of February 5, 1901, between 10 and 11 o'clock, J. W. McKeown was found lying in a helpless condition on defendant's track between Yorkville and Sharon, in York county, by William Currence, who lived close by, and had for some time heard his cries before going to his assistance. This was after defendant's freight train had passed going from Yorkville towards Sharon, the interval not being definitely stated, but spoken of by the witness as "a good bit." The train left Yorkville that night and went towards Sharon without a headlight, and deceased, who was partially deaf, was probably going in the same direction, as he was last previously seen in Yorkville late that evening, and lived beyond Sharon. No one who testified saw the train strike deceased. After he was found on the track, there was much delay in securing sufficient help to remove him; but he was finally removed a short distance away, where he died about 1 o'clock that night. The physician who examined his body found a bad bruise on the right side about 12 inches broad, with congested blood under the skin,

McKeown v. South Carolina & Georgia Ex. R. Co

as if struck by a violent blow, and the physician stated that, in his opinion, the wound was such as could have been made by some portion of a train of cars projecting over the track and striking him. There was some evidence of impressions on the soil near by where he was found, indicating that he had staggered off from the track, was down upon his knees, and had dragged himself back to the place where he was found. This was sufficient to justify overruling the nonsuit on the fifth ground.

In sustaining the nonsuit the court gave as his reason that the evidence showed that the deceased, at the time of his alleged killing or injury, was a trespasser upon the track of the defendant company, and did not tend to show any wantonness, willfulness, or intentional disregard of the rights of the deceased by the defendant which rendered the defendant liable for such killing or injury. Assuming now that defendant's train struck deceased, the next inquiry should be whether there was any evidence tending to show that defendant thereby breached any duty which it owed the deceased. If deceased was a trespasser, defendant owed him the duty to do him no wanton injury. If he was a licensee, the defendant owed him the duty to exercise ordinary care not to injure him. But whether the deceased was a trespasser or a licensee, and whether the conduct of defendant was wanton or merely negligent, are questions of fact for the jury, if there is any testimony tending to establish the issue presented in that regard. It is only when the testimony is incapable of any inference in support of plaintiff's case that a nonsuit is allowable. The complaint alleged and the testimony tended to show that the path along the side of defendant's track, where plaintiff was struck, had long been used by the public as a place of travel, with the knowledge and acquiescence of the defendant. The testimony was to the effect that the path had been constantly used by the public, even more frequently by pedestrians than the public road near by, without the slightest objection by the defendant, and that the neighborhood was thickly settled. The circumstances were such as might, in the mind of the jury, indicate that the defendant, through its agents, knew of the use made by the public of the pathway, and by not objecting defendant indicated a willingness that it should be used by the public. Such evidence would not tend to show that the public had acquired a right of way by alienation or prescription, so as to give the public a legal right to use the pathway against the consent of the defendant, but it does tend to show circumstances which call for the exercise of ordinary care on the part of defendant. As stated by this court in *Jones v. Railway Co.*, 61 S. C. 560, 39 S. E. 758: "Even though the use of the track by the public as a walkway was not for such length of time, nor of such character, as to give a legal right to so use the track, and even though the evidence fell short of showing any posi-

McKeown v. South Carolina & Georgia Ex. R. Co

tive consent of such use by the company, yet, if there was evidence tending to show knowledge of and acquiescence in such use without protest, such evidence would tend to show that the railroad company had much reason to expect the presence of persons upon the track, who were there not as bald trespassers, but using it with the knowledge and acquiescence of the company. Under such circumstances it would be the duty of the railroad company to keep a reasonable lookout, or to give warning of the approach of the train, or generally to observe ordinary care under the circumstances to avoid injury." The case of *Haltiwanger v. R. R. Co.*, 64 S. C. 24, 41 S. E. 810, is not entirely consistent with the rule stated in *Jones v. Railway Co.*, but the recent case of *Matthews v. Seaboard Air Line Ry.*, 67 S. C. 501, 46 S. E. 335, is in accord therewith, and states the rule thus: "While a railroad company cannot lose its right of way by alienation or prescription because of the public interest in its holding it for public purposes, it may impose upon itself as a private corporation duties and obligations to the public or to individuals by inviting the use of the right of way, or indicating its willingness that it should be used by the public or particular individuals. In such circumstances the duty devolves on the railroad company to exercise ordinary care to avoid injury to those so using the right of way." The court erred in this case in not submitting to the jury to determine what was deceased's relation to the defendant's right of way, whether as trespasser or licensee, and in declaring that deceased was a trespasser. He further erred in not submitting to the jury the question whether defendant's conduct was negligent or reckless and wanton. The testimony was not only that defendant's train was being operated at night, without a headlight, along a track where there was reason to expect pedestrians to be, but that the operatives were conscious that it was negligent to be without a headlight, for at Yorkville they were aware of the failure of the headlight for want of oil, and there was some conversation among the operatives as to who was to blame for the failure to procure oil; and, although the train remained quite a while at Yorkville, and oil was readily procurable there, nevertheless they deliberately started out at night without a headlight. We mean, of course, that the testimony had tendency to show this state of facts. Was this reckless, or wanton, or negligent? The jury ought to have been permitted to say. Wantonness may be inferred from a conscious failure to observe due care. *Watts v. R. R. Co.*, 60 S. C. 74, 38 S. E. 240. Whether the want of a headlight was a proximate cause of the injury, and whether the train could have been stopped in time to avoid injuring the deceased if there had been a headlight, were questions for the jury under instructions as to the law. There was testimony that a headlight would throw light so as to distinguish a man some 200 or 250 yards.

Fares v. Rio Grande Western R. Co

Did the absence of the headlight prevent the engineer and fireman from seeing the deceased in time to avoid injuring him? Would the presence of a headlight, by its reflections forward on the adjacent objects, have enabled deceased, though hard of hearing, to avoid the danger, notwithstanding his back was probably towards the engine? These were matters for the jury in determining, from all the circumstances, whether the absence of the headlight was a breach of any duty owing by defendant to deceased, and whether it was a proximate cause of the injury.

The judgment of the circuit court is reversed, and the case is remanded for a new trial.

FARES *v.* RIO GRANDE WESTERN R. CO.

(Supreme Court of Utah, June 28, 1904.)

[77 Pac. Rep. 230.]

Freightening Teams—Negligence—Insufficiency of Evidence.

Plaintiff, driving along a highway, approached where it ran parallel with a railroad track through a canyon for several hundred feet, and saw an engine, at a tank in the canyon, headed in the direction plaintiff was driving. Plaintiff started to drive along the highway through the canyon, when the engine, without warning, and making no more noise than usual or necessary, backed toward him, and on its approach he was injured by his horses becoming frightened: *held*, that there was no evidence of negligence on the part of the railway company.

Same—Same—Same.

Plaintiff having testified that the engine was in plain view, and that he saw it when it started, and that the sounding of the bell or whistle might have added to the fright of his horses, no negligence was shown in the failure to give warning.

Same—Constructing Railroad Adjoining Highway.

A railway company has a right to construct its track through a canyon, though it is compelled in doing so to run parallel with and in close proximity to a highway.

Same—Same.

Where plaintiff, suing for personal injuries, alleged that a railroad company was negligent in the construction and operation of its railroad so close to a highway that a team could not pass in safety, but offered no proof to sustain the allegations, it will be assumed that the railroad was lawfully constructed at such point.

Same—Same—Prudent Operation.*

A railroad company having a track adjoining a highway is not responsible to travelers whose horses become frightened by the

*As to the liability of railroad companies for frightening teams by the operation of trains or cars, see *Chesapeake & N. Ry. Co. v. Ogles* (Ky.), 7 R. R. R. 740, 30 Am. & Eng. R. Cas., N. S., 740 (duty to give warning for the protection of highway travelers, when approaching trestle crossing highway); *Louisville & N. R. Co. v. Howerton* (Ky.), 7 R. R. R. 554, 30 Am. & Eng. R. Cas., N. S., 554 (not negligence to fail to give signal when approaching crossing); *Louisville & N. R. Co. v. Howerton* (Ky.), 7 R. R. R. 554, 30 Am. & Eng. R. Cas., N. S., 554 (railroad not liable for injuries to one driving horse, which was frightened by hand car approaching

Fares v. Rio Grande Western R. Co

appearance of its engines or trains, if the same are operated prudently, and without unnecessary noise or willful disregard of a traveler's perilous position, after it has been discovered by the servants of the company.

Same—Same—Lookouts.

A railroad company is not required to keep a lookout specially for travelers on a highway running parallel with and in close proximity to the railroad track, nor to keep its trains so under control that they can be stopped if a team is founded at a point of danger on such highway, nor to exercise the same degree of care as is required at grade crossings.

Liability for Accidents.

A railroad company has the right to operate its road in a lawful manner, and, when it does so without negligence and without malice, it is not responsible for injuries occasioned thereby.

Baskin, C. J., dissenting.

Appeal from District Court, Salt Lake County; S. W. Stewart, Judge.

Action by Joseph Fares against the Rio Grande Western Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

This is an action to recover damages for physical injuries which the plaintiff claims he received because of the negligence of the defendant. The essential allegations of the complaint are, substantially, that the defendant is operating a railroad between Salt Lake City and Park City, through Parley's Canyon, which extends east and west; that, at a

without unusual noise); Chicago, etc., R. Co. v. Roberts (Neb.), 6 R. R. R. 277, 29 Am. & Eng. R. Cas., N. S., 277 (railroad not liable for injuries to horses frightened by ordinary operation of hand car); Hendricks v. Fremont, etc., R. Co. (Neb.), 6 R. R. R. 281, 29 Am. & Eng. R. Cas., N. S., 281 (railroad not liable for injuries to team frightened by ordinary operation of train); Kentucky & I. Bridge Co.'s Receivers v. Montgomery (Ky.), 2 R. R. R. 405, 25 Am. & Eng. R. Cas., N. S., 405 (care required in operating train upon toll bridge); Louisville & N. R. Co. v. Penrod's Adm'r (Ky.), 1 R. R. R. 887, 24 Am. & Eng. R. Cas., N. S., 887 (customary noises); Texas & P. Ry. Co. v. Hamilton (Tex.), 1 R. R. R. 884, 24 Am. & Eng. R. Cas., N. S., 884 (customary signals); Lowe v. Alabama & V. Ry. Co. (Miss.), 4 R. R. R. 335, 27 Am. & Eng. R. Cas., N. S., 335 (horse injured by fall into ditch not injured by reason of the running of the train which frightened it); Gulf, C. & S. F. Ry. Co. v. Milner (Tex.), 1 R. R. R. 607, 24 Am. & Eng. R. Cas., N. S., 607 (statutory crossing signals); Texas & P. Ry. Co. v. Hamilton (Tex.), 1 R. R. R. 884, 24 Am. & Eng. R. Cas., N. S., 884 (malicious conduct of employees); Cleghorn v. Western Ry. of Alabama (Ala.), 5 R. R. R. 501, 28 Am. & Eng. R. Cas., N. S., 501 (gentle horse frightened by mail crane); Oates v. Metropolitan St. Ry. Co. (Mo.), 3 R. R. R. 916, 26 Am. & Eng. R. Cas., N. S., 916 (negligence of motorman in violently ringing bell could not be justified as an attempt to assist driver of runaway horse to prevent it from going on track); Kelacy v. New York, N. H. & H. R. Co. (Mass.), 1 R. R. R. 880, 24 Am. & Eng. R. Cas., N. S., 880 (sufficiency of evidence of negligence in sounding whistle under bridge); International & G. N. R. Co. v. Locke (Tex.), 2 R. R. R. 754, 25 Am. & Eng. R. Cas., N. S., 754 (team frightened at crossing by hand car which was an unsightly object); Texas Midland R. R. v. Cardwell (Tex.), 1 R. R. R. 892, 24 Am. & Eng. R. Cas., N. S., 892 (unnecessarily allowing engine emitting sparks to

Fares v. Rio Grande Western R. Co

point about 300 feet west of the company's water tank in the canyon, the public highway runs parallel with and adjoins the railroad, the railroad being on the south side and a cliff of rocks on the north side of the highway, leaving insufficient space to drive a team along the highway with safety while an engine is being operated on the railroad track; that because of the close proximity of the highway to the railroad it was the duty of the defendant, in operating its engine or cars, to give timely warning of the approach of its engine and cars at that point, and to keep a lookout for teams that might be traveling along the highway, and keep its engine under control, so it "could be stopped if any team was at that point on the highway"; that "when its engine stopped at the water tank it was its duty to look ahead and allow any passing teams to reach a safe place, and to blow the whistle and ring the bell before starting, and, in running its engines westward, to keep a lookout for passing teams, and stop should any be passing that point, and to approach said point with due care, and in such a manner that the engines could be readily stopped"; and that "on September 16, 1901, notwithstanding the defendant's knowledge of the danger, it failed in its duty in the foregoing respects, while plaintiff was at that point driving his team, and its engine collided with said team and wagon," causing the injuries of which complaint is made.

The facts and circumstances connected with the accident appear from the testimony of the plaintiff and the witness Mrs. Jennie Priestly, who was riding with the plaintiff at the time of the occurrence. It appears that on September 16,

remain at crossing); *Lake Shore & M. S. Ry. Co. v. Butta* (Ind.), 1 R. R. R. 898, 24 Am. & Eng. R. Cas., N. S., 898 (usual and necessary noises in starting train at crossing); monograph, 5 Am. & Eng. R. Cas., N. S., 282, et seq.; note, 9 Am. & Eng. R. Cas., N. S., 724 (blowing whistle); note, 6 Am. & Eng. R. Cas., N. S., 501; note, 1 Am. & Eng. R. Cas., N. S., 68; note, 22 Am. & Eng. R. Cas., N. S., 440 (whether railroad liable for injuries resulting from malicious conduct of employees in frightening teams); *Ohio Val. R. Co.'s Receiver v. Young* (Ky.), 8 Am. & Eng. R. Cas., N. S., 399 (failure to give signal); *Mitchell v. Nashville, C. & St. L. Ry. Co.* (Tenn.), 10 Am. & Eng. R. Cas., N. S., 775 (blowing whistle beneath bridge); *Kepner v. Harrisburg Traction Co.* (Pa.), 8 Am. & Eng. R. Cas., N. S., 493 (breaking of trolley wire); *Louisville & N. R. Co. v. Penrod* (Ky.), 17 Am. & Eng. R. Cas., N. S., 759 (care required of railroads in streets); *McCann v. Consolidated Traction Co.* (N. J.), 7 Am. & Eng. R. Cas., N. S., 280 (care to be exercised in running cars so as not to frighten horses); *Boothby v. Boston & M. R. R.* (Me.), 8 Am. & Eng. R. Cas., N. S., 299 (discharge of steam by engines at crossings); *Inabnett v. St. Louis, etc., Ry. Co.* (Ark.), 20 Am. & Eng. R. Cas., N. S., 590 (duty to look out for teams near crossing); *Louisville, H., etc., Ry. Co. v. Schmidt* (Ind.), 6 Am. & Eng. R. Cas., N. S., 571 (engine under excessive and unnecessary pressure of steam); *Atlanta, K. & N. Ry. Co. v. Durham* (Ga.), 16 Am. & Eng. R. Cas., N. S., 606 (failure to comply with statutory requirements as to crossings); *Miller v. Wellington & P. R. Co.* (N. Car.), 20 Am. & Eng. R. Cas., N. S., 557 (it is not negligence to obstruct crossing with engine emitting steam, for a few minutes,

Fares v. Rio Grande Western R. Co

1901, the plaintiff and his lady companion left Salt Lake City for Park City with a light wagon and team. Traveling through Parley's Canyon in an easterly direction, they crossed the railroad track to the north side thereof, and, looking up the canyon, they saw an engine headed toward Park City, standing still and taking water at the water tank. At, and for some distance above, the crossing, there was considerable space between the track and the Cliff of rocks on the north, but as they approached the engine the space became narrower until they reached a point about 200 feet west of the engine, where the space between the bottom of the cliff and the track was about 12 feet wide. This narrow space continued for a distance of about 60 or 70 feet, when it widened out again. As they thus drove along the railroad track, they saw the engine at the water tank nearly all the time, but saw no one on or about the engine. After the team had started into the narrow place and gone to a point about 175 feet from the engine, the engine started towards them without blowing the whistle or ringing the bell, and making just "the ordinary noise of an engine as it rolls over the rails—nothing unusual." Neither the plaintiff nor his companion made any effort, by calling or otherwise, to attract the attention of those in charge of the engine, until it started to move towards them, when they called, but apparently were not heard by them. At the sight of the moving engine the horses were frightened, and when it was about opposite them they whirled suddenly around toward the track, and in doing so one of them was struck by the tender,

in order to transact business); *Coleman v. Wrightsville & T. R. Co.* (Ga.), 23 Am. & Eng. R. Cas., N. S., 863 (liability for frightening team on side track as affected by speed and failure to give crossing signals); *Omaha St. R. Co. v. Duvall* (Neb.), 1 Am. & Eng. R. Cas., N. S., 269 (duty of motorman); *Philadelphia, W. & B. R. Co. v. Burkhardt* (Md.), 5 Am. & Eng. R. Cas., N. S., 189 (horses frightened by escape of steam where defendant was not negligent); *Ochiltree v. Chicago & N. W. Ry. Co.* (Iowa), 9 Am. & Eng. R. Cas., N. S., 30 (giving signals); *Atchison, T. & S. F. R. Co. v. Morrow* (Kan.), 5 Am. & Eng. R. Cas., N. S., 262 (hand car on side track); *Valley v. Concord & M. R. R.* (N. H.), 9 Am. & Eng. R. Cas., N. S., 128 (horses frightened by lumber near highway); *Ohio Val. R. Co.'s Receiver v. Young* (Ky.), 8 Am. & Eng. R. Cas., N. S., 399 (liability on account of ordinary train noises); *International & G. N. R. Co. v. Yarborough* (Tex.), 7 Am. & Eng. R. Cas., N. S., 733 (wanton acts of employees); *Central of Ga. Ry. Co. v. Black* (Ga.), 23 Am. & Eng. R. Cas., N. S., 864 (usual and necessary noises); *Weil v. St. Louis S. W. Ry. Co.* (Ark.), 9 Am. & Eng. R. Cas., N. S., 721 (negligently sounding whistle); *Dewey v. Chicago, M. & St. P. Ry. Co.* (Wis.), 11 Am. & Eng. R. Cas., N. S., 275 (noises usually incident to operation of railroads); *Illinois Cent. R. Co. v. Griffin* (Ill.), 17 Am. & Eng. R. Cas., N. S., 767 (piling cinders on highway near crossing); *Louisville & N. R. Co. v. Shearer* (Ky.), 20 Am. & Eng. R. Cas., N. S., 138 (sounding whistle under bridge unnecessarily); *Southern Ry. Co. v. Pool* (Ga.), 15 Am. & Eng. R. Cas., N. S., 617 (wanton act of employee); *Brendie v. Spencer* (N. Car.), 16 Am. & Eng. R. Cas., N. S., 722 (wanton and willful negligence).

Fares v. Rio Grande Western R. Co

the vehicle overturned, and the plaintiff injured. The horses were not on the track at all.

In the course of his examination as a witness, the plaintiff, respecting the occurrence, testified: "When I saw that engine only 600 feet away, I didn't know which way it was going when it started. I didn't know anything about it. I looked up the track and saw the engine when I crossed the track several hundred feet below the engine. After crossing, I drove along substantially parallel with the railroad track. With very few exceptions, I could see the engine all the time, and I noticed it there all the time. My companion was sitting in the seat with me. I kept a lookout all the way up from the crossing, and I knew I was coming to the narrow place in the highway. I didn't know that the engine was going to start. It had been standing there all the while I had been in sight, and I thought I would get through. The distance the highway ran close to the track is about 60 or 70 feet. My team was trotting, and is perfectly gentle. I have driven them around railroad trains before; ordinarily they are not afraid of them. The place where the accident happened is 150 feet from where the engine was standing. The team whirled pretty near the end of the narrow space nearest the engine—150 feet from where the engine stood. The lower end of the narrow space would be about 50 feet from where the accident happened, so when I started in the narrow space the engine was about 200 feet away, and the team was trotting. I didn't see any one in the engine or working about it. I didn't see the engineer or the fireman until immediately after the accident. When I started into the narrow space on the trot I didn't give them any signal, but as soon as I saw them start I hollered. I don't know whether the engineer and fireman knew whether I was traveling along there or not. They told me afterwards that they didn't. I could have hollered in time, and I did as soon as I thought there was any danger. When I started into that narrow space I could have hollered and made them hear me, but I did not holler until the engine started. The engine then was about 175 feet from me when it started. It came down the track with the tender first. I saw it start, and it wasn't necessary to whistle or ring the bell to let me know that the engine was starting. I don't know what effect the blowing of the whistle would have had on them; it might have scared them all the more—I don't know. It wouldn't have helped me a particle to blow the whistle or ring the bell before they started if they had kept on coming down. If they had blown the whistle or rung the bell just before starting, I would have been out of there flying, because all I had to do was to let out the lines and the horses would go like the wind. My horses were not afraid when the engine started about 175 feet away. There was no whistle or ringing of the bell as it came down the track.

It just made the ordinary noise of an engine as it rolls over the rails—nothing unusual. When I drove up in that narrow place I knew that the engine, after it had got through taking water, would start. I didn't know which way it would start. They could have heard me holler, the moment before they started, better than after starting."

The witness Mrs. Priestly, as appears from the transcript and respondent's brief, among other things testified: "When Mr. Fares started in the narrow place he drove rapidly, so as to get out of the way, for fear the engine might come. That was spoken of. He whipped up, and the horses were pretty good travelers. We were both looking at the engine, and could not see anybody around it. When we got about half way up this narrow place the engine started. When we started into the narrow place we talked about the fact that the engine might start, so we concluded to drive rapidly to get out. The conclusion was that, as the engine was standing still, we would have time to get through. When the engine started, it didn't have to whistle to let us know it was starting, because we saw it start. They didn't ring the bell. They came rather quickly. When the engine started, the horses commenced to rear; that is, when the engine was away a few yards." The witness further testified: "When the engine started it did not make any other noise than an engine will going over the rails, but its movements scared the team as soon as it started."

Under this and other evidence of similar import, the jury returned a verdict in favor of the plaintiff for the sum of \$5,150, and judgment was entered thereon accordingly. Thereupon the defendant prosecuted this appeal.

Sutherland, Van Cott & Allison, for appellant.

Powers, Straup & Lippman, for respondent.

BARTCH, J. (after stating the facts). When the plaintiff rested his case, the defendant interposed a motion for a nonsuit, upon the ground, among others, that the railroad company was not shown to have been guilty of any negligence whatever in operating its engine on the occasion in question. The motion was overruled. Then, when both sides rested, the defense requested the court to instruct the jury to return a verdict in favor of the defendant, which request was refused, and thereafter a motion for a new trial denied.

The appellant, under proper exceptions, complains, in the first instance, of these several rulings of the court, and insists that the evidence shows, without conflict, that the defendant was entitled to a verdict and judgment as matter of law. The contention is that the railroad company is not liable to the plaintiff for the injury sustained by him, under the circumstances connected with the accident and disclosed in evidence, and this contention appears to be well founded.

Fares v. Rio Grande Western R. Co

The defendant had a right, under the law, to construct and operate its railroad through the canyon, and in doing so it was compelled, owing to the physical conditions of the canyon, to run parallel with and in close proximity to the highway. To hold that the railroad company was guilty of negligence in constructing its railroad parallel with and adjoining the highway would practically be to hold that railroads could not be constructed and operated in canyons in this intermountain country, for ordinary observation demonstrates the utter impossibility of constructing railroads through these precipitous canyons without, in places, encroaching to some extent upon highways and rendering them less safe. This the respondent appears to admit, for while, in the complaint, he alleged negligence in the construction and operation of the railroad so close to the highway that a team could not pass with safety, he offered no proof in support of such allegations; yet one who alleges negligence has the burden to prove it. He must show, as to an act lawful in itself, the commission of it, at the time, place, or in the manner, was unlawful. We must therefore assume that the railroad was lawfully constructed at the place in question, notwithstanding its close proximity to the highway and the cliff of rocks north thereof. It is apparent that railways and highways must, of necessity, in some places, run side by side. In such cases the inconvenience to passing teams occasioned by the construction and operation of the railroad is compensated for by the greater convenience to the general public in the more rapid and improved method of intercommunication and transportation. The railroad in the present instance having been lawfully constructed at the place where the accident occurred, the railroad company had a right to stop its engine at the water tank, and, after taking water, to again move it in pursuit of its business; and the moving of the engine, without making any unnecessary noise, or any more noise than an engine ordinarily makes in rolling over the rails, as is admitted in this case, was not an act of negligence, even though the appearance of the moving engine frightened the respondent's horses. A railroad company has the undoubted right to run its engines and trains on its railroad adjoining the highway, and is not responsible to travelers whose horses become frightened by the appearance of such engines or trains, if the same are operated prudently, and without unnecessary noise or willful disregard of a traveler's perilous position, after it has been discovered by the servants of the company.

Nor is a railroad company required to keep a lookout specially for travelers upon the highway, where the railroad and highway run parallel with and are in close proximity to each other. Under no circumstances is it required to exercise more than ordinary care towards persons traveling along a highway adjacent to the railroad. It is its duty, primarily,

and in the highest degree, to keep a lookout upon its track to discover persons or vehicles that may be upon or crossing the track, so as to avoid collision with them. This duty is enjoined upon it not only to avoid injury to those who may be upon or crossing its track, but also for the safety of its passengers, whom it has contracted to carry safely. It is true that when those in charge once discover a traveler, on an adjacent highway, in a perilous position, they are bound to recognize his situation, and to refrain from doing any heedless or wanton act which will increase the danger of his surroundings, and, if they fail to do so, the company will be liable for resulting injury and damages; but no such liability attaches for the mere failure of servants, while in the exercise of proper care in running engines or trains, to observe a traveler upon an adjacent parallel highway, who may be in a perilous position because of the fright of his horses at the appearance of an engine or train. Nor is a railroad company, as alleged in the complaint, required to keep its engines and cars so under control that they can be stopped if any team is found at a point of danger on an adjoining highway; nor is it bound to exercise the same degree of care, as contended for by the respondent, at all points of known or reasonably apprehended danger, in keeping a lookout, and in the operation of its engines and trains alongside the highway, as it is required to exercise at grade crossings. Such rules would render the operation of railroads in this mountainous country, where such places of danger are almost innumerable, well-nigh impracticable, and would release travelers upon the highway from their duty of themselves keeping a lookout for their own safety. In *Lamb v. Old Colony Railroad*, 140 Mass. 79, 2 N. E. 932, 54 Am. Rep. 449, a case in many respects like the one at bar, the plaintiff was driving his horse along a highway parallel to and adjoining the defendant's railroad, and the evidence was uncontradicted that the railroad and highway were adjoining each other for more than a mile. The plaintiff's horse was frightened by the smoke from the engine of a train passing on the railroad in a direction opposite to that in which the plaintiff was going, and the plaintiff was injured in consequence. The smoke was occasioned by the act of firing up the engine on the stretch of railroad adjoining the highway. There was no evidence that the defendant's servants knew that the plaintiff was on the highway, but there was evidence that they would have seen him if they had been on the lookout for travelers on that part of the highway. The court, holding that it was not the duty of those on the engines to be on the lookout for travelers on the highway who might be endangered by such act, in the course of its opinion said: "The defendant had a right to run its trains on its railroad adjoining the highway, and was not responsible to travelers on the highway for the consequence of noise, vibration, or smoke

Fares v. Rio Grande Western R. Co

caused by the prudent running of its trains. * * * Under such circumstances, the firing up near the highway, and the smoke occasioned by it, were ordinary incidents of running the train, as much so as the smoke when not firing, or the noise or vibration caused by the cars; and they were not of themselves evidence of negligence. * * *

The lawfulness of the act cannot depend upon whether a traveler happens to be at such a distance from the engine that he will not be endangered by the smoke caused by it, or in such a position that he cannot be seen by the fireman or engineer. If it is their duty to see one traveler outside the location of the railroad, it is their duty to see how many travelers are there, and to observe the position, direction, and speed of each, the speed of the engine, the state of the atmosphere, the direction and force of the wind, the character of the coal used, and other circumstances which may determine whether all travelers are, and will continue to be until the smoke is dissipated, in such positions that their horses will not be affrighted by it. Being under no obligation to watch for travelers on the highway, the defendant could not have been guilty of negligence in not seeing and avoiding the plaintiff." So, in *Dewey v. Chicago, M. & St. P. R. Co.*, 99 Wis. 455, 75 N. W. 74, an engine of the defendant, in charge of its servants, passed over a street crossing, and, after going a short distance beyond it, was brought to a stop. The plaintiff was riding in a buggy drawn by a single horse, and, when he approached the crossing, the engine, in plain sight, started, and made a slight exhaust or puff, and steam and smoke escaped, but there was nothing unusual as to noise, steam, or smoke. There was a strong wind blowing, which carried the steam and smoke directly towards the horse, whereby it became frightened and uncontrollable, overturned the buggy, and injured the plaintiff. At the close of the evidence a nonsuit was granted. In affirming the judgment of nonsuit, the appellate court said: "They had a right to move the engine in pursuit of defendant's business in which they were engaged, and without responsibility on defendant's part for the consequences of any of the ordinary noises which the operation of the engine caused, or such incidents as the ordinary escape of smoke and steam. If such were not the case, railway companies would be greatly embarrassed in the performance of the duties they owe to the public. There appears to have been an utter failure to show any excessive or unreasonable blowing off of steam, or any unusual noise, or anything not ordinarily attendant upon the usual movements of a locomotive. That, where injuries result from the frightening of horses by the sight of moving cars, trains, or locomotives, or the usual noises or incidents of their ordinary operation, there is no liability on the part of the railway company, is firmly established and recognized as the law." In *Ryan v. Pennsylvania R. Co.*, 132 Pa. 304,

Fares v. Rio Grande Western R. Co

19 Atl. 81, the plaintiffs were driving under the defendant's railroad, on a city street, when a train of cars overhead frightened their horse so that he become unmanageable. They were thrown out of their carriage, one of them severely injured, and their child killed. The jury, under a binding instruction, rendered a verdict for the defendant. In affirming the judgment, the Supreme Court said: "The defendant company was operating its road in a lawful manner. No defect was shown in the construction of the road. On the contrary, it was the work of competent engineers, approved by the chief engineer and surveyor of the city, and in pursuance of an ordinance of councils expressly authorizing it. The sight and sound of a moving train always have a tendency to frighten horses. In this case the fright was occasioned by the sound. We cannot measure, nor can a jury be properly allowed to measure, the amount of sound which may be made by a railroad train, either in crossing bridges at overhead crossings or at other places. The defendant company, under all the authorities, has the right to operate its road in a lawful manner; and when it does so without negligence, and without malice, it is not responsible for injuries occasioned thereby." 2 Thomp. Neg. § 1908; *Bailey v. Hartford & Conn. V. R. R. Co.*, 56 Conn. 444, 16 Atl. 234; *Beatty v. The Central Iowa R. Co.*, 58 Iowa, 242, 12 N. W. 332; *Webb v. Railway Co.*, 202 Pa. 511, 52 Atl. 5; *Hahn v. S. P. R. R. Co.*, 51 Cal. 605; *Lake Shore & M. S. Ry. Co. v. Butts* (Ind. App.) 62 N. E. 647; *Hendricks v. Fremont E. & M. V. R. Co.* (Neb.) 93 N. W. 141; *Leavitt v. Terre Haute & I. R. (Co. Ind. App.)* 31 N. E. 860; *Abbott v. Kalbus*, 74 Wis. 504, 43 N. W. 367; *Cahoon v. Chicago & N. R. Co.*, 85 Wis. 570, 55 N. W. 900; *Howard v. Union Freight R. Co.*, 156 Mass. 159, 30 N. E. 479; *Omaha & R. V. Ry. Co. v. Brady* (Neb.) 57 N. W. 767; *Lake Erie & W. R. Co. v. Juday* (Ind. App.) 49 N. E. 843; *Ohio Val. R. Co. v. Howerton* (Ky.) 72 S. W. 760; *McCerren v. Alabama & V. Ry. Co.* (Miss.) 18 So. 420; *Chicago & E. R. Co. v. Cummings*, 24 Ind. App. 192, 53 N. E. 1026; *Ohio Val. R. Co. v. Young* (Ky.) 39 S. W. 415.

It is, however, insisted by the respondent that it was imperative upon the defendant to blow its whistle, and ring its bell, before it moved its engine down along the highway, and that the plaintiff had a right to expect that some signal would be given. We do not think that the failure to sound the whistle or to ring the bell was negligence under the circumstances. On the contrary, we are inclined to the view that to have done so on that occasion would have rendered the defendant guilty of negligence, because, since the plaintiff was aware of the presence of the engine, it would have been an unnecessary thing to do, and in all probability would have frightened the horses more, and added to the peril of the occupants of the vehicle. As will be observed, the plain-

Fares v. Rio Grande Western R. Co

tiff himself, in his testimony, said: "I saw it start, and it wasn't necessary to whistle or ring the bell to let me know that the engine was starting." He also stated that he did not know what effect the blowing of the whistle would have had upon his horses; that "it might have scared them all the more;" and that the sounding of the whistle or ringing of the bell would not have helped him a particle if the engine had kept on coming down. If, under the then existing circumstances, the whistle had been sounded or the bell rung, would not the respondent now be contending that the servants of the defendant aggravated his perilous position unnecessarily and willfully by the additional noise? And could it be said that such contention would be altogether without force? It is true the blowing of the whistle and ringing of the bell are ordinary incidents to the operation of railroads, and when the whistle is sounded or the bell rung, without fault or negligence, no liability results therefrom; but it may be quite otherwise when the act is done unnecessarily, willfully, or wantonly, to the injury of those in close proximity, or who may be traveling upon a highway close by. In such event the act, lawful in itself, may become unlawful, and the guilty party amenable to damages. The fact that there was a grade crossing several hundred feet below the place of the accident, upon approaching which a signal was ordinarily required to be given, is immaterial under the circumstances. The accident did not happen at the crossing. And, even if the failure to give a signal for the crossing amounted to negligence, that negligence did not cause injury to the plaintiff, and therefore he cannot avail himself of it. Nor, if the defendant had discovered the plaintiff in his perilous position, would the nearness of the engine to the crossing, under the circumstances, have justified the defendant in the doing of an act, though lawful, unnecessarily or heedlessly, which would have rendered such position yet more dangerous. "Courts," says Mr. Justice Brewer, in *Culp v. A. & N. Rld. Co.*, 17 Kan. 475, "must take knowledge of the fact that the blowing of a whistle is one of the ordinary signals used in the running of a train, and that in the management of locomotive engines it is at times necessary to open the valves and permit the escape of steam. But still these acts, which at times are legal and necessary, may be done without any necessity therefor, out of mere heedlessness and negligence, or with a wanton and criminal intent to do wrong. That a party has a right to do a given act at certain times and under certain circumstances, does not prove that the same act is right under all circumstances and at all times." 2 Thomp. Neg. §§ 1909-1911; *Wabash R. R. Co. v. Speer*, 156 Ill. 244, 40 N. E. 835; *Billman v. Indianapolis, C. & L. R. R. Co.*, 76 Ind. 166, 40 Am. Rep. 230; *Petersburg R. R. Co. v. Hite*, 81 Va. 767; *Stanton v. Louisville & N. R. R. Co. (Ala.)* 8 So. 798; *Philadelphia, etc., R. R. Co. v. Stinger*, 78 Pa.

219; Northern Pacific R. Co. v. Sullivan, 53 Fed. 219, 3 C. C. A. 506.

After careful examination of the testimony in this case, and taking every fact of which there is any evidence as proven, we are unable to see wherein the defendant was guilty of negligence. If there was any negligence on the occasion in question, it was on the side of the plaintiff himself. He has shown nothing to excuse his heedless act in driving from a place of comparative safety into that narrow space with the engine in plain sight, ignorant of when it would start, or where it would go, whether toward or from him, and making no effort, until the engine started, to attract the attention of the defendant's servants, so as to disclose to them the perilous position into which he had placed himself and his companion. He fully realized the danger of his undertaking, but concluded to take the chances of getting to a place of safety before the engine would start. He failed in his calculations, and has but to attribute his misfortune to his own want of ordinary prudence and caution. Justice will not permit compensation in damages as a result of such heedlessness. In deciding such questions as this, we cannot be unmindful of the fact that the rights of others are involved. We may concede the right of a man to risk his own life and the lives of his horses, but not the right to imperil the lives of others, who may be on the engine or train, by his lack of caution. The misfortune might have been much greater if, through his unwarranted assumption of risk, his horses had gotten upon the track and been struck by the engine. We are clearly of the opinion that, under the facts and circumstances in evidence, the court ought to have granted a nonsuit, or, at the close of the testimony, instructed the jury to return a verdict for the defendant, and that, having failed to do either, a new trial ought to have been ordered.

The judgment must be reversed, with costs, and the case remanded for further proceedings in accordance herewith. It is so ordered.

MCCARTY, J., concurs.

BASKIN, C. J. (dissenting). It appears from the evidence that the place on the public highway where the injury occurred was a dangerous one; that the engine, as the plaintiff traveled toward it, was standing still a short distance beyond and in full view of the dangerous point in the highway, and headed in the opposite direction from which the plaintiff was approaching. In view of these facts it was the duty of the employees of the company in charge of the engine, before starting it in the backward direction, to look and see that no one in vehicles was at the dangerous place. This they failed to do, and in my opinion it was negligence for which the railroad company is responsible.

I cannot, therefore, concur in the reversal of the judgment.

EAST ST. LOUIS CONNECTING RY. CO. v. ALTGEN.

(Supreme Court of Illinois, June 23, 1904.)

[71 N. E. Rep. 377.]

Ownership of Engine Causing Injury—Question for Jury.

In an action for injuries, the question whether the engine and cars which caused the injury belonged to defendant and were under the control of its servants at the time of the injury is one of fact to be submitted to the jury, where there is any evidence fairly tending to establish it.

Same—Evidence.

The fact that an engine causing an injury bore the name of defendant company was sufficient evidence of ownership, and that the servants of defendant were in possession thereof, to authorize the court to send the case to the jury upon those issues, in the absence of any evidence by defendant thereon.

Same—Presumption—Rebuttal.

While the presumption of ownership of an engine and that it was operated by defendant's servants at the time of the injury, which arises from the presence of defendant's name on the engine, may be weakened by the fact that it was upon a track other than its own, it is not rebutted thereby.

Weight of Testimony—Question for Jury.

The weight of testimony, though largely hearsay, that the men who were in control of and operating an engine at the time of an accident were servants and employees of defendant, which went to the jury without objection and without any motion being made to strike, was for the jury.

Pleading and Proof.

Where plaintiff was injured while lawfully upon a locomotive, it was not necessary for him to prove, in an action for the injuries, an immaterial allegation of his declaration that he was on the locomotive if the performance of his duties as a servant.

Appeal—Prosecution for Delay—Penalty.

Where an appeal from the Appellate Court to the Supreme Court is prosecuted for delay, the defense in the latter court being without merit, the judgment of the Appellate Court will be affirmed, with 5 per cent. damages.

Appeal from Appellate Court, Fourth District.

Action by Henry Altgen against the East St. Louis Connecting Railway Company. There was a judgment of the Appellate Court, affirming a judgment for plaintiff, and defendant appeals. Affirmed.

Charles W. Thomas, for appellant.

Daniel McGlynn and M. W. Borders, for appellee.

HAND, J. This is an action on the case, commenced in the circuit court of St. Clair county, to recover damages for a personal injury alleged to have been sustained by the plaintiff by reason of the negligence of the servants of defendant in backing a train under their control against a locomotive upon which the plaintiff was then riding. A trial resulted in a verdict in favor of the plaintiff for the sum of \$15,000. Plaintiff remitted \$4,000, and thereupon judgment was rendered in

East St. Louis Connecting Ry. Co. v. Altgen

favor of the plaintiff for the sum of \$11,000, which judgment has been affirmed by the Appellate Court for the Fourth District, and a further appeal has been prosecuted to this court.

The accident resulting in the plaintiff's injury occurred on the night of January 16, 1902, at the crossing of the tracks of the St. Louis Merchants' Bridge Terminal Railway Company and the tracks of the St. Louis, Troy & Eastern Railroad Company, at a point between East St. Louis and Madison. At the time of the collision the plaintiff was in the employ of the St. Louis Merchants' Bridge Terminal Railway Company as a switchman, and was a member of a night switching crew then engaged in moving a train of cars from Madison to the East St. Louis yards. By order of the foreman he was riding in the engine cab, eating his supper. As the engine reached and was passing over said crossing, a train of cars moved by one of the defendant's engines was carelessly and negligently backed against the locomotive upon which the plaintiff was riding, striking it just in front of the cab, the result of which was that the plaintiff was seriously and permanently injured. At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant moved the court to peremptorily instruct the jury to return a verdict in its favor. The court declined to so instruct the jury, and the action of the court in that regard is the only assignment of error urged as a ground for reversal in this court.

It is first contended there is no evidence in the record that the engine and cars which caused the injury belonged to the defendant or were under the control or being operated by its servants at the time of the injury. That contention raises a question of fact only, and, if there is any evidence in the record fairly tending to establish that fact, then it was not error for the court, upon that question, to refuse to take the case from the jury. It is conceded that the engine which backed the cars against the locomotive upon which the plaintiff was riding at the time he was injured was marked "E. St. L. C. Ry. Co.," which was the abbreviation of its corporate name placed by the defendant upon all its engines. The defendant introduced no evidence upon the question of the ownership of said engine, or whose servants were operating the same at the time of the injury. Such being the state of the record, the fact that the engine which caused the injury bore the name of the defendant company was sufficient evidence of ownership, and that the servants of defendant were in possession thereof, to authorize the court to let the case upon that question go to the jury.

It is conceded by the defendant that the fact that its name appeared upon the engine which caused the injury would be prima facie evidence that it was its property and being operated by its servants if at the time of the injury the engine had been upon its own road, but, it is said, at the time of the

East St. Louis Connecting Ry. Co. v. Altgen

injury the engine was being operated upon the tracks of the St. Louis, Troy & Eastern Railroad Company, and that under such circumstances its name upon the engine affords no evidence of ownership or that said engine was being operated by its servants. While the presumption of ownership of the engine and that it was operated by the defendant's servants at the time of the injury may be weakened by the fact that it was upon a track other than its own, still such presumption was not rebutted by that fact. In *Pittsburgh, Fort Wayne & Chicago Railway Co. v. Callaghan*, 157 Ill. 406, 41 N. E. 909, it was held that the fact that a locomotive causing an injury on a track used by different companies was lettered with defendant's name established prima facie possession and ownership by defendant, and was sufficient proof on that question to justify the trial court in refusing to take the case from the jury.

In addition to the fact that the engine was lettered with the characters which defendant had adopted and was using upon its engine as an abbreviation of its corporate name, several witnesses testified that the men who were in control of and operating the engine at the time of the injury were servants and employees of the defendant, and one of the crew in control of the engine which caused the injury testified he was in the employ of the defendant. While the cross-examination of these witnesses showed that their knowledge was based largely upon hearsay, their evidence went to the jury without objection and no motion was made to strike it out, and it was for the jury to say what weight the statements of said witnesses were entitled to receive at their hands, as bearing upon the question who owned and in whose possession the engine was which collided with the locomotive upon which the plaintiff was riding at the time he was injured. In *Pittsburgh, Cincinnati & St. Louis Railway Co. v. Knutson*, 69 Ill. 103, on page 105, the question here raised was under consideration, and the court there said: "It is first urged that the train which did the injury was not shown by the evidence to have belonged to appellants. On this question several witnesses testify, and their evidence tended strongly to show that appellants owned, or at least were operating, this train. It may not prove the fact beyond all doubt, but it certainly raises a strong presumption that they had the control of the train. In reference to such a fact we cannot expect full and undoubted proof. The ownership can only be proved or disproved positively by some of the officers of the road. It is no doubt true that the larger portion of the employees of the company, and all persons not connected with it, can have no certain knowledge of the ownership or what company is using such property. * * * The evidence was prima facie sufficient to prove this fact that the company owned the property, and, if untrue, appellants had it in their power to disprove it, but have failed to do so, and cannot complain that the jury have found that issue as they did."

Rawitzer v. St. Paul City Ry. Co

The declaration averred that at the time of the injury the plaintiff was on said locomotive "in the performance of his duties as a servant of said company," and, while it is conceded said allegation was immaterial, yet it is contended, the plaintiff having made the averment, it became necessary that he establish it by proof or be cast in his action. We do not agree with such contention. The foreman testified the members of the crew, to save time, often ate their meals upon the train while it was in motion, that on the night of the injury of plaintiff it was dark and extremely cold, that after the train was on its way to its destination he directed the plaintiff to go into the engine cab and eat his supper, and that he was eating his supper at the time of the injury. The plaintiff was upon the locomotive lawfully at the time of the collision, and it was no concern of the defendant what he was doing at the time he was injured. It has been repeatedly held in personal injury cases that it is not necessary to prove immaterial allegations (*Lake Shore & Michigan Southern Railway Co. v. Hundt*, 140 Ill. 525, 30 N. E. 458), and that in such actions it is sufficient if a party prove enough of his declaration to make out a case (*Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876).

We are impressed, from an examination of this entire record, with the fact that the defense made in this case in this court is without merit, and that this appeal was prosecuted for delay. The judgment of the Appellate Court will therefore be affirmed, with 5 per cent. damages.

Judgment affirmed.

RAWITZER v. ST. PAUL CITY RY. CO.

(Supreme Court of Minnesota, July 22, 1904.)

[100 N. W. Rep. 664.]

Accident on Street Railway Track—Injury to Cyclist—Discovered Peril—Duty of Motorman.*

A cyclist was negligently riding on the tracks of defendant, absorbed in an occupation which distracted his attention from an approaching street car, running at a high and unlawful rate of speed, whereby he was in danger of being run upon: *held*, under facts tending to show that the motorman in control of the car might have known that the rider would remain on the tracks, and did not appreciate his danger, that it was the duty of such motorman to avoid running upon the cyclist; and whether he could have done so by the exercise of ordinary care should have been submitted to the jury.

Discovered Peril—Duty to Trespassers.†

The negligence of one person, whereby he is placed in a perilous

*As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-note appended to *Rouse v. Detroit Electric Ry.* (Mich.), 10 R. R. R. 58, 33 Am. & Eng. R. Cas., N. S., 58, where all the preceding authorities in this series are referred to.

†As to the duties of those in charge of trains after discovering a

Rawitzer v. St. Paul City Ry. Co

situation, does not excuse a reckless disregard of his safety by another. Under such conditions a trespasser, even is entitled to protection from wanton or willful acts; and when the danger he has incurred is apparent the duty exists to exercise ordinary care to avoid injuring him.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Edwin A. Jaggard, Judge.

Action by Clarence M. Rawitzer, as administrator of the estate of Harry Jacobs, deceased, against the St. Paul City Railway Company. There was verdict for defendant, and from an order denying a motion for a new trial plaintiff appeals. Reversed.

Welch, Hayne & Hubachek and Jones & Jones, for appellant.

Munn & Thygeson, for respondent.

LOVELY, J. Plaintiff, as administrator of Harry Jacobs, brings this action to recover damages for the alleged wrongful act of defendant, charged with recklessly running one of its street cars upon him, causing his death. The trial court, at the close of the evidence, directed a verdict for defendant upon a settled case embracing the entire evidence. There was a motion for a new trial, which was denied. Plaintiff appeals.

An examination of the record would justify the following inferences of fact in favor of the plaintiff, to which on this review he must have the benefit: Defendant operated its Interurban cars over double tracks on University avenue, one of the public thoroughfares of the city of St. Paul, on the 1st of October, 1903. About the hour of 4 o'clock in the afternoon of that day, the deceased, a youth of 17 years, who was riding a bicycle, turned into the avenue, and moved westerly a short distance on the northerly car track, between the rails. He was followed from the rear by one of defendant's cars, when, to avoid it, he turned into the space between the tracks; then went directly upon the southerly track, to allow this car to pass, which it did. At the same instant he took from his pocket a bundle of papers, consisting of bills, which he was collecting for his father. He continued on the

person in a perilous situation upon its tracks, see foot-note appended to *Louisville & N. R. Co. v. Vanaradell's Adm'r* (Ky.), 10 R. R. 1, 33 Am. & Eng. R. Cas., N. S., 1, where all the preceding authorities in this series are collected.

As to the care due trespassers and licensees on railroad tracks, see foot-note appended to *Alabama Great Southern R. Co. v. Guest* (Ala.), 9 R. R. R. 441, 32 Am. & Eng. R. Cas., N. S., 441, where all the preceding authorities in this series are collected or referred to; *Illinois Cent. R. Co. v. Eicher* (Ill.), 9 R. R. R. 226, 32 Am. & Eng. R. Cas., N. S., 226; *Morgan v. Oregon Short Line R. Co.* (Utah), 10 R. R. R. 81, 33 Am. & Eng. R. Cas., N. S., 81; *Goodman's Adm'r v. Louisville & N. R. Co.* (Ky.), 10 R. R. R. 693, 33 Am. & Eng. R. Cas., N. S., 693 (duty to trespassers on track).

Rawitzer v. St. Paul City Ry. Co

southerly track, guiding his bicycle with his right hand, and holding the papers in the left, bending forward over the seat at the same time and examining them attentively, apparently oblivious of the fact that a car was coming towards him on the same track from the west, behind time, running on a down-grade at a high rate of speed, estimated by witnesses at from 25 to 30 miles an hour, or 12 miles faster than permitted by the ordinances of the city. The evidence also tends to show that the motorman on this car was at his place, in control. The car was supplied with the usual appliances for stopping it, and had a gong for the purpose of giving warning; but the evidence also shows the motorman gave no signals of danger, although the view was unobstructed, and he was at his place, looking forward, where he could easily see the deceased. It reasonably appears that the boy himself was not aware of his peril until the instant before the car reached him, when he lifted his head, discovered his danger, and made an effort to get from the track, which was unavailing. He was struck, thrown into the air by the collision, hurled to the ground, and killed. The car was then stopped, but not until it had run 200 feet from the place of the accident.

The motorman and car starters were put on the stand by the defendant, but did not testify as to the failure to give warnings or signals.

The inference in favor of plaintiff's claim that the accident occurred through the reckless conduct of the motorman is stated strongly, as is necessary on a review of the evidence directing a verdict against him. What the jury would have found cannot be determined, since they were not allowed to pass upon the facts.

The learned trial court was of the opinion that plaintiff's intestate was guilty of contributory negligence in occupying defendant's tracks and remaining thereon without looking forward to discover danger, and it may well be conceded that this was so. It may also be conceded, further, that if the deceased was on the tracks, apparently observing the course he was pursuing, that the motorman would have a right to presume that he would leave the same before the car reached him, acting upon the ordinary instincts of self-preservation usually adopted under such circumstances. But the apparent absorption of the deceased in his occupation reading the papers in his hand, his inattention to what was occurring around him, apparent to several witnesses, does not seem to have impressed the motorman, or to have been acted upon by him, for he pushed ahead without making any effort to warn the unfortunate youth of the danger which he did not appreciate; and we are not at liberty to hold that, even though deceased was himself at fault in the course he pursued in remaining and riding on the track, his negligence in this respect justified a disregard of the duty by the motorman to avoid willful recklessness or wantonly inflicting injury upon

Rawitzer v. St. Paul City Ry. Co

him because he failed to exercise proper care for his own safety. It is insisted on behalf of defendant that the most that can be said in behalf of plaintiff is that both the deceased and the motorman were guilty of negligence concurring in the accident which caused intestate his life. Were it clear under the evidence that the negligence of intestate and that of the motorman concurred at all times until the fatal disaster happened, so that, in a legal sense, the fault of defendant's servant was not the proximate cause of the accident, the direction of the trial court would have to be supported under the well-settled doctrine of this court. *Gagne v. Minneapolis Street Ry. Co.*, 77 Minn. 171, 79 N. W. 671; *Olson v. Railway Co.*, 84 Minn. 258, 87 N. W. 843; *Baly v. St. Paul City Ry. (Minn.)* 95 N. W. 757. But under the evidence upon which the verdict was directed it was a question of fact whether or not, for a sufficient length of time previous to the collision, the apparent and manifest absorption of intestate in his occupation, whereby his attention was entirely distracted from the approaching car, was plainly observable to the motorman, and the probability that he would continue inattentive to the instincts of self-preservation and fail to leave the track was so clear, as to require the exercise of greater prudence by the motorman than would have been due to him but for those conditions. In other words, whether, from the appearance of intestate, and the occupation in which he was engaged, it was doubtful if the motorman could indulge in the presumption that intestate would observe the ordinary rules of caution prevailing commonly among riders of bicycles or persons walking on the track in front of his car, and whether, in view of the situation, he should not have exercised greater caution from the apparent disregard by intestate of the ordinary duties which he owed to himself, and did not seem to appreciate. A trespasser on a railroad track, who is unaware of danger, and is known to be in manifest peril by the person in control of an engine or street car, is not altogether remediless for the consequence of wanton and reckless injury after such peril is, or with reasonable prudence should be, discovered. This principle is founded upon the dictates of humanity, and is supported by great weight of authority. *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341; *Sloniker v. Great Northern Ry. Co.*, 76 Minn. 306, 79 N. W. 168. If, after the discovery of intestate's peril, and the probable continuance of it to an ultimate catastrophe, the motorman could have exercised reasonable care in avoiding the same, he should have done so; and this should have been submitted upon the record to the jury.

Order reversed, and new trial ordered.

ILLINOIS SOUTHERN RY. CO. *v.* MARSHALL.

(Supreme Court of Illinois, June 23, 1904.)

[71 N. E. Rep. 597.]

Injury to Employee—Negligence of Fellow Servant Acting as Foreman.*

Where an injury to a servant was caused by negligence of a fellow servant in failing to perform a certain act, and also by the negligence of the same person, acting as foreman or vice principal, in giving a certain order without having performed the act in question, the injured servant was entitled to recover.

Same—Whether Fellow Servant or Vice Principal—Question for Jury.

In an action against a master for the death of a servant, caused by negligence of a person alleged to have been a foreman, evidence held to require submission to the jury of the issue of whether this person was a foreman or fellow servant.

Appeal from Appellate Court, Fourth District.

Action by Alta Marshall, as administratrix of the estate of William S. Marshall, deceased, against the Illinois Southern Railway Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

This is an action in case, begun on December 22, 1902, in the circuit court of Randolph county, by the appellee, as administratrix of the estate of her deceased husband, William S. Marshall, against the appellant company to recover damages for the death of said William S. Marshall. The plea of the general issue was filed. The trial in the court below resulted in a verdict and judgment in favor of appellee for \$5,000. An appeal was taken to the Appellate Court, and the latter court has affirmed the judgment of the circuit court. The present appeal is prosecuted from such judgment of affirmance. The death of William S. Marshall occurred on February 5, 1902, and resulted from injuries, received at about 5:30 p. m. on February 3, 1902, while he was in the employment of appellant. The declaration alleges, in substance, that the injuries were inflicted while the said Marshall was, with all due care and caution, attempting to lower two certain "leads," which were heavy upright timbers 38 feet long, used in connection with a certain piledriver on a flat car, and which leads one Fred Hoff, alleged to be the boss of said Marshall and the foreman or vice principal of the appellant, had negligently ordered Marshall to lower. The declaration charges that Hoff negligently failed to fasten a certain rope in a yoke iron at or near the bottom of said leads, to control them while being lowered, and to prevent them from falling; it being alleged that it was the duty of said Hoff to so fasten said rope before giving said order.

The material facts in the case are substantially as follows:

*See foot-note appended to *Bodie v. Charleston & W. C. Ry. Co.* (S. Car.), 9 R. R. R. 95, 32 Am. & Eng. R. Cas., N. S., 95.

Illinois Southern Ry. Co. v. Marshall

The appellant on February 3, 1902, was operating a single-track railroad between Salem, in Marion county, and Chester, in Randolph county, and had in its employ a certain gang of men, engaged in bridge work, and who were employed by appellant to operate a piledriver along the line of its road between Coulterville, in Randolph county, and Oakdale, in Washington county, at or near a place known as McKinley. On February 3, 1902, appellant was engaged in driving piles at or near the point where its line crosses Mud creek, in Washington county. The piledriving machinery was rigged up on a flat car, and was operated from the car standing on the railroad track. The piledriver, or large hammer, was worked up and down between two large upright timbers, called "leads," about 38 feet in length. These leads, when in position for work, were fastened on the front end of the flat car, and extended about 4 inches from the rail upward, and were supported, when in an upright position for work, by certain props or "stiff legs." When in position for work, they were swung out over one end of the car, and the lower ends of the leads projected nearly to the ground, being from 4 to 6 inches above it. On the other end of the car was a certain stationary engine, which worked the piledriver, which piledriver was then and there used to drive piles in and to the side of the railway track. When the piledriver was in use, the car, on which were placed said leads, and said stationary engine and the machinery and appliances incident to the working of the piledriver, stood on the railroad track of appellant. When a passenger or freight train had to pass over said track, the car, containing the piledriver and the machinery and appliances in connection with it, had to be moved off to a siding or side track, so as to be out of the way of such passing passenger or freight train. When the flat car was to be so moved, the leads were lowered and allowed to rest on a specially constructed piece on the deck of the car, about eight feet in height, called the "lead rest." The method of lowering the leads was to attach one end of a strong rope to the yoke iron in the leads, and to draw it taut about a spool operated by the engine. The legs or props would then be removed, or knocked away, and the leads would be gradually lowered to the "rest," as the line paid out from the spool. In order to get the flat car, containing the piledriver and its machinery and appliances, to the side track or siding, so that a passing train could pass over the railroad track, a locomotive engine, kept at the place for that purpose, would be attached to this flat car, and the flat car would be hauled onto the siding by such locomotive engine. The car, on which the piledriver as aforesaid was placed, was also hauled in like manner to and from the work before the commencement and at the end of each day's work. When the flat car with the piledriver thereon was so removed to the side track or siding, it was necessary to lay

Illinois Southern Ry. Co. v. Marshall

said leads or upright timbers down upon the lead rest, placed upon the car for that purpose, so that said leads or long timbers might be transported in safety to the men engaged in said work and upon said car. The rope, which it was necessary to fasten to the yoke iron on or near the bottom of the leads, as above stated, extended from a certain sheave, and was fastened or attached to a winchhead in the engine room, where the stationary engine was located on the car. The purpose of fastening the rope in the manner stated was to control the leads, as they were let down upon the lead rest, and thus cause them to be let down gradually, and slowly, and under control, and so as to prevent them coming down suddenly, and injuring any person or persons who might happen to be upon the car.

The declaration charges that it was the duty of said Hoff, who is alleged to have been appellant's foreman and had charge of the men doing the work, to hook the rope to said yoke iron before ordering the leads to be thus lowered. On the day of the injury, the deceased, William S. Marshall, was a member of the gang operating the piledriver, and his proper position was on said car, and it was a part of his duty to assist in lowering said leads. The declaration charges that on the day aforesaid said Hoff ordered William S. Marshall to lower said leads to and upon the said lead rest, so that the car might be hauled to a certain side track, and that Marshall proceeded, with ordinary care for his own safety, to carry out the orders of Hoff and to lower said leads; that Marshall was bound to obey said orders; that said leads then and there suddenly fell upon said Marshall, "on account of said Fred Hoff, who was not then and there a fellow servant of said Marshall, having carelessly and negligently failed and omitted to hook said rope into said yoke iron, as it was his duty to so hook and fasten said rope, and said Marshall, while in the exercise of ordinary care, and while acting under the orders of his said foreman, Fred Hoff, was then and there struck by said leads; as a direct and immediate result of the negligence and carelessness of said Fred Hoff in failing to hook said rope into said yoke iron, and of said negligent and careless order given by said Hoff, as foreman, to said Marshall, and the said William S. Marshall then and there received injuries from which he afterwards, to wit, on February 5, 1902, died." Hoff's duties required him to be upon the ground near the front of the car. On the day of the accident, the regular engineer of the stationary engine was absent, and Newton Harben, who was superintendent of bridges and bridge building for the appellant, and who employed the men and appointed the bosses of the bridge gangs, placed his son Mabre Harben in charge of the engine, and gave Fred Hoff control of the men engaged in driving the piles. In this position Hoff had authority to give orders and direc-

Illinois Southern Ry. Co. v. Marshall

tions concerning the work to all the men, except the engineer.

The evidence tends to show that the deceased, Marshall, began work for the company in September, 1901, as a member of the bridge gang, but that he had been working with the piledriver in question only a few days before he was hurt, and that on that day he had worked on top of the car for the first time, and had then for the first time attempted to lower the leads himself; that previously Hoff had climbed on the car and assisted Marshall to lower the leads, and showed him how it was done, he being inexperienced in the work. The "stiff legs" were timbers used to steady and support the leads, and prevent them from falling when in an upright position. When the hook at the end of the rope was fastened into the yoke iron, so as to control the momentum of the leads when they were lowered, and so as to lower them slowly, and under control, it was the duty of the man on the top of the car, in the place called the "mink trap," to knock out these "stiff legs," and then the leads would be laid over on the lead rest, falling of their own weight and force, being prevented by the rope from falling too suddenly. If the rope was not properly fastened, the leads would fall with great force of their own momentum and weight.

As is said by the Appellate Court in stating the facts of the case: "About the time for closing the day's work, the men having just finished driving a pile outside of the track, and a passenger train being about due, Hoff gave orders to them to gather up their tools, place them on the car, and swing the leads to the center. He also signaled the engineer of the locomotive, which accompanied the car, to couple onto the car and pull off the bridge. The leads were swung to the center, and the rope, used to lower them, tightened. The hook in the rope was, however, at the time, fastened to the drawbar underneath the car; Hoff having neglected to attach it to the iron yoke on the leads. Marshall then proceeded to knock out the props, and the leads, not having the rope to hold and ease them down, fell upon him, inflicting the injuries from which he subsequently died. It is claimed by appellee that Hoff gave the order to lower the leads just prior to the time Marshall knocked out the props." The evidence tends to show that, when the movement began to haul off the flat car, with its piledriver and machinery and appliances, to the side track, a period of 10 minutes only would elapse before a passenger train would come along, and pass over the track from which the flat car was removed.

R. J. Goddard and F. M. Trissal, for appellant.

M. W. Borders, for appellee.

MAGRUDER, J. (after stating the facts). The questions involved in this case are within a very narrow compass. No errors are assigned as to the action of the trial court in ad-

Illinois Southern Ry. Co. v. Marshall

mitting or excluding evidence. Only one instruction was given for the plaintiff below, and no objection is urged against this instruction by the appellant. Seven instructions asked by the appellant were given by the court, and no instruction asked by the appellant was refused, except the instruction asked at the close of the plaintiff's testimony, and also again at the close of all the evidence in the case, directing the jury to find for the defendant. This latter instruction was refused by the court, and its refusal is the only error insisted upon by counsel for appellant in their brief.

It is not claimed, as we understand the argument, that the deceased, William S. Marshall, was not in the exercise of due care for his own safety when the accident occurred. He was on the car, engaged in the performance of his duty, which was to remove the props when the leads, or upright timbers, were to be lowered, and there is no evidence tending to show that he was guilty of any contributory negligence. Nor is it seriously claimed that Hoff was not guilty of the negligence which caused the injury to Marshall. It was the duty of Hoff to attach the rope to the yoke iron, in order that the leads might be gradually lowered, so as to rest upon the lead rest. Unless the rope was so attached to the yoke iron, the leads would fall suddenly and rapidly and not be gradually lowered. Hoff neglected to attach the rope to the yoke iron, but attached it, or suffered it to be fastened, to the drawbar under the car. This was certainly great negligence on the part of Hoff. The evidence tends to show that the deceased, Marshall, was unable to see, from the position which he occupied on the car, whether or not the rope was properly attached to the yoke iron; and he was justified in supposing that the rope was so properly fastened when he removed the props from the leads, or upright beams.

The claim of the appellant is that Hoff and Marshall were fellow servants, and that, therefore, the appellant is not liable, because Marshall was injured by the negligence of a fellow servant. It is furthermore insisted by the appellant that Hoff and the deceased, Marshall, must be held to have been fellow servants as matter of law, and that the question whether or not they were fellow servants was not a question of fact. Appellee insists that Hoff was the foreman of the appellant company, and had charge of the men and directed them in their work; that Marshall was one of the gang of workmen, who were acting under Hoff's direction; that it was not only the duty of Hoff to attach the rope to the iron yoke on the leads, but that it was also his duty to give the order to lower the leads when the proper time came; that Hoff was guilty of negligence, in that he ordered the leads to be lowered, and thereby directed Marshall to remove the props under the leads, without having attached the rope to the iron yoke; and that the injury which resulted in Marshall's death was caused by the act of Hoff, as foreman and

Illinois Southern Ry. Co. v. Marshall

representative of the appellant, in negligently giving the order, which Marshall obeyed, and in consequence of which he lost his life. There is conflict in the testimony upon certain material questions of fact. In the first place, Hoff testified that he was not foreman. At least three witnesses, however, testified that he was foreman upon that day, and directed the movements of the gang, which was at work operating the piledriver. Newton Harben, the superintendent of bridge construction for the appellant, appointed Hoff to act as foreman and control and direct the movements of the men on that day, because, the regular engineer being absent, his son, Mabre Harben, who had previously acted as foreman, was obliged to perform the duties of engineer; and it was not possible for the engineer, while operating the engine, to direct the movements of the men in the other part of the work. Not only does the evidence tend to show that Hoff was foreman upon the occasion in question, but counsel for appellant substantially admit the fact in their brief, when they say: "We cannot deny that, on the day in question, Hoff was invested with a measure of authority over the other members of the gang. He doubtless was a vice principal in certain respects."

Appellant also insists that, even if Hoff was acting as foreman upon the day in question, yet that he did not give the order to lower the leads. Several witnesses contradict him upon this subject. Mabre Harben and Winston both testify that he did give the order to lower the leads. He himself admits in his testimony that he gave the order to "swing to the center," and it is conceded on all hands that the order to lower the leads was involved in the order to swing to the center, because the only object of swinging the beams to the center from their position outside of the track, or near the outside of the track, was to lower them to the lead rest and prepare for the removal of the car to the side track. After a careful examination of all the evidence, we are satisfied that there is proof tending very strongly to show, both that Hoff was foreman, and that he gave the order, obeyed by Marshall and resulting in his death, to lower the leads at the time in question. The theory of appellant seems to be that the injury resulted from the failure of Hoff to attach the rope to the yoke iron, and that, in performing or failing to perform such duty, he was acting as a fellow servant with Marshall. While it may be true that the injury resulted to some extent from the failure to attach the rope to the iron yoke, yet it is also true that the injury resulted from the order of Hoff, as foreman or vice principal, to lower the leads, and, as preliminary thereto, to remove the props from under the leads. The duty to attach the rope to the iron yoke was preliminary to giving the order to lower the leads, and he should not have given that order unless the rope was properly attached, because, without a proper attachment of the rope, the leads

Illinois Southern Ry. Co. v. Marshall

would fall and injure persons upon the car. If as fellow servant he neglected his duty in not attaching the rope, as foreman having control of the men he was guilty of negligence in ordering the leads to be lowered before the rope was properly attached. In giving this order as foreman or vice principal, he was representing the appellant, and the appellant is certainly responsible under the decisions of this court for his negligence. Where an injury to a servant is the combined effect of the negligence of the master and of a fellow servant, the servant may recover. *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215.

In *Chicago & Alton Railroad Co. v. May*, 108 Ill. 288, we said (page 299): "The mere fact that the servant exercising such authority sometimes, or generally, labors with the others as a common hand, will not of itself exonerate the master from liability for the former's negligence in the exercise of his authority over the others. Every case, in this respect, must depend upon its own circumstances." In *Norton Bros. v. Nadebok*, 190 Ill. 595, 60 N. E. 843, 54 L. R. A. 842, we said (page 600, 190 Ill., page 844, 60 N. E., 54 L. R. A. 842): "When the appellee was ordered by his superior servant to put his hand into the machine and take out the 'catch,' in the absence of any warning or notice, he had the right to assume that his superior, who gave the order, would not by his own negligence make the act which he had commanded him to do, and which he was bound to obey, unsafe." In *Consolidated Coal Co. v. Gruber*, 188 Ill. 584, 59 N. E. 254, we said (page 588, 188 Ill., page 255, 59 N. E.): "If the action was taken by him [the foreman], in the discharge of his duties as vice principal, his position was one of superiority, and not that of a fellow laborer. The fact that in the discharge of his duties as assistant mine manager he engaged temporarily in work usually performed by Nagle would not justify the declaration, as matter of law, that he became a fellow servant of appellee." In *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550, 48 N. E. 915, it was said (page 554, 170 Ill., page 917, 48 N. E.): "When the negligent act complained of arises out of, and is the direct result of, the exercise of the authority conferred upon him [the foreman] by the master over his collaborators, the master will be liable."

Here, the true test is whether the negligent act complained of arose out of, or was the direct result of, the exercise of the authority conferred upon Hoff as foreman. The proof tends to show that he directed the men in their work upon that day, and that such work was done subject to his orders and directions. When it was known that a passenger train was approaching, and would pass over the track in 10 minutes, Hoff, in order to get the flat car out of the way and prevent a collision, began to direct the men in their movements. In his testimony

Illinois Southern Ry. Co. v. Marshall

he says that he ordered them to swing to the center; that he gave the engineer a signal to pull off the bridge; that he ordered some of the men underneath to bring out the tools, and put them on the driver. These were the orders of a master, and not the ordinary orders, given by one laborer to another, merely to carry out and accomplish a common work. The orders so given affected every man in the crew at work, except the stationary engineer. They pertained to different matters, and involved discretion, and were for the protection of the master's property, and the guidance of the crew or gang. Hoff was invested with the discretion to determine whether or not the time had arrived for the removal of the flat car to the side track, and whether or not the time had arrived for the lowering of the leads and for the coupling of the locomotive engine to the flat car, so as to remove it to the side track. The fact that he was thus invested with discretion, and gave the order in pursuance of the exercise of such discretion, made his position and authority those of a foreman or vice principal. In *Metropolitan Elevated Railroad Co. v. Skola*, 183 Ill. 454, 56 N. E. 171, 75 Am. St. Rep. 120, it was held that the determination by a foreman of an electric railroad, in his capacity of vice principal, to run certain cars in on the repair track, after ordering a car repairer to work under a car on such track, is the act of the master, and, if his failure to notify the car repairer of his determination was negligence, then the fact that he acted as motorman in running such cars would not relieve the master from liability under the doctrine of fellow servants; and in that case we said (page 457, 183 Ill., page 172, 56 N. E., 75 Am. St. Rep. 120): "The contention, therefore, is that the court should have declared, as matter of law arising out of undisputed facts, that the relation of fellow servant existed between the deceased and the said McCrumb, and that the doctrine of respondeat superior did not apply. But the question as to what cars should be brought from the main track in and upon this cleaning, inspecting, and repairing track, and when such cars should be so brought in, and where cars so coming in should be placed thereon, was to be determined by McCrumb in the exercise of the duties devolving upon him in his capacity as vice principal."

The question whether the relation of fellow servants exists only becomes a question of law, and not of fact, when there is no dispute with reference to the facts, and when the evidence and the legitimate conclusions to be drawn therefrom are such that all reasonable men will agree to the existence of the relation of fellow servants. *Slack v. Harris*, 200 Ill. 96, 65 N. E. 669; *Illinois Steel Co. v. Coffey*, 205 Ill. 206, 68 N. E. 751; *Chicago & Eastern Illinois Railroad Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921; *Norton Bros. v. Nadebok*, supra. In the case at bar it cannot be said that the question whether or not Hoff and Marshall were fellow servants

Illinois Southern Ry. Co. v. Marshall

is a question of law, because, in the first place, as has already been shown, the material facts are not undisputed, but there is a sharp conflict in reference to the same; and, in the second place, the evidence and the legitimate conclusions to be drawn from it are not such that all reasonable men will agree to the existence of the relation of fellow servants. As is well said by the Appellate Court: "We are not prepared to say from the proofs in this case that all reasonable men would agree that the relation of fellow servants existed between Hoff and Marshall." On the contrary, instead of being fellow servants, performing such duties as to bring them into habitual association, so that they exercised a mutual influence upon each other promotive of proper caution, the one was subject to, and acting under the direct orders of, the other as a vice principal and representative of the employer.

But, in addition to what has been said, the questions whether or not Hoff and the deceased were fellow servants, and whether or not Hoff was a foreman or vice principal representing the employer, were questions of fact, which were submitted to the determination of the jury under instructions given for appellant, and which the appellant itself asked in its own behalf. In *Offutt v. World's Columbian Exposition*, 175 Ill. 472, 51 N. E. 651, we said (page 478, 175 Ill., page 653, 51 N. E.): "It is also insisted that the evidence showed that, if there was any negligence of the defendant, it consisted in the negligence of the foreman, Hunt, when he was acting as a fellow servant with the plaintiff in the same line of service. This is also a question of fact, with the evidence strongly tending to prove the contrary. The evidence tends to prove that Hunt was acting as foreman, representing the common master, and in that capacity gave specific orders to the plaintiff to perform the very act which caused the injury, and, as the case is presented here, we must, of course, so assume." This language is precisely applicable to the present case. Whether or not the negligence of the present appellant consisted in the negligence of the foreman, Hoff, when he was acting as a fellow servant, was a question of fact to be determined by the jury, and has been settled by the judgments of the lower courts so far as we are concerned. See, also, *Martin v. Chicago & Northwestern Railway Co.*, 194 Ill. 138, 62 N. E. 599.

In *Chicago Hair Co. v. Mueller*, 203 Ill. 558, 68 N. E. 51, it was held that an assistant foreman, such as Hoff is claimed to have been in the present case, who is sometimes engaged in labor as a common workman with other servants, is not necessarily and as matter of law, their fellow servant; and we there said (page 562, 203 Ill., page 52, 68 N. E.): "The evidence showed that Hermes held the position of assistant foreman to the appellant company, that he hired and discharged employees, and that he gave orders to appellee and

Whittlesey v. New York, etc., R. Co

other employees; and the evidence tended to show that on the day in question he had charge and control of the work of getting the bales out of the warehouse, and that he occupied a position of superiority to appellee and the other workmen. The mere fact that Hermes engaged in some labor as a common workman did not, as a matter of law, make him any the less a vice principal. * * * It was a question of fact whether he sustained the relation of fellow servant to the appellee."

The judgment of the Appellate Court is affirmed.
Judgment affirmed.

WHITTLESEY v. NEW YORK, N. H. & H. R. CO.

(Supreme Court of Errors of Connecticut, July 1, 1904.)

[58 Atl. Rep. 459.]

Injury to Section Hand—Collision between Hand Car and Train—Negligence Not Pleaded.

In an action against a railroad for the death of a section hand caused by collision of a freight train with a hand car on which deceased was riding, a recovery could not be had on the ground that the section foreman was negligent in starting out the car or the defendant negligent in failing to adopt proper rules as to when hand cars might be run, where the only ground of negligence pleaded was failure to protect the hand car while running.

Same—Same—Duty to Flag Train—Fellow Servants.*

Where a hand car used by a section crew was provided with flags to be sent ahead to signal approaching trains when the car was running, it was not the duty of the company to see that flags were so sent ahead so as to make it liable for injuries to a section hand caused by failure of the foreman to do this, but his neglect in this respect was that of a fellow servant.

Appeal from Superior Court, New London County; George W. Wheeler, Judge.

Action by Charles B. Whittlesey, as administrator of Sylvester Sullivan, deceased, against the New York, New Haven & Hartford Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Charles B. Whittlesey, for appellant.

Walter C. Noyes, for appellee.

HALL, J. The plaintiff's intestate, Sylvester Sullivan, was employed by the defendant as a section hand in a gang of laborers, one of whom was a foreman, stationed on the line of defendant's railroad, and engaged in keeping the roadbed in repair. The foreman of the gang, one Dwyer, worked with the other laborers of the gang, kept their time,

*As to whether a foreman is a fellow servant of a hand working under him, see foot-note appended to *Southern Indiana Ry. Co. v. Harrell* (Ind.), 9 R. R. R. 35, 32 Am. & Eng. R. Cas., N. S., 35, where all the preceding authorities in this series are collected.

and, in the absence of the roadmaster, directed their work, but had no power to hire or discharge them, except in emergencies. The roadmaster had the direction and supervision of the work done by section gangs in his division, and reported to the superintendent, who reported to the general officers of the company. It was the duty of the gang to report every morning at the station where the tools were, and where a hand car was kept for the use of the gang to transport themselves and their tools when their work was distant from the station; and the men thereafter became subject to the orders of their foreman, who directed when and how the hand car should be used, and, when upon it, directed how it should be operated. The train dispatcher did not control the running of hand cars. On the morning in question, while Sullivan and the other section hands were riding upon the hand car with the foreman, at the latter's order, and moving west toward the point on the road where they were to work that day, the hand car was struck by a freight train which came around a curve running in an opposite direction, and which, unknown to Dwyer, was that morning about 20 minutes behind its usual time of passing that point. The occupants of the car, upon seeing that a collision would occur, made every reasonable effort to escape injury, but Sullivan fell, and was run over by the freight train and killed. The court finds that reasonable care required that, when a hand car was running upon the track a man should be sent ahead with a flag to signal trains; that the car, which was a suitable one, was properly provided with flags for that purpose; and that the collision was caused by the negligence of Dwyer, who was a competent foreman, in not so protecting the hand car.

The argument of the plaintiff's brief seems to be that in sending out the hand car Dwyer was performing a duty similar to those of a train dispatcher, and therefore one which the company owed to its employees, as was held in *Darrigan v. N. Y. & N. E. R. R. Co.*, 52 Conn. 285, 52 Am. Rep. 590, and that the defendant is consequently liable to the plaintiff for the negligence of Dwyer in ordering the hand car started while the freight train was approaching from the opposite direction on the same track, or is liable because of its negligent failure to adopt proper rules as to when hand cars might be run upon its tracks. This argument overlooks the fact that no such negligence is charged in the complaint. In his pleadings the plaintiff finds no fault with the rules of the company, nor with the act of Dwyer in ordering the hand car to be started under the circumstances. The failure of the defendant "to protect said hand car while running on said track from all other trains by flags or other signals" is the only breach of duty alleged, and the only alleged cause of the accident. The only question, therefore, for our consideration, is whether the duty of causing a flag to be sent

Whittlesey v. New York, etc., R. Co

ahead to signal approaching trains while the hand car was proceeding along the track was one of those duties which the defendant company was required to perform as a master or principal, or one which rested upon Dwyer merely as a fellow servant with Sullivan, and this question is to be determined rather by the nature of the neglected duty than by the comparative ranks of the negligent servant and the person injured. At the time of the collision these section hands, including Sullivan and Dwyer, were engaged in the work of keeping a portion of the defendant's roadbed in repair. One of their duties in connection with this work was to transport themselves and their tools, by a hand-car, to the point where such repairs were to be made. This part of their work was necessarily rendered somewhat hazardous by the danger of injury from approaching trains. To perform it with reasonable safety required a signal flag to be sent ahead of the hand car. It was the duty of the railroad company to exercise reasonable care to provide these men with suitable means and appliances for so signaling approaching trains. Having performed that duty, nothing further was required of the defendant in order to render the place where the men were working reasonably safe. It became then the duty of the men to use the means provided for the safe and proper performance of their work. The act of carrying forward a signal flag was one which the men were competent to perform, and it was the duty of Dwyer to order it to be done, just as it was his duty to direct the performance of other details of the work in which they were all engaged. The defendant provided a suitable hand car, properly equipped with signal flags, and a sufficient number of competent men for the proper performance of the work. Having done this, it was not required to see that the flag was used when necessary. That was a duty of the servants, the negligent failure of Dwyer to perform which was the negligence of a fellow servant of Sullivan, for the consequences of which the defendant is not liable. *Kelly v. New Haven Steamboat Co.*, 74 Conn. 343-347, 50 Atl. 871, 57 L. R. A. 494, 92 Am. St. Rep. 220; *Sullivan v. N. Y., N. H. & H. R. R. Co.*, 62 Conn. 209-215, 25 Atl. 711; *McQueeney v. Norcross*, 75 Conn. 381-387, 53 Atl. 780, 54 Atl. 301.

In directing a judgment for nominal damages in the case of *Nolan v. N. Y., N. H. & H. R. R. Co.*, 70 Conn. 159-194, 39 Atl. 115, 43 L. R. A. 305, this court virtually sustained the decision of the superior court, that the failure of the defendant's brakeman on a freight train to go back the required distance to flag an approaching special train, by which a collision was caused, and an employee of defendant on the special train killed, was the negligence of a fellow servant of the injured person, for which the railroad company was not liable.

In *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup.

Heinzle v. Metropolitan St. Ry. Co

Ct. 843, 40 L. Ed. 994, and in *Clifford v. Old Colony R. Co.*, 141 Mass 564, 6 N. E. 751, it was held that the foreman of a section gang on a railroad, by whose negligence in the management of a hand car one of the section hands upon it was injured in a collision, was a fellow workman with the injured person, for whose negligent act the company was not liable. There is no error. The other Judges concurred.

HEINZLE v. METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 2, June, 14, 1904.)

[81 S. W. Rep 848.]

Expert Testimony—Stopping Car.

A motorman, who had been engaged in running cars on a street car line for more than a year, and who was familiar with a street crossing, was sufficiently qualified to testify as an expert as to the distance within which a car approaching the crossing at a certain rate could be checked.

Same—Same—Hypothetical Question.

In an action for injuries to a child on a street crossing, a hypothetical question to an expert as to the checking of a car must embrace the time and space within which a like car could have been stopped by a reasonably skillful motorman after he discovered, or with reasonable care might have discovered, the child in danger, with due regard to the safety of passengers, and was too restrictive where he was asked if he was able to state in about what distance one of the cars carrying certain passengers could be checked in passing down the grade at such crossing at a certain rate.

Directing Verdict.

Where, in an action for injuries to a child on a street car crossing, the evidence did not show that the failure to ring the bell was the proximate cause of the injury, but the evidence was conflicting as to speed of the car, a peremptory instruction for defendant was properly refused.

Care Required of Children—Instruction.*

In an action for injuries to a six year old child, instructions applying the same rule to plaintiff, in determining her contributory negligence, as to one who had arrived at an age to possess ordinary discretion, were properly refused.

Injury to Child on Street Car Crossing—Negligence—Question for Jury.

Where, in an action for injuries to a child on a street car crossing, the evidence was conflicting as to the speed of the car, and tended to show the motorman was not looking ahead of his car, it was for the jury whether, under the circumstances, the speed was dangerous and the injury occasioned thereby, or whether the motorman by ordinary care could have seen plaintiff's perilous position in time to have avoided the injury.

Plaintiff's Next Friend—Appointment.

An instruction submitting to the jury the question as to whether plaintiff's next friend was regularly appointed erroneous.

*As to the degree of care required of children for their own protection, see foot-note appended to *Mitchell v. Illinois Cent. R. Co.* (La.), 9 R. R. R. 240, 32 Am. & Eng. R. Cas., N. S., 240, where all the authorities in this series are collected.

Heinzle v. Metropolitan St. Ry. Co

Instruction.

In an action for injuries by a street car, an instruction is defective in referring to the failure to keep the car under control, when no such averment was made in the petition.

Same.

In an action for injuries to a child by a street car, an instruction is erroneous that the employees were negligent if they failed to give the usual signals, after discovering the danger the child was in, to warn her of the approach, where there was no evidence to warrant it.

Same.

An instruction relating to the failure of the defendant's motorman to sound his gong to give warning when approaching a street crossing is properly refused, where such failure had no connection with the accident.

Accident on Street Car Crossing—Contributory Negligence and Failure of Motorman to Look Out.

An instruction that plaintiff's negligence would not prevent a recovery, if the motorman and conductor could have seen the plaintiff by keeping a vigilant watch in time to have prevented the car striking plaintiff, should be modified by omitting the reference to the conductor.

Same—Speed as Negligence.

Where plaintiff alleges that defendant's servants in charge of a car negligently and wrongfully approached a street crossing at an unusual speed, resulting in plaintiff being injured, it was proper to instruct to find for plaintiff, if she was exercising reasonable care for her own safety, and defendant was running its car at a speed which under the circumstances was negligent and dangerous, and in consequence thereof she was injured, though the speed did not exceed the rate fixed by ordinance.

Appeal from Circuit Court, Jackson County; Wm. B. Teasdale, Judge.

Action by Anthannette E. Heinzle, by her next friend, Martin Heinzle, against the Metropolitan Street Railway Company. From a judgment for the plaintiff, defendant appeals. Reversed.

John H. Lucas, for appellant.

O. H. Dean, C. O. French, and Geo. W. Wright, for respondent.

BURGESS, J. This is an action by plaintiff, a female between five and six years of age, for damages caused by being run over by one of defendant's street cars in the city of Argentine, Kan., on the 26th day of February, 1901. The amount of damages sued for was \$25,000. The trial resulted in a verdict and judgment for plaintiff in the sum of \$9,166.66. Thereafter in due time defendant filed its motion for a new trial, which being overruled, it brings the case to this court by appeal for review.

The accident happened at the crossing of Fifth street and Metropolitan avenue. The negligence charged in the petition is that defendant's servants and employees in charge of said car negligently and wrongfully approached said crossing at a rapid and unusual rate of speed, and negligently

Heinze v. Metropolitan St. Ry. Co

failed to ring the bell or sound an alarm as a warning to plaintiff of its approach; that defendant's agents and servants and employees in charge of said car negligently and wrongfully failed to keep a lookout ahead for pedestrians or other obstructions in or near defendant's tracks at said street crossing, as required by law; and, further, that defendant's servants and employees in charge of said street car saw the dangerous and perilous position of plaintiff on and near its said tracks in time to have checked or stopped said car before striking plaintiff, or by the exercise of ordinary care could have seen the perilous position in which plaintiff was situated in time to have done so.

The following state of facts is disclosed by the record: Fourth and Fifth streets run north and south. Fifth street lies west of Fourth. Metropolitan avenue runs east and west, and crosses Fifth street where the accident occurred. The defendant company owns and operates two different tracks running parallel on Metropolitan avenue; cars moving west occupying the north track, while cars moving east occupy the south track. A crosswalk spanned the avenue on the east side of Fifth street, from sidewalk to sidewalk, and another on the west side of Fifth street, which were 55 feet apart. The avenue is quite a steep downgrade from Fourth street to the crosswalk on the east side of Fifth street, and from that point west for some distance it is practically level. The avenue otherwise was smooth and the view unobstructed. At the southeast corner of the intersection of Fifth and the avenue, and upon the sidewalk line, stood the two-story building, known as the "Building and Loan Association," occupied by plaintiff and her parents. At the northeast corner, and upon the lot line, had been constructed the Fifth Avenue Hotel, a two-story building, fronting 75 feet on Fifth street, and extending east on the avenue to the alley between Fourth and Fifth. At the northeast corner was the office of the lumber company. The southwest corner was vacant. These streets, in the vicinity of their intersection, were traversed by vehicles, school children, workmen, and other pedestrians, and Eastland, the motorman in charge of the car, at the time of the accident, knew all those conditions and surroundings. East-bound cars stopped at the crosswalk on the east side of Fifth street to receive and discharge passengers, and west-bound cars stopped at the crosswalk on the west side of Fifth street for the same purpose. It was at a point midway between these crosswalks, in the center of Fifth street, and between the rails of the west-bound tracks, that the plaintiff collided with one of defendant's west-bound street cars, resulting in injury and amputation of her right limb below the knee. The rate of speed at the time of the accident is estimated by the witnesses to have been from 3 to 35 or 40 miles per hour. A few minutes before the accident plaintiff, who resided at the southeast corner of the

Heinze v. Metropolitan St. Ry. Co

intersection of Fifth street and Metropolitan avenue, went on an errand necessitating the crossing of Metropolitan avenue and Fifth street at their intersection by her in order to reach the point of her destination. As the child and a small companion were crossing this intersection from the southeast to the northwest corner, in a diagonal and northwesterly direction, a street car approached from the east, downgrade, without giving any note of warning to the children as they were running toward the track. The avenue between Fourth and Fifth is 226 feet, with an alleyway on the north side about midway between Fourth and Fifth streets. Crosswalks 55 feet apart extend over the avenue, both east and west of the intersections of these streets. The Fifth Avenue Hotel, a two-story structure, stands on the building line of Fifth street and the avenue, extending east to the alley. The avenue from Fourth to Fifth street was smooth, and the view unobstructed between the building lines by any natural objects. The west-bound car was at or east of the alley in the rear of the hotel at the time the plaintiff and her companion started across the intersection of these streets. She was seen by a number of witnesses from the car after it turned west on the avenue near Fourth street, as well as by a number of witnesses situated around this intersection.

Mrs. Elizabeth Egan, a witness for the plaintiff, who was a passenger on the car, and who had traveled over the line every other day for a year preceding the accident, testified that the car was going faster on that trip than at any other time that she had noticed it going along the line; that the reason she noticed it, when the car was going down the hill from Fourth to Fifth street, when they turned, they were going so fast that she had a little boy on the seat with her, and held him to keep him from sliding off the seat; the car was going so fast he would have fallen right out of the seat, if something had not held him.

Charles Curth, who was on the sidewalk, on the south side of the avenue, about midway between Fourth and Fifth streets, testified substantially as follows: That his attention was directed to the car going west; that it was going mighty fast around the corner, and he kind of watched how fast it went down; and that his attention was attracted to it, because it came faster than a car goes any place in Argentine—that is to say, from 35 to 40 miles per hour.

O. R. Croul, a former gripman for defendant, was crossing Fifth street, near the avenue, on the north side, at the time of the accident, and saw the west-bound car pass the east-bound car near the middle of the block. He testified that he observed the speed of these cars, and that the car going west was running fast; that he tried to catch the car going east and failed, and then tried to catch the car going west and failed in that also; that he was able to state about how fast the west-bound car was going, and would judge about 15 or 20 miles an hour, as near as he could tell.

Frank Moffitt, a railroad man of four years' experience, who was standing in an alley between Fourth and Fifth streets, near the place of the accident, testified that he noticed two street cars about the time the girl was hurt, one going east and the other west; that when the car was going east the girl was standing on the east side of Fifth street, on Metropolitan avenue, down between the walk and the car track, with some little boy; that the cars were going, one east and the other west, and he heard the motorman halloo, and heard the child scream, and saw her rolled in front of the car, and the woman take her up in her arms; that he did not see the little girl and boy attempt to cross the track until after the east-bound car had passed, and as quick as the east-bound car had passed they ran right behind it and in front of the west-bound car. When they were in front of the west-bound car they were probably five or six feet from it, not more than that. As near as he could come to it, its rate of speed was 10 or 12 miles an hour. He did not hear the bell on that car ring as it was coming down the hill between Fourth and Fifth streets.

Theodore Schweitzer was a passenger on the car. He testified that when the car came down the avenue it was going as fast as they usually come down, and kept about the same speed until it stopped, at which time the little girl was crossing the street. When the car stopped, she was lying about in the middle of the road.

A. P. Butcher, who saw the accident, testified that the car was coming down the hill fast, at the rate of 9 or 10 miles an hour; it was in the evening, when the street car fellows were making time; that the children were playing in the street, and attempted to cross the track; the car was coming from the east upon the avenue upon the crossing at rather a rapid rate of speed, as he thought, and also one approaching from the west, and the two cars passed each other right on Fifth street, in the open there; and the little girl attempted to dodge the car, and, with the other car approaching, got caught by the one running down the hill, as I saw it. A bell was rung on one of the trains, but he could not say which one. The child was struck about Fifth street.

Lydia Fox, witness for plaintiff, stated that she was walking up the street, and the car was coming down, and the little girl was on the north side of the street, right at the Fifth Avenue Hotel. She started across the street, and the witness halloed at her, and she started back, then started up, and, before she could get across, between the two tracks, she was caught and knocked down in front of the car. When she first saw the car it was right south of the hotel, coming down the grade. The car stopped a little bit east, and pretty close to the crossing. She saw the child going across, and the car was going at such a speed she knew, if she started, she would be run over. When the child passed in

front of the car, she was nearer to four than six feet in front of it, and was about the center of the track when the car struck her.

J. W. Stubbs, a witness for the plaintiff, a former employee of the defendant, and 21 months experienced as motorman for defendant in Armourdale, Kan., testified that he had crossed the place where the accident occurred as motorman, and from his experience as motorman he was able to state in about what distance those cars could be checked or stopped in passing down the grade between Fourth and Fifth street, carrying a load of two boys, 15 or 16 years old, two ladies, two children from 2 to 6 years old, the motorman, and the conductor, and that "you can stop in 30 feet. If going from 15 to 30 miles an hour, it could be stopped at 40 or 50 feet, and if a man is a mind to he can stop it in less than that. I have stopped them in less than 20 feet."

There was also evidence that at the time of the accident defendant's motorman on the car was looking north at a young lady at a window in the second story of the Fifth Avenue Hotel, and not along the track in front of him.

T. R. Eastland, witness for defendant, who was motorman on the car which caused the injury testified as follows: "Q. Do you remember anything concerning the accident to the child? A. Why, yes, sir; I do. Q. You may tell the jury in your own way and manner when you first saw the child and all concerning the accident, what you did, if any thing, to prevent striking, and all the circumstances in connection with it? A. Well, at this point where this happened it is downgrade, and there was a car at this crossing. Q. A car standing on that crossing? A. A car standing at that crossing. Q. Which way was that car going? A. And it was going east, and I was going west. Q. Yes? A. And the first thing that I saw of the little child, she ran in front of my car as close from me as to that gentleman there. Q. You may state where the child came from when you first saw it. A. Well, the child came from behind this car that was standing on the east-bound track. Q. Then in which direction was the child going? A. It was going north. Q. It was going north? You said that it ran into your car, or against your car? A. Ran in front of my car. Q. In front of your car, yes, sir. Tell these gentlemen what you did when you saw the child, if anything, to stop your train. A. Well, I was going downgrade. I had my car slowed down to a very slow speed, had one hand on the brake at the time, just holding it at about a certain rate of speed down the grade; and the minute I seen the child in front of me, or the minute it ran in front of me, I took both hands and set my brake just as tight as I could and as quick as I could. Q. Were there any other children, besides this child that was injured, that you saw there? A. Why, I saw a boy, I think it was a colored boy, run across the track. Q. You may state, Mr. Eastland,

Heinzle v. Metropolitan St. Ry. Co

whether you gave any signals of the approach of your car on reaching Fifth and Metropolitan? A. I was ringing my bell as I came down the hill meeting this car, and it is customary for us always to ring our bells when we meet a car and it standing still. Q. You may state to these gentlemen how long, prior to reaching the crossing and prior to striking the child, had you been sounding your gong? A. Well, for nearly half a block. Q. Where did your car stop that day? A. Right on the crossing. Q. Is that the ordinary and usual place where you stop? A. That is about where we usually stop; yes, sir. Yes, sir; it is about that. Q. Where was the child, when you struck the child—what part of the street? A. Near the middle. Q. Where was the east-bound car that you speak of? A. It was—well, I wouldn't say that it was exactly on the crossing, because it is something that we seldom ever do. We stop at that crossing on account of the grade; sometimes pull up to it, and sometimes stop a little west on account of the grade. Your car will stand there without you having to hold your brakes all the time; but it was near that crossing. Q. Now, you may state, Mr. Eastland, what observation, if any, you were making of the street in front of you when you came down on Metropolitan from Fourth to Fifth? A. I wasn't making any. I was noticing the car stopped in front of me, and I noticed for to see if there was any one getting off of the car; but I didn't notice any one getting off. Q. Yes? A. Saw no one step from behind it until I got to it. Q. So that, as the child ran around that car, you then, if I understand you, put both hands on the brake? A. Yes, sir. Q. I will ask you to state whether or not you could have stopped that train or that car any quicker than you did stop it that day? A. No, sir. Q. Now, I get it. A. And then it pulls up here and stops. It had stopped before I got to it, and as I got to this car, as I came on to it—the front end of my car came even this way—it was standing there. Q. You noticed children playing on the sidewalk? A. How many I could not say. Q. You was not interested in people passing on that street there, or standing on the crossing, either? A. I was interested in watching my track in front of me, you understand. Q. Where were you then? Where was this east-bound car when you ran over the child? A. Well, to the best of my knowledge that car started just as I— just as the child ran out in front of my car, this other car started. Q. And you were only running about 3 miles an hour? A. That is what I think I was. Q. In what distance can you stop such a car as that, with the appliances, while running at the rate of 3 miles an hour? A. From 45 to 65 feet. Q. How far would it take you to stop on a level? A. Well, about from 30 to 50 feet. Q. And your car ran how far after you struck the child? A. About 30 feet, I think. Q. Do you know how wide that street is there? A. Yes, sir. Q. How wide is it?

Heinzle v. Metropolitan St. Ry. Co

A. 40 feet. Q. Was she running? A. Yes, sir; and when I was ringing the bell, and when I saw her run so close to me, right up so close, as near as from me to you there, I hollered at her, as well as ringing my bell; and some other gentleman standing on the corner, I presume he was, some other gentleman—he told me afterwards he was the man; anyway, some gentleman—somebody hollered at her to go back, and the minute she got on the rail, just as I seen her on the track, she whirled around. Q. Yes? A. Just as I first saw the child, she was in the act of turning around. Q. Yes; but she fell between the two tracks, and not between the two rails of the track that you were on? A. She fell between the two tracks, near my track, but between the two tracks. Q. And didn't fall on you track at all? A. So near it that it caught her foot, but her body did not fall on the track. Q. Stumbled and fell on the track? Now, you had not seen her until you saw her in the middle of the track ahead of you? A. She dashed right on the track. When I first seen her she was on the track. Q. That is right? The first thing you saw of her she came right on the track immediately ahead of you? A. Yes, sir. Q. What were you doing all this time she was coming around behind the car, and passing between over that track and up to the other, and down into the center of that street? Where were you when she was doing that. A. They only have there about 18 inches from behind one car to another for to pass by. Q. Do you get the idea? Assuming that she was coming from behind this car here, with your car in the proximity that I have described, which you say is probably a foot or two—enough for a man possibly to get through that; now, how far would the girl have to run? A. From here? Q. Yes. A. From this car? Q. Yes, sir. A. That is a hard question for me to answer in feet. Q. What is you judgment about that—three or four feet, or five feet? A. Yes, sir; she would have to go that much for to run from the car. Q. Now, as you was coming in this way with your car, could you see anybody behind this east-bound car? A. No, sir. Q. Your view—A. Your view here is obstructed by this car; yes, sir. Q. So that it would be impossible for you to see anybody behind that car until you got opposite it? A. Yes, sir."

H. C. Kruger, conductor on the train, testified that it was going at about three miles per hour, or a little over, that day; that there were bells ringing. "I think they were ours, as near as I remember. We met a car going east. There was a car standing up just from the corner; made a stop and picked up a passenger there. Just as we passed there they started up. The child was about the middle of the street."

J. B. Crane, conductor on the car going east, testified that his train was going east, about 5 o'clock on the afternoon of the accident; that they stopped at Fifth and Metropolitan for a passenger, and while they stopped there the other car

Heinzle v. Metropolitan St. Ry. Co

came up going west. They were going east, and stopped about five feet west of the east crossing. A passenger got on there. The west-bound train passed his train, just about the time his train was in the act of starting. That car going west was running at the rate of three or four miles an hour.

Edward Sedgwick, motorman on the east-bound train, testified that the west-bound train passed them at the east crossing. It was running between four and five miles an hour. The bell was ringing; that is, the gong.

Mary Drolinger, witness for defendant, stated that a car bell rang, but whether it was the east or west bound car bell she could not say. The speed of the west car was just about the same of cars generally when they are going to stop there anyway, when the cars passed each other. The east-bound car was just starting when the west-bound car came by. They passed each other on the east side of Fifth street. She saw the little child before it was hurt. She was waiting for the east-bound car to go up. When she next saw her, she came right behind the car. Then the west-bound car passed directly on the crossing, and obstructed her vision, so that she could not see any more. She last saw the child, before it was hurt, just as she came behind the east-bound car. Just as the west-bound car was going past, the child started to run.

Mrs. Stutty, who was a passenger on the west-bound car, testified that the bell rang on that car on approaching at or near at Fifth and the avenue; that the car was running slow compared to the way it usually moved along.

James M. Howard testified that the first thing that called his attention was that he heard some one holler, and looked out the door, and the car had just passed off the child. It was lying in the middle of the street, as near as could be. He saw a car going east at that time, just the west end of which must have been across the east crossing of Fifth street when he noticed it.

John Obliges, a passenger on the car, stated that the first thing he saw was a lady standing on the crossing, and she threw up her hands and commenced to scream. The car stopped right on the west crossing.

Blatherwick testified that about the time the east-bound car came up the little girl was standing "on the corner there, getting out of its way. This car stopped, and about this time the west-bound car come along, and when the east-bound car started up the hill she ran from behind it, and right in front of the west-bound car, which struck her about the middle of the street. When the children stepped out from the back of the car going east, the one going west was about six feet for them." He saw the children all the time from the time they started behind the east-bound car until the car struck the little girl and shut out his view. He hallooed at them, when he saw the children start across.

Heinzle v. Metropolitan St. Ry. Co

G. F. Overman testified that he saw the children on the street, and saw both trains coming. When the car coming east got to Fifth and the avenue, it stopped. When the children saw the car coming from the east, they went right in behind the east-bound car. The west-bound car was then about the front of the east-bound train, and the children ran around from the west side of the east-bound train in front of the west-bound train. Heard bell ringing. Train was not going more than six or seven miles an hour. Would say the child was struck on about the center of the street.

One expert witness on the part of defendant testified that, under the conditions stated, a car running down that track at the rate of 4 miles an hour the motorman could stop in 60 feet. Elbert E. Hunt, another expert witness, testified that, on a car running down that track at the rate of 3 or 4 miles an hour, a stop in 45 or 50 feet would be a good stop.

Over the objection and exceptions of defendant the court, at the instance of plaintiff, instructed the jury as follows:

"(1) The court instructs the jury that if they find from the evidence that on the 23d day of March, 1901, Martin Heinzle was duly and regularly appointed next friend of the plaintiff, Anthannette E. Heinzle; that the defendant corporation was operating an electric street railway, running for a part of its course east and west along Metropolitan avenue, in the city of Argentine, Wyandotte county, Kansas, at its intersection with Fifth street, another public highway of said Argentine; and that if you further find that on the 26th day of February, 1901, the plaintiff, Anthannette E. Heinzle, five years of age, was on foot, crossing said Metropolitan avenue and the tracks of the defendant at the regular street crossing of said Metropolitan avenue and Fifth street, and approaching a car of the defendant moving westward on said tracks, and that she was, at the time of and just preceding the injury, in the exercise of such care and caution as a person of her age, discretion, and experience would naturally and ordinarily use under similar circumstances; and if you find that servants and agents of defendant, in charge of and operating said car on its road at said time and place, failed to sound a gong or warning signal; and if you find that the failure, if any, to sound such gong was negligence; and if you further find that the servants and agents in charge of said train failed to keep a proper lookout for said infant, while she was approaching its car on said tracks, if you find that she was so approaching, and that such failure, if any, to keep a proper lookout was negligence; and if you further find, from the evidence, that in consequence of such failure, if any, to sound a warning signal, or, if any, to keep a proper lookout for said infant while she was approaching the track along which the train was moving, or to keep said car under control and moving at a reasonable rate of speed, the plaintiff was struck by said car, and by it run over, sustain-

ing such injuries to her person as alleged—then you will find a verdict for the plaintiff.

“(2) You are instructed that it is the duty of one having the control of the movements of electric cars in towns and cities to keep a constant lookout along the track where persons are likely to be; and if you find from the evidence that the defendant’s servants in charge of said car, by having their attention on the street in front of said car, might have discovered, in time to have stopped the car, that a child was about to cross the track, or, after discovering her danger, they failed to give the usual signals to warn the child of the car’s approach, they were guilty of negligence.

“(3) The court instructs the jury that it was the duty of defendant’s motorman to sound his gong or bell when approaching Fifth street, so as to give notice to persons desiring to cross said street of the approach of said car; and if you find from the evidence that said motorman failed to sound his gong or bell or give any other warning when approaching said street, and that, but for his failure to sound his gong or bell or give such warning, the accident complained of would not have happened, your verdict should be for the plaintiff, provided you further find from the evidence that plaintiff at the time exercised such care for her own safety as could be reasonably expected of a child of her age and capacity.

“(4) The jury are instructed that, even if they should find from the evidence that the plaintiff was negligent in going upon the track of the defendant company, yet the court further instructs you that such negligence will not of itself prevent a recovery in the case by plaintiff, provided you further find from the evidence that the motorman and conductor, in charge of said car, by keeping a vigilant watch for persons moving towards the track, could have seen the plaintiff approaching the track in time to have prevented the car from running over and upon her. If you find from the evidence that said motorman and conductor, or either of them, was not keeping such a vigilant watch, and you further find from the evidence that the plaintiff should have been seen by said motorman and conductor in a position of danger in time to have avoided running over her, then your verdict should be for the plaintiff, although you should also find that the plaintiff was guilty of negligence in going upon the track.

“(5) The court instructs you that while the defendant company was permitted by ordinance to run its cars, at the point where the accident happened, at a speed not exceeding 15 miles per hour, yet such permission fixed the highest rate of speed at which the defendant company was permitted under any circumstances to run, and did not authorize the defendant company to run at such rate, regardless of any and all circumstances and conditions that might exist. If, therefore, you find from the evidence that the plaintiff, Anthan-

Heinzle v. Metropolitan St. Ry. Co

nette E. Heinzle, was run over and injured, as alleged, by defendant's car, at a point on the defendant's tracks where the defendant's servants and agents had reasons to anticipate the appearance of children and other persons upon the track, and if you further find that the defendant at the time of the injury was running its said car at a rate of speed which, under the facts and circumstances shown by the evidence, was careless, negligent, and dangerous, and in consequence thereof ran over and injured said plaintiff, and provided you further find from the evidence that said Anthannette E. Heinzle at the time exercised such care for her own safety as could be reasonably expected of a child of her age and capacity, then your verdict should be for plaintiff, although you should also find that such rate of speed did not exceed the rate of 15 miles per hour.

"(6) If you find for the plaintiff, you will, in assessing her damages, take into consideration her age and condition in life, the injury sustained by her, the physical pain, mental anguish, the loss of health, and the impairment of her capacity and ability to earn a livelihood, if any, suffered by her because of said injury, and such damages, if any, of the nature above specified, as you believe from the evidence she will sustain in the future, and the direct effect of said injury, and assess the same in such amount as, under all the facts and circumstances shown in evidence, will be just and reasonable compensation to the plaintiff, not exceeding the sum of twenty-five thousand (\$25,000.00) dollars."

At the request of the defendant the court instructed the jury as follows:

"(1) The court instructs the jury that in considering this case they should not indulge in any mere suppositions or imaginings as to what may or may not have been done, or occurred at the time of the occurrence, but must decide the case upon the evidence of the witnesses and the instruction of the court. And the court further instructs the jury that they are the sole judges of the credibility of the witnesses and the weight to be given to their testimony, and in weighing the testimony the jury should take into consideration, not only what they have testified to, but also their manner of testifying, and their bias, if any is shown, towards or against plaintiff or defendant, their ability at the time to clearly see what occurred, and now to clearly recall and relate the facts; and if the jury believe from the evidence that any witness has knowingly sworn falsely to any material fact, then the jury may disbelieve the whole or any part of such witness' testimony.

"(2) This case should be considered by the jury the same as if it were a contest between two persons of equal standing in the community. The fact that one of the parties is an infant and the other a corporation should not affect your minds in any way, but the rights of the parties should and must be

Heinzle v. Metropolitan St. Ry. Co

determined upon the evidence introduced in the case and the instructions given to the jury, which is the law and only law to guide you in your deliberations. These instructions, although read to you by the lawyers, are the court's instructions, and must be taken and considered by the jury the same as if they had been read by the judge from the bench.

"(3) If you believe from the evidence that the injury was merely the result of an accident, your finding will be for the defendant.

"(4) The court instructs the jury that it was the duty of the plaintiff before going on or across the tracks of the company to look and listen for approaching cars; and if she failed so to do, and by looking and listening she could have seen or heard the approaching car in time to have averted the injury to herself, then you must find your verdict for the defendant, unless you further find from the evidence that the plaintiff was in the act of crossing the track, and the employees of the defendant engaged in the operation of its car, after they saw, or by the exercise of ordinary care could have seen, that plaintiff was in the act of crossing the track, failed to use such care and caution in stopping said car to avoid injury to said plaintiff as a person of ordinary care and prudence would have exercised under like and similar circumstances.

"(5) It is the duty of a person, before attempting to cross a railroad track, to look and listen for approaching cars, and to exercise ordinary care to avoid coming in collision with the car; and if you find from the evidence in this case that the plaintiff did not look and listen, and that by doing so she would have observed the approaching car, and by the exercise of ordinary care would have avoided the collision, then your verdict must be for the defendant.

"(6) It is the duty of a person who is about to step upon a railroad track to look and listen for approaching cars in both directions, and if you believe from the evidence that at the time plaintiff stepped upon the track she could by looking have seen, or by listening have heard, the approach of the car by which she was struck, and avoided a contact therewith, but did not so look and listen, then your verdict will be for the defendant.

"(7) The court instructs the jury that there is no liability whatever on the part of the railroad company, and there is no presumption of negligence on the part of the motorman, and the jury must not presume any, from the mere fact that the car struck the plaintiff and it was run over by it and injured.

"(8) The court instructs the jury that it is the duty of persons, before crossing the street upon which electric cars run, to listen and look for cars that may be approaching, and if they can be heard or seen, and there is any danger from them in attempting to cross the

Heinzle v. Metropolitan St. Ry. Co

track, then they must stop before reaching the track and let the car pass, and not put themselves in danger from it; and if the jury believe from the evidence plaintiff had capacity to know that if she got upon the track in front of and near to the approaching car she might be struck and hurt, and the jury further believe that she could, by the exercise of ordinary care as explained in these instructions, before leaving the pavement or reaching the track, have seen or heard the approaching cars, then it was her duty to stop, and not run upon the track, and your verdict must be for defendant.

"(9) Although you may believe that the motorman saw, or by the exercise of ordinary care might have seen, the plaintiff standing on the south side of the street to permit the train going east to pass, and although you may believe that the motorman knew, or ought to have known, that she intended to cross the tracks, he had a right to presume that she would not start to cross in front of a moving car, and he was not required to stop, or attempt to stop, his train until such time as he saw, or could have seen, her in a position of peril—that is, after she had started, after so stopping, and was on or so near the track on which the said motorman's train was running that if he did not stop she would be injured; and, if it was then too late to stop his train and avoid injury, plaintiff cannot recover.

"(10) The court instructs the jury that the employees of the defendant company owed to the plaintiff only that degree of care which an ordinarily careful and prudent person engaged in the same business would have exercised under like and similar circumstances; and if the jury believes from the evidence that the employees of the defendant company exercised such care, then the jury will find their verdict in favor of defendant."

Defendant also asked the court to give the following instructions:

"(1) Under the pleadings and the evidence, your finding must be for the defendant.

"(2) The court instructs the jury that if you find that the plaintiff was in a place of safety before she stepped on the track, when the motorman first discovered her, then the motorman had a right to presume that she would not go on to the track in front of an approaching car, and the motorman was not required to make any effort to stop his car until he discovered that plaintiff had started or was starting to go on the track.

"(3) There is no evidence that the motorman saw or could have seen the plaintiff in a position of peril, in time to have stopped the car, and on the issue your finding will be for the defendant.

"(4) There is no evidence that plaintiff was injured by reason of the rate of speed at which the car ran, and on that issue your finding will be for the defendant.

Heinzle v. Metropolitan St. Ry. Co

"(5) There is no evidence that the plaintiff was injured by reason of failure, if there was a failure, to ring the bell, and on that issue you will find for defendant."

Which instructions the court refused to give, and defendant by its counsel then and there duly excepted.

The court of its own motion, over the objection and exceptions of defendant, gave the following instructions:

"(1) The court instructs the jury that it is not necessary that all of the jurors should concur or agree upon the verdict to be rendered herein, but if nine or more, but less than twelve, members of the jury, agree upon a verdict, then the jurors so agreeing should sign the verdict so agreed upon and return the same as their verdict in this case. If all the jurors agree upon the verdict, then only your foreman is required to sign the verdict.

"(2) The court instructs the jury that, if you find for the plaintiff, your verdict will be in the following form: 'We, the jury, find for the plaintiff, and assess her damages at the sum of ——— Dollars.' If you find for the defendant, your verdict will be as follows: 'We, the jury, find the issues for the defendant.'

"(3) The difference between negligence on the part of the cable company, if any, and on the part of the plaintiff, if any, is this: Negligence on the part of the company, if any, before the plaintiff can recover, must by the jury be found to be the cause of the injury; whereas, negligence, if any, on the part of the plaintiff defeats a recovery if it directly contributed to the injury. And this is true, even though the company was guilty of negligence which concurred with the negligence of the deceased, if any, in producing the injury. The plaintiff was required to exercise ordinary and reasonable care for her own safety. If she did not do so, she was negligent, and plaintiff cannot recover.

"(4) If you believe that both parties were negligent, and the negligence of both directly contributed to the injury, then there can be no recovery herein.

"(5) The court instructs the jury that, while the plaintiff was not required to use greater care and caution than children of her age and experience would ordinarily use under the same circumstances, nevertheless she was required to use such care and caution; and if you further believe from the evidence that in going or running towards the track she was negligent, and thereby caused her being struck by the car, then your verdict must be for the defendant."

"(7) The court instructs the jury that a street railway company is not obliged to stop its cars or slow up, because there are persons, adults or children, on the pavement; that the defendant had the right to run its train at Fifth street, and approaching it, at fifteen miles an hour, and the motorman was not required to slow up or stop merely because there were persons on the pavement or near the track, and you

must not presume any negligence on his part merely from that fact; and if you believe from the evidence that, as he was approaching Fifth street and crossing it, he was looking ahead of him down the street, attending to his duties as defined in the instructions, and that while plaintiff was running from the pavement towards him he saw her as quickly as he could by the exercise of ordinary care on his part, under all the circumstances in evidence, and promptly did his best to stop the train, then the jury will find their verdict in favor of the defendant; and the court further instructs you that if you believe he did not do so, but was negligent, and you also believe from the evidence that plaintiff was also negligent for one of her age and capacity, as explained in these instructions, in running directly in front of the train and so near to it as she did, and that she thereby directly contributed to the accident, then your verdict must be for defendant.

"(8) Even though you should find that the cable company was guilty of negligence as submitted by these instructions, yet the plaintiff cannot recover, unless you further find from the evidence that such negligence was the direct cause of the injury. If it was not the direct cause of such injury, then the plaintiff cannot recover. Or if the plaintiff was negligent, and thereby directly contributed to her injury, then and in that event you must find against plaintiff, even though you may find negligence as charged therein against the cable company which concurred in producing the injury."

It is said for defendant that it was essential to plaintiff's recovery that she should show within what distance a car could be stopped, and for that purpose introduced but one witness, J. W. Stubbs, the admission of whose testimony was over timely objection by defendant upon the ground that he had not shown himself to be qualified as an expert, and the want of sufficient evidence upon which to predicate a hypothetical question. This witness testified that he had been in the service of the defendant for 15 or 16 months as motorman, knew where Fifth street in Argentine crosses Metropolitan avenue, and had gone over defendant's line at that point 20 times a day—that is, going west about 10, and coming east about 10—for about 15 or 16 months; that he was familiar with the road at the intersection of Fifth street and Metropolitan avenue; "that it was down hill until we just about struck the street; it was quite a grade going down, and then after we struck the street it was level." Witness was then asked the following question: "Now, from your experience as a motorman on this line and at this particular place, are you able to state in about what distance one of those cars could be checked or stopped in passing down the grade between Fourth and Fifth street, carrying a load of two boys 15 or 16 years old, two ladies, two children from 2 to 6 years old, the motorman, and conductor, moving at the rate of from 6 to 12 miles an hour—8 to 12 miles an

Heinzle v. Metropolitan St. Ry. Co

hour." He answered: "Yes; in 30 feet." And if running at the rate of 15 or 30 miles an hour, under the same conditions and at the same place, it could be stopped at 40 or 50 feet. It seems to us that the witness was clearly qualified from experience and personal knowledge of the situation to testify as an expert, but the proper predicate was not laid upon which he should have been permitted to express an opinion, in that it was too restrictive and did not embody important facts in the case. It should have embraced the time and space within which a car like this one could have been stopped by a reasonably skillful motorman, after he discovers or might have with reasonable care discovered the little girl in danger, with due regard to the safety of the passengers. *Ruschenberg v. Southern Electric Railroad Co.*, 161 Mo. 81, 61 S. W. 626; *Culbertson v. Railroad*, 140 Mo. 59, 36 S. W. 834; *Mammerberg v. Railroad*, 62 Mo. App. 564.

In regard to the testimony of plaintiff's witnesses with respect to the speed of the train at the time of the accident, we are unable to discover any ruling of the court which would justify a reversal of the judgment upon that ground.

It is contended by defendant that the demurrer to the evidence of the plaintiff should have been sustained, and its peremptory instruction at the conclusion of the whole case given. It is insisted in the first place that there was no evidence that the failure to ring the bell, if there was such failure, was the proximate cause of the injury. It is true that there was not upon this point any evidence tending to show that the failure to ring the bell by defendant, or from which it could be inferred, that the proximate cause of the injury was the failure to do so. But we are unable to concur in the contention that there was not sufficient evidence that the train was being run at a rapid and unusual rate of speed to take the case to the jury upon this theory of the case. It is conceded by defendant that the evidence conflicted as to the rate of speed of the train, and whether such rate constituted a proper rate of speed or not depended upon the character of the train, the location and particular surrounding of the track, and other circumstances.

Nor was there error in the refusal by the court of the fourth and fifth instructions asked by defendant, for the reason that they applied the same rule in determining what would be contributory negligence on the part of plaintiff as to one who had arrived at any age to possess ordinary judgment and discretion, when all that was required of her in order to give her a right of action against the defendant for an injury inflicted upon her by it is that she should have exercised care and prudence equal to her capacity. *Boland v. Missouri Railroad Company*, 36 Mo. 484. In *O'Flaherty et al. v. Union Railway Co.*, 45 Mo. 70, 100 Am. Dec. 343, it is said: "In discussing the question of infantile responsi-

Heinzle v. Metropolitan St. Ry. Co

bility in a case in this court, we held that the same rigid rule in determining what would be a bar to an action on the ground of contributory negligence would not be applied to an infant, an idiot, or an insane person as to one who had arrived at an age to possess ordinary judgment and discretion. All that was necessary to give a right of action for an injury inflicted by the defendant was that the injured person should have exercised care and prudence equal to his capacity. *Boland v. Missouri Railroad Company*, 36 Mo. 484. The young and the old, the lame and infirm, are entitled to the use of the streets, and more care must be exercised towards them by persons controlling or managing cars and vehicles than towards those who have better powers of motion. A child or young person cannot be expected to possess that vigilant foresight which would be exacted of a person of maturer years. But it does not thence follow that they are to be denied the privilege of going on the streets, and, if they do so go, they may be killed with impunity." The same rule is announced in *Frick v. Railway Company*, 75 Mo. 595; *Dowling v. Allen & Co.*, 88 Mo. 293. In the case of *McCarthy v. Cass Avenue R. Co.*, 92 Mo. 536, 4 S. W. 516, this rule was applied to a boy between 8 and 9 years of age, and in *Anderson v. Union Terminal Ry. Co.*, 161 Mo. 411, 61 S. W. 874, to a boy 11 years of age.

As was said in the case of *Winters v. Kansas Cable Ry. Co.*, 99 Mo. 509, 12 S. W. 652, 6 L. R. A. 536, 17 Am. St. Rep. 591: "If the defendant's liability in this case is limited to want of care on the part of its servants after they saw the boy in a dangerous situation, then the plaintiff failed to make out a *prima facie* case. The evidence is all to the effect that the gripman used all the means at his command to avoid the calamity after he knew the boy was in danger. But the principle of law just stated does not control this case. The defendant is operating dangerous machinery at a rapid speed on and along the public streets of the city, and must know, and in law is bound to know, that men, women, and children have an equal right to the use of the highway, and will be upon it. It is the duty of the defendant's servants to be on the lookout, and to take all reasonable measures to avoid injuries to persons who may be upon the street. The duty to be on the watch is no more than ordinary care under such circumstances. The care to be used, to be ordinary care, must depend upon the surrounding circumstances." In *Frick v. Railroad*, *supra*, it is said: "It has been repeatedly held by this court that greater care is to be exercised by the persons managing a train of cars within the limits of a town or city than is required in the country. *Brown v. R. R. Co.*, 50 Mo. 461, 41 Am. Rep. 420; *Maher v. R. R. Co.*, 64 Mo. 276; *Hicks v. R. R. Co.*, 64 Mo. 439; *Harlan v. R. R. Co.*, 65 Mo. 24. In *Brown v. R. R. Co.*, *supra*, it was said that in towns caution should always be

Heinzle v. Metropolitan St. Ry. Co

used, and the degree of care to be exercised must of course be proportioned to the danger to be apprehended of inflicting injury on others. At street crossings in a town or city, where the public have a right to be, and where people are constantly passing and repassing, a high degree of vigilance should be exercised. The signals required by law for the protection of travelers upon the highway should be given, and the servants of the company in charge of the train should be at their posts, observant of the track, and ready at a moment's notice to avert, if possible, any apprehended danger."

There was evidence tending to show that about the time the train arrived plaintiff and other children were playing near the track, and as it approached plaintiff and the little boy started to cross the track, and at the same time the motorman was not looking in front of his train, but was looking at a lady in a window in the second story of a near-by hotel, which was upon the opposite side of the track from which the plaintiff approached the track. The petition alleges that the defendant's agents, servants, and employees in charge of said car negligently and wrongfully failed to keep a lookout ahead for pedestrians or other obstructions on or near defendant's tracks at said street crossing, as required by law; that they saw the dangerous and perilous condition of plaintiff on and near its said tracks in time to have checked or stopped said car before striking plaintiff, or by the exercise of ordinary care could have seen the perilous position in which she was situated in time to have done so. It was the duty of defendant's motorman on the car to be on the lookout, and to take all reasonable measures to avoid injuries to persons who might be upon the street; and if he might, by having his attention on the street in front of the car, have discovered in time to have stopped the car that the child was about to cross the track, and failed to discharge his duties in these respects, he was guilty of negligence. *Baird v. Railroad*, 146 Mo. 265, 48 S. W. 78; *Meekerv. Metropolitan Street Ry. Co.* (Mo. Sup.) 77 S. W. 58. So that upon either theory of the case—that is, whether under all the facts and circumstances in evidence the rate of speed of the train was improper or dangerous and the injury occasioned by reason thereof, or defendant's motorman by the exercise of ordinary care could have seen the perilous position in which plaintiff was situated in time to have avoided her injury—the questions were for the consideration of the jury.

Plaintiff's first instruction is erroneous in that there was no evidence that the failure to ring the bell or sound the gong, if such was the case, contributed to the injury. It submitted to the jury for determination the question as to whether or not Martin Heinzle was duly and regularly appointed next friend of the plaintiff, when that matter was a question of law, to be passed upon by the court. It is also

Conrad v. Elizabeth, etc., Ry. Co

faulty in that it enlarges upon the allegations in the petition, in saying "or to keep said car under control," when there is no such averment in the petition.

Plaintiff's second instructions is vicious, in that it told the jury that if the employees failed to give the usual signals, after discovering the danger the child was in, to warn her of the car's approach, they were guilty of negligence, when there was no evidence to warrant it.

Plaintiff's instruction No. 3 should have been refused, for the reason that the evidence does not show or tend to show that the failure of defendant's servants in charge of the train to sound the gong or ring the bell when approaching Fifth street, if such was the case, had any connection whatever with the accident.

Upon another trial plaintiff's instructions No. 4 should be restricted to the "motorman" who had control of the movement of the train.

We are unable to see any substantial objection to the fifth instruction given for plaintiff. It was authorized, we think, under the allegation in the petition that defendant's servants and agents in charge of said car negligently and wrongfully approached said crossing at a rapid and unusual rate of speed, in consequence of which plaintiff was run over and injured.

Upon another trial we may be permitted to suggest that the words "the loss of health" be omitted from plaintiff's sixth instruction.

Our conclusion is the judgment should be reversed, and the cause remanded, to be tried in accordance with views herein expressed. It is so ordered. All concur.

CONRAD *v.* ELIZABETH, P. & C. J. RY. CO.

(Court of Errors and Appeals of New Jersey, June 20, 1904.)

[58 Atl. Rep. 376.]

Collision between Street Car and Other Vehicle—Mutual Obligations.*

The rule with respect to the use by vehicle of a common highway on which a trolley line is operated requires that reasonable care should be exercised, by one about to cross such highway, not to drive in front of an approaching car, which, in spite of reasonable care in its operation, may strike him; and that the car must not be allowed to strike a vehicle so crossing its tracks if reasonable circumspection and control on the part of the motorman will suffice to prevent it.

Same—Contributory Negligence.

If, from the testimony in a case, the jury may legitimately find that when the plaintiff started to cross the trolley tracks laid in a public highway it was apparently safe for him to do so under the conditions within his observation, one of which was a trolley car

*See foot-note appended to *Hayden v. Fair Haven & W. R. Co.* (Conn.), 10 R. R. R. 32, 33 Am. & Eng. R. Cas., N. S., 32.

Conrad v. Elizabeth, etc., Ry. Co

sufficiently distant to be checked, or, if need be, stopped, before it should reach him, the question of the plaintiff's contributory negligence is for the jury.

Same—Negligence.

If, in such case, the jury do not find that the plaintiff was negligent in crossing the highway when he did, the question whether the collision could have been avoided by the exercise of reasonable care on the part of the motorman in the operation of his car is also one of fact for the jury when the testimony submitted to them will sustain the inference that the motorman did not have his car under proper control, in view of the conditions within his observation.

(Syllabus by the Court.)

Error to Circuit Court, Union County.

Action by Henry T. Conrad against the Elizabeth, Plainfield & Central Jersey Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John A. Bernhard and Chauncey H. Beasley, for plaintiff in error.

J. A. Kiernan, for defendant in error.

GARRISON, J. Error is assigned upon bills of exception to the judicial denial of two motions made on behalf of the defendant in the court below—one for a judgment of nonsuit, and the other for a direction of a verdict—the grounds of each motion being that there was no proof of the defendant's negligence, and that the contributory negligence of the plaintiff affirmatively appeared.

The testimony admitted at the trial was competent to prove that the plaintiff, at about 7:30 o'clock on the evening of the day in the early part of November, drove a mule team across a public highway on which the defendant had its trolley tracks; that before starting to cross he looked for cars, and saw one a block away that seemed to be standing there; that he had driven over the first set of tracks, and was nearly over the second, when the car struck the hub of his left hind wheel, and ran for a considerable distance before it was stopped. There was other testimony, from which it might be inferred that the car was going at a rate of speed that was excessive under the circumstances within the observation of the motorman, and also that the car was not under proper control; notably the testimony of the motorman himself, which tended to show within what space a car could normally be stopped, and the distance that this car ran after the collision with all power off and the brakes set. The inferences that might legitimately be drawn from this testimony, as circumstantially given, coupled with the rules of law which distinguish the relative rights and duties of persons using a common highway from those by which steam railroad crossings are safeguarded, made it obligatory upon the trial court to submit to the jury both the question of the negligence of the motorman as well as that of the plaintiff.

From the testimony of the plaintiff the jury might legit-

Eichorn v. New Orleans & C. R., L. & P. Co

imately have found that when he started to cross the highway it was apparently safe for him to do so under the conditions within his observation, one of which was a trolley car sufficiently distant to be checked, or, if need be, stopped, before it should reach him. *Electric Ry. v. Miller*, 59 J. N. Law, 423, 36 Atl. 885, 39 Atl. 645.

The question of the plaintiff's negligence, under these circumstances, was for the jury.

If the jury did not find that the plaintiff was negligent in crossing the highway when he did, then the question of the defendant's negligence depended upon whether the motorman could, by the exercise of reasonable care, have checked his car, or, if need be, have stopped it before striking the plaintiff's wagon. If he could, it was his duty to do so. *Consol. Traction Co. v. Glynn*, 59 N. J. Law, 432, 37 Atl. 66; *Zolpher v. Camden & S. R. Co.* (N. J. Err. & App.) 55 Atl. 249.

This also was, under the evidence, a jury question.

The rule of law pertinent to these issues is based upon the plainest dictates of good sense and common humanity. It is simply that in crossing a highway a person must exercise reasonable care not to drive in front of an approaching car, which, despite reasonable care in its operation, may strike him; and that a car using the public highway must not be allowed to strike a vehicle so crossing its tracks if reasonable circumspection and control on the part of the motorman will suffice to prevent it. In the absence of any exception to the charge of the court below, it must be assumed that the case was submitted under proper instructions.

There was no error in the denial of the defendant's motions.

The judgment of the circuit court is affirmed.

EICHORN v. NEW ORLEANS & C. R., LIGHT & POWER CO.

(Supreme Court of Louisiana, Feb. 29, 1904.)

[36 So. Rep. 335.]

Railroad Crossings—Unusual Dangers—Precautions Required.*

If a railroad company, in the management of its traffic, causes unusual peril to travelers, it shall meet such peril by corresponding precautions. So, where the crossing is especially dangerous on account of its locality or mode of construction, or because the view is restricted or the track is curved, it is the duty of the company to exercise such care and take such precautions as the dangerous nature of the crossing requires. If the city council fails to pass ordinances called for by existing conditions, the company should, of its own motion, make a regulation to that effect, and notify their employees; but the latter are held, without notice, to have had knowledge of the visible dangerous conditions, and bound, without specific directions, to take the steps necessary for the public safety.

Same—Same—Same.*

Where trainmen have reason to believe there are persons in exposed

*As to care required in running steam cars in streets to avoid collisions with other users of streets, see note appended to *Goodrich v.*

Eichorn v. New Orleans & C. R., L. & P. Co

positions on the tracks, as over unguarded crossings in populous districts in cities, or where the public are wont to cross with such frequency and numbers as to be known to them, they will be held to a knowledge of the probable consequences of not taking proper care and precautions, and their employees will be responsible for injuries received in consequence thereof, notwithstanding there was negligence on the part of the person injured, and no fault on the part of the servant after seeing the danger.

Same—Contributory Negligence—Width between Tracks.

The general public are not called upon to know or take in at a glance that the space between parallel tracks in a city is not wide enough to afford protection to persons standing on that space, or to know the length and width of the cars used upon the road. A person has the right to assume that the width is sufficient, and to assume that it was not likely that two cars would pass each other, moving, while he was in that position.

On Rehearing.**Death by Wrongful Act—Right of Action—Statutes.**

Under the provisions of Act No. 71, p. 94, of 1884, amending and re-enacting article 2315 of the Revised Civil Code of 1870, two causes of action arise when the deceased left a widow and minor children—one to recover the damages which the father might have recovered if he had survived the injury, and the other founded on his death. Before the adoption of Act No. 71, p. 94, of 1884, the first cause of action was joint, but that act provides that it shall survive in favor of the "minor children or widow, or either of them."

Same—Same.

Hence, when the widow sues alone, a judgment in her favor exhausts the first cause of action, leaving to the minors only a right of action to recover the pecuniary loss sustained by them by reason of the death of the father.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; John St. Paul, Judge.

Action by Amelia Eichorn against the New Orleans & Carrollton Railroad, Light & Power Company. Judgment for plaintiff. Defendant appeals. Modified.

Dart & Kernan, for appellant.

George Joseph Untereiner and Benjamin Rice Forman, for appellee.

NICHOLLS, C. J. The plaintiff, as widow of Ludwig Eichorn, seeks in this action to recover from the defendant the sum of \$50,000, with legal interest, because, as she alleged, through its negligence, unskillfulness, and want of

Burlington, C. R. & N. Ry. Co. (Iowa), 10 Am. & Eng. R. Cas., N. S., 719 (mutual rights of company and citizens); note, 13 Am. & Eng. R. Cas., N. S., 499 (care to be exercised by company at populous places); Florida Cent. & P. R. Co. v. Foxworth (Fla.), 13 Am. & Eng. R. Cas., N. S., 469 (backing train across street without looking is negligence); Louisville & N. R. Co. v. Cummins (Ky.), 21 Am. & Eng. R. Cas., N. S., 774 (care required of trainmen at street crossings); Holt v. Pennsylvania R. Co. (Pa.), 8 R. R. 804, 31 Am. & Eng. R. Cas., N. S., 804 (care required of trainmen and drivers of vehicles in using street); Carrow v. Barre R. Co. (Wash.), 4 R. R. 933, 27 Am. & Eng. R. Cas., N. S., 933 (running train backwards as negligence).

care in laying its tracks on Baronne near Canal street, and operating its cars at said place on the 29th of January, 1902, it killed her husband, who was lawfully upon the public streets at that place, and without fault or negligence on his part.

She alleged in her petition that the tracks were laid at the place for much narrower cars, and, since the tracks were laid, the said company had bought and operated, and did on the 29th of January, 1902, operate at that place, cars much too wide for the space between the tracks—a fact unknown to Ludwig Eichorn, and not noticeable by an ordinary observer, but which, in the interest of the public safety, and with its engineers and instruments of precision, operating electric cars through the populous streets of this city, it was bound to know and guard against, and a reasonable care for the lives of the people required it, when it adopted the wider cars, and made it the duty of the company, to increase the space between the tracks.

(2) It was negligent in the selection and employment of youths, too youthful and inexperienced, and careless motoneers in the operation of its cars, which caused the death of Ludwig Eichorn.

(3) On the day in question he was crossing Baronne street at the usual place, near Canal street, and his way was stopped by a car standing across the passage, and while he was standing in what appeared to be a perfectly safe place, waiting for the car which obstructed his passage to go forward, another car of said defendant company, coming in the opposite direction, carelessly and negligently, and without warning of its approach, and when the motoneer ought to have waited until the other car had passed, came on, and rolled and crushed the said Ludwig Eichorn between the said two cars, when he was not on the track of either, but between the two, where he had a right to be, and to suppose he was perfectly safe.

The motoneer ought herein to have been warned by the officers of the danger of rolling a car at that place alongside of one on the separate parallel track, which had not been done, or, done, he negligently disregarded the safety of Ludwig Eichorn.

The said company could have prevented the injury, and did not do so. Ludwig Eichorn was so crushed by the said two cars that he suffered great pain in body and mind for two days, and then died. Five thousand dollars is claimed for his own sufferings, and \$45,000 for petitioner's loss of his comfort and support. He was, previous to his negligent killing by defendant, in good health, and had a life expectancy of 40 years, and his earnings were about \$3,000 a year. In view of the premises, petitioner prayed that the said New Orleans & Carrollton Railroad, Light & Power Company be cited to appear and answer, and be condemned to pay peti-

Eichorn v. New Orleans & C. R., L. & P. Co

tioner \$50,000 damages, with 5 per cent. interest from judicial demand, and for costs, general relief, and trial by a jury.

Defendant excepted that plaintiff's petition was vague, general, and indefinite, and disclosed no just and legal cause of action, and the suit should be dismissed. The exceptions were overruled.

The defendant then answered, pleading first the general issue. It denied that it was in any way liable for the injuries alleged to have been received by the husband of plaintiff, and averred that, if plaintiff's said husband was injured as claimed in the petition, it was not through the fault and negligence of respondent, or any of its agents, servants, or employees, but, on the contrary, was entirely through the fault, negligence, and gross want of care of the plaintiff's said husband; but, in the event it should be shown there was a question of negligence, respondent pleaded that the said husband was guilty of contributory negligence.

Plaintiff, with leave of the court, filed a supplemental petition in which she alleged that she had been informed and believed, and so averred, that since the filing of her suit the New Orleans Railways Company, a corporation doing business in this city, had acquired all the property of the New Orleans & Carrollton Railroad, Light & Power Company, and had assumed all of its liabilities, among which was petitioner's right to damages.

That she reiterated and reaffirmed all the allegations of her original petition herein filed.

She prayed that the New Orleans Railways Company be cited; that petitioner have judgment against it in solido with the New Orleans & Carrollton Railroad, Light & Power Company, with 5 per cent. interest per annum from judicial demand, and costs, and for general relief.

The court ordered the New Orleans Railways Company to be made a party defendant and cited.

The case was tried before a jury, which returned a verdict for plaintiff in the sum of \$25,000, with legal interest from judicial demand.

Defendant unsuccessfully applied for a new trial.

The court rendered judgment upon the verdict and in favor of the plaintiff against the New Orleans & Carrollton Railroad, Light & Power Company for the sum of \$25,000, with legal interest from judicial demand, and defendant appealed.

In 110 La. 534, 34 South. 667, will be found reported the case of *Schwartz v. New Orleans & C. R. Co.*—an action sounding in damages against the defendant in that case for injuries received by the plaintiff by being caught and crushed between two cars which were being operated by the defendant company on Baronne street, in New Orleans, near its intersection with Canal; the cars moving in opposite directions on distinct tracks. The facts of the case are fully set out, and a diagram showing the situation of the railroad

Eichorn v. New Orleans & C. R., L. & P. Co

tracks at and near the spot where the injury was received will be found annexed to the opinion of the court. The injury to Ludwig Eichorn which resulted in his death, and which gave rise to the present litigation, was received by him at the same place, and under very similar circumstances. The defendant company operates electric cars from a point on Canal street near the Mississippi river to Baronne, and thence up Baronne street to the upper part of the city. The company has double tracks on the neutral ground on Canal street and also double tracks on Baronne street. The connection of the tracks upon these two streets is made by curved tracks crossing Canal street at Baronne. One of the company's tracks on Canal is on the upper or right-hand side of the neutral ground as one faces the Mississippi river, and the other on the lower side of the neutral ground. The cars conveying passengers from the upper part of the city pass down upon the right-hand track on Baronne street, cross Canal street on a sharp curve to the upper side of the neutral ground on Canal, and pass on to the end of the line, near the river. At that point they cross to the track on the lower side of the neutral ground, and pass towards the rear of the city upon that track, until they reach Baronne. They then cross Canal street upon a wide curve to the intersection of Baronne and Canal streets, and proceed to the upper part of the city on the track opposite to that on which they had gone down.

The curved tracks by which the tracks on Baronne street connect with those on Canal street begin upon the crossing at the intersection of these two streets, upon which pedestrians cross from one side of Baronne street to the other. Baronne at that point is one of the busiest streets in the city. Hundreds of persons, if not thousands, cross there each day, and the street there is frequently blocked by vehicles. The tracks on Baronne street, even when they are parallel to each other, are too close together to enable a person to stand safely upon the space between the two, and, should a person be standing at the point where the curves upon the crossing commence at the time when two moving cars pass each other there, he would meet with almost certain death, as, in passing, the ends of the moving cars swing towards each other, and block the way up upon the upper side.

The tracks, when they were laid, were, even with the cars then in use, traps, to all persons not having knowledge of the exact situation; and the danger had been made much greater for several years past than it was before, as wider and longer cars have been substituted for those formerly used.

A street railway company accepting a franchise to operate cars upon tracks so dangerously laid at points very menacing to human life was bound to know of the risks it was assuming, and the duties and burdens it was taking upon itself. It

Eichorn v. New Orleans & C. R., L. & P. Co

is no answer for it to say that it could not control the city officers and authorities in its placing of the tracks. There was no obligation on its part to engage in the business at all, and, if it thought proper so to do, in view of and in spite of the attendant responsibilities, it could not avoid the legal consequences of a failure on its part to meet the requirements resulting from the exact situation. Not only was the company itself held to a knowledge of the dangerous situation of affairs, but the conductors and the motormen upon the cars were also bound to know this. It required no notice to them from the officers of the company of this fact, for this matter was constantly and directly before their eyes. The danger of the situation in respect to this crossing had been additionally demonstrated and brought home to the company by the accident to Schwartz. In the Schwartz Case this court quoted approvingly from Elliott on Roads & Streets (2d Ed.) pp. 856, 791, to the following effect: "If a railroad company, in the management of its traffic, causes unusual peril to travelers, its should meet such peril by corresponding precautions. So, where the crossing is especially dangerous to travelers, on account of its locality or mode of construction, or because the track is curved or the view obstructed, it is the duty of the company to exercise such care and take such precautions as the dangerous nature of the crossing requires."

Proceeding, this court said: "The danger [in that case] might have been avoided, without material impairment of the sufficiency of the car service, by simply not permitting the cars to meet on the crossing, and it was incumbent upon the defendant to do so. See, in this connection, Summers v. Railroad, 34 La. Ann. 145; Id., 44 Am. Rep. 419. That there is danger to the public in permitting the cars to meet at this crossing, the present case and another one before the court but too sufficiently attest. Defendant should have known of this danger, and guarded against it. He who creates a danger upon or near a public highway must see to it that no harm results therefrom to the public." Wharton, Negligence, 839; Thompson, Negligence, vol. 1, p. 346.

Notwithstanding this positive announcement by the court as to what was legally required of railroad corporations for the protection of the public at this very crossing, no steps whatever seem to have been taken towards the performance of defendant's plain duty in the premises. No instructions were given to its subordinates on the subject, and they were left free to follow their own ideas as to what was proper or necessary to be done.

If the defendant company was of the opinion that its duties to the public went no further than compliance with positive existing statutes or ordinances, it was mistaken. In Lampkin v. McCormick, 105 La. 422, 29 South. 952, 83 Am. St. Rep. 245, we said: "It may be that these obligations were not

imposed by general ordinances or statutes, but there are certain obligations imposed upon railroad corporations independently of convention or ordinance or statute. There is a duty imposed upon every one, whether natural persons or artificial persons, to avoid, by proper care, doing injury to others through their fault." And in *Sundmaker v. Yazoo & Miss. Valley R. R.*, 106 La. 116, 30 South. 285, this court declared that, if the city council failed to pass an ordinance called for by existing conditions, "the company should have, of its own motion, made a regulation to that effect; that it was in fault in not having done so, and must abide the consequences."

It is error to suppose that trainmen operating cars have no duties to perform, other than those as to which they have received specific directions. They are required to do whatever the necessities of a particular situation or condition legally demands, whether they have received instructions or not; and, as said in *Downing v. Morgan's La. Railway Co.*, 104 La. 519, 29 South. 207, the precautions to be adopted and the steps to be taken in aid of safety increase as the danger of accident and injury increases, and their sufficiency is to be gauged by what is called for by the special circumstances of each case.

In *Ortolano v. Morgan's La. R. R. Co.*, 109 La. 911, 33 South. 917, this court said: "Where trainmen have reason to believe that there are persons in exposed positions on the track, as over unguarded crossings in populous districts in a city, or where the public are wont to cross on the track with such frequency and numbers as to be known to those in charge of the trains, they will be held to a knowledge of the probable consequences of maintaining great speed without warning, so as to impute to them reckless indifference in respect thereto, and render their employees responsible for injuries therefrom, notwithstanding there was negligence on the part of the injured, and no fault on the part of the servant after seeing the danger."

We now pass to the facts of the case, and premise by saying that, at the point at which he was standing when injured, Eichorn was neither a trespasser nor a licensee. He was in the public streets of the city, and had a legal right to be where he was. *Lampkin v. McCormick*. On the morning of the 29th of January, 1902, Eichorn started to cross from the wood side to the river side of Baronne street at its intersection with Canal street. He started across the street almost at the same moment that one Geoghehan did so, Eichorn being upon the latter's right. At that moment there was a car, which we will refer to as the "outgoing car," upon the river-side track of Baronne street. It was then either at rest, discharging its passengers, with its front immediately above the foot crossing of Baronne street, or it was just starting or had just started to move out onto Canal

Eichorn v. New Orleans & C. R., L. & P. Co

on its way to the river. At this same time a car of the same company, which will be referred to as the "incoming car," was crossing Canal street on its way up town through Baronne street. Geoghehan and Eichorn both passed in front of the latter car without injury. The incoming car did not stop in consequence of their crossing in front of it. According to the motorman's own account, he only checked up, and at once put the power on again. It is true that it was soon after this brought to a standstill, but only after Eichorn had received his injury. Geoghehan and Eichorn upon reaching the space intervening between the two tracks, found that they would be unable to cross over the second track, for the reason that the outgoing car had already started down the track, and was so close upon them as to have made it dangerous to pass in front of it. Both, therefore, stopped. In the meantime the incoming car, moving up, passed to the rear of the two men. After the two cars passed each other, the front end of the incoming car and the rear end of the outgoing car swung across the space between the two tracks, closing it up so closely that the only exit which could be made at that time from parties between the two cars was by moving rapidly towards Canal street. The space between the cars widened as the curves extended into Canal street. Geoghehan, being on the left of Eichorn, and the nearer to Canal street, occupied a position where the interval between the tracks was wider than was the space in which Eichorn found himself.

Believing the space between the tracks sufficiently wide for safety, Geoghehan remained standing where he was, and escaped injury. In his testimony, he says that he was not squeezed, but it was very close. Eichorn, being to his right, on a narrower space, was rolled along between the cars, and his ribs crushed in to such an extent that in two days he died.

We have before us a model representing the condition of things at the place where the accident occurred, corresponding to the diagram which is attached to the opinion of this court in the Schwartz Case. Very considerable testimony was adduced to show upon the model the precise spot at which Eichorn was standing when the cars passed him, but we do not consider the fixing of that precise spot, under the circumstances of this case, to be as important as defendant's counsel think it was, for Eichorn had the legal right to have been either at the point where the plaintiff claims he was, or at that point at which defendant seeks to place him; and, as matters shaped themselves, the injury was as certain to occur to him at one place as the other. The two cars had no more right to throw him between them in the space between the tracks by moving past each other at one point than at the other. *Downing v. Morgan's La. R. R. Co.*, 104 La. 522, 29 South. 207.

Eichorn v. New Orleans & C. R., L. & P. Co

The direct, immediate cause of the injury to plaintiff's husband was the fact of the two cars of the defendant company moving simultaneously—one before and the other behind him—while he was standing in the very narrow space between the two tracks. The cars unquestionably met and passed each other on the foot crossing. This could not have been done without culpable negligence. The outgoing car was brought to a standstill after Eichorn got between the two cars by the emergency signal given by its conductor, and the other car was brought to a halt by the action of its motorman himself. The latter says he saw Eichorn "pass" his dashboard, and soon after, hearing him moan, he looked out, and saw him at the side of his car, and between the two cars. Unquestionably Eichorn disappeared from opposite the dashboard of the incoming car, but this was not because he moved to the left, but because that car, moving forward, passed up to and beyond him. Not a witness testified that either Geoghehan or Eichorn, prior to the accident, shifted their respective positions between the tracks from what they had been originally.

The two cars could not have occupied the positions which they did, relatively to each other and to Eichorn, on the space between the two tracks at or near the foot crossing, without fault on the part of defendant's employees. That condition of affairs cannot be explained away. Having reached the conclusions we have as to there being fault on the part of the defendant company, we have to inquire whether there exists any fact which it can set up which would relieve it from liability therefor. Defendant urges contributory negligence on the part of Eichorn, but we have failed to find any act of his which could be chargeable with being negligent. That question was thoroughly discussed in the Schwartz Case, and the same reasons which absolved Schwartz from the charge of negligence absolve Eichorn. He was clearly not chargeable with negligence in passing into the open space between the two tracks before the incoming car, for he passed across in safety, and negligence, so far as that act is concerned, does not enter as a cause of injury at all as a factor in the consideration of the case. *De Mahy v. Morgan's L. R. R.*, 45 La. Ann. 1342, 14 South. 61; *Schwartz v. Railroad*, 110 La. 619, 34 South. 709. Being once upon the open space between the tracks, he could not have acted in any other manner than he did. He was perfectly passive, and the accident to him resulted by the two cars moving negligently, one in front of and the other behind him, so that he could not have possibly escaped. Geoghehan barred the way to the left, and the space to the right was closed.

As one of the general public, he was not called upon to know or to take in at a glance that the space between the two tracks was not wide enough to afford protection to a person standing upon it, or to know the length and the width of

Eichorn v. New Orleans & C. R., L. & P. Co

the cars used upon the road; and, if he had known that the position was dangerous, he had the right to assume that the company's employees did know, and one or other of the cars would stop before reaching him.

We now pass to the quantum of damages. Eichorn had five ribs broken and crushed into his lung. He died in two days. Defendant says that during that period he was insensible. If there be testimony to that effect, it has escaped us. His wife testified he groaned constantly and suffered greatly. He earned from \$200 to \$250 a month. He was 39 years of age and in good health, and his expectancy of life was about 28 years.

He left seven children, all minors. Plaintiff insists that the amount of the verdict was far too small an amount, and, by answer to the appeal, prays for an increase in the amount. The present suit is brought on behalf of the widow. Defendant's counsel inform us that a second suit, claiming damages for a like amount, has been brought on behalf of the children.

No objection or exception was made to this course. We think it proper to say we do not think the lawmakers intended that there should be distinct suits before different juries, but that all the issues involved should be presented and disposed of at one and the same time.

We think the judgment in favor of the plaintiff on the merits is correct, but that the amount of damages allowed is too large, and that it should be reduced to \$10,000.

For the reasons assigned, it is hereby ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount awarded to the plaintiff to \$10,000, and, as amended, it be affirmed; appellee to pay the costs of appeal.

On Application for Rehearing.

(April 11, 1904.)

LAND, J. 1. Our attention is called to the fact that the judgment appealed from allows interest from judicial demand, and that we have amended the judgment as to the amount, but not as to the date from which interest should run.

Interest should have been allowed only from date of judgment. See *Ortolano v. R. R. Co.*, 109 La. 902, 33 South. 914.

2. The next point raised in the application is that the allowance of damages is excessive, unless it be construed as covering also the damages sustained by the minors, who have since verdict instituted a suit for damages in their own behalf.

In *Clairain v. Telegraph Co.*, 40 La. Ann. 178, 3 South. 625, this court held that the claim of the widow and children of the deceased for damages was properly presented in a single suit.

In *Curley v. Railroad Co.*, 40 La. Ann. 810, 6 South. 103, this court, referring to Act No. 71, p. 94, of 1884, said: "This

act gives to either the minor or the widow the right to sue for the alleged injury to the husband and father. The widow sues for her interest in her own right, and for the interest of her minor child in her representative capacity."

Article 2294 of the Civil Code of 1825 was amended in 1855 so as to read as follows, viz.:

"Every act whatever of man, that causes damage to another, obliges him, by whose fault it happened, to repair it; the right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them, and in default of these, in favor of the surviving father and mother or either of them, for the space of one year from the death."

Article 2294, as thus amended and re-enacted, became article 2315 of the Revised Civil Code of 1870.

Under this article the action of the minor children and mother was joint, and was limited to the recovery of such damages as the deceased might have recovered, had he survived the injury. *Van Amburgh v. Railroad Co.*, 37 La. Ann. 650, 55 Am. Rep. 517.

Act No. 71, p. 94, of 1884, was passed for the purpose of enabling the survivors mentioned in article 2315 to recover damages sustained by the death of the parent or child or husband or wife, as the case may be. *Id.*

But in re-enacting the article the word "or" was substituted for "and" in the second clause of the first sentence, so as to make it read "minor children or widow" instead of "minor children and widow."

We do not know the reasons of this change, but its legal effect is to vest the right of action in either the minor children or widow. But this right of action is limited to damages recoverable before the passage of the act of 1884, which further provided as follows, viz.: "The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be."

As to damages caused by death, the widow and the minors have separate causes of action, but have been permitted by our jurisprudence to cumulate their demands in the same suit, because their right to recover is dependent on the same state of facts, and they have a joint interest in the recovery of such damages as were recoverable prior to the act of 1884. *Buswell on Personal Injuries* says: "And it is held, apparently with sound reason, that, when the death occurs, two causes of action may arise—one in favor of the decedent, under the statute providing for the survival of such actions; the other founded on his death, under the statute providing for such actions, and being for the benefit of the relations named in the statute." The damages are given for different purposes. *Id.* (2d Ed.) p. 25, § 21.

Hence the judgment rendered in this case will leave to the

Illinois Cent. R. Co. v. Prickett

minors no cause of action, except to recover the pecuniary loss sustained by them by reason of the death of the father.

We do not consider the amount of damages allowed by our decree excessive, but will amend our decree by allowing interest only from date of judgment. And it is so ordered, and, with this modification, the application for a rehearing is refused.

ILLINOIS CENT. R. CO. v. PRICKETT.

(Supreme Court of Illinois, June 23, 1904.)

[71 N. E. Rep. 435.]

Killing of Engineer and Fireman—Exercise of Due Care—Evidence—Reputation.*

Where the engineer and fireman were killed by an explosion of a locomotive boiler, and no other witnesses observed what the engineer did immediately before the explosion, evidence as to his general reputation as a careful and competent engineer and a sober man was admissible, in an action for his death, as showing the exercise of ordinary care.

Same—Defects in Boiler—Evidence.

In an action for death caused by a boiler explosion, nonexperts

*Admissibility of evidence of habits or reputation as bearing on question of negligence or contributory negligence, see *Chesapeake & O. Ry. Co. v. Riddle* (Ky.), 8 R. R. R. 77, 31 Am. & Eng. R. Cas., N. S., 77 (reputation for sobriety); *Louisville, etc., R. Co. v. McClish* (C. C. A.), 3 R. R. R. 942, 26 Am. & Eng. R. Cas., N. S., 942 (habits of deceased, in action for killing person on track); note, appended to *Harriman v. Pullman Palace Car Co.* (C. C. A.), 10 Am. & Eng. R. Cas., N. S., 277 (whether employee is habitually careful). See also, extensive note, appended to *Missouri, K. & T. Ry. Co. v. Johnson* (Tex.), 12 Am. & Eng. R. Cas., N. S., 824; *Dalton v. Chicago, R. I. & P. Ry. Co.* (Iowa), 21 Am. & Eng. R. Cas., N. S., 460 (habit of deceased of falling asleep in vehicle, in action for death at crossing); *Mackrall v. Omaha & St. L. R. Co.* (Iowa), 19 Am. & Eng. R. Cas., N. S., 59 (habitual performance of duty to give crossing signals); *Smith v. Boston & M. R. R.* (N. H.), 19 Am. & Eng. R. Cas., N. S., 320; *Davis v. Concord & M. R. R.* (N. H.), 19 Am. & Eng. R. Cas., N. S., 68 (habits of deceased as to carelessness at crossings); *Whitmore v. Rio Grande Western Ry. Co.* (Utah), 23 Am. & Eng. R. Cas., N. S., 742 (other killings of stock); foot-note appended to *Illinois Cent. R. Co. v. Watson's Adm'r* (Ky.), 10 R. R. R. 27, 33 Am. & Eng. R. Cas., N. S., 27; foot-note appended to *Mills v. Louisville & N. R. Co.* (Ky.), 9 R. R. R. 409, 32 Am. & Eng. R. Cas., N. S., 409 (admissibility of evidence of other fires set by defendant's locomotives).

As to the degree of care due from a railroad company to employees, see foot-note appended to *Scott v. Seaboard Air Line R. Co.* (S. Car.), 9 R. R. R. 148, 32 Am. & Eng. R. Cas., N. S., 148.

As to the degree of care due from railroad companies, as employers, in furnishing appliances, see foot-note appended to *Roche v. Denver & R. G. R. Co.* (Colo.), 8 R. R. R. 955, 31 Am. & Eng. R. Cas., N. S., 955, where all the preceding authorities in this series are collected; *Boyd v. Seaboard Air Line Ry. Co.* (S. Car.), 9 R. R. R. 123, 32 Am. & Eng. R. Cas., N. S., 123; *Choctaw, Okla. & G. R. Co. v. Tennessee* (U. S.), 10 R. R. R. 223, 33 Am. & Eng. R. Cas., N. S., 223.

Illinois Cent. R. Co. v. Prickett

may testify that the breaks and cracks in the broken stay bolts of the boiler had the appearance of being old or new breaks or cracks; such conclusions being stated with the facts on which they were based.

Same—Same—Same.

Where a declaration in an action for death by a boiler explosion charged that defendant negligently furnished an engine in unsafe condition, with a boiler composed of materials deficient in strength, evidence was admissible showing when the locomotive was built, that it had run 500,000 miles, and that previously it had collided with another engine.

Same—Inspection of Boilers—Evidence—Custom.

A railroad company, in an action for death by a boiler explosion, may prove the general custom of well-regulated and prudently managed railroad companies as to the time and manner of inspecting their engines and boilers.

Same—Same—Same—Same.

In an action for death by a boiler explosion, a witness cannot be questioned as to the usual time railroad companies inspected engines, as the injury must be limited to the custom of well-regulated and prudently managed companies.

Wrongful Death—Damages—Insurance Benefits.

A mortuary benefit accruing to the widow and next of kin as beneficiaries in an insurance policy presents no ground for an abatement of the pecuniary loss occasioned by the death of their intestate by wrongful act.

Evidence—Objections.

Where, in an action for death by a boiler explosion, a witness testifies on cross-examination as to the prevention of accidents from stay bolts, an objection that the evidence was not germane to the direct examination, and was not proper, because the declaration did not aver that the stay bolts were improperly constructed, is general, and only questions the materiality and pertinency of the evidence.

Cross-Examination.

Where a witness, in his direct examination, in an action for death by a boiler explosion, stated that there was no way to determine whether the stay bolts of an engine had become cracked, without taking the engine to pieces, it was proper for him to testify on cross-examination as to the prevention of accidents from stay bolts.

Question for Jury.

Where, in an action for death of an engineer by the explosion of a locomotive boiler, the evidence tends to show that the cause of the explosion was the company's negligence, and that the decedent exercised ordinary care, the cause is properly submitted to the jury.

Appeal—Review.

Objections to instructions not raised in the Appellate Court cannot be considered in the Supreme Court.

Same—Same.

Where a portion of a requested instruction is omitted in the printed abstract, the court's action in giving the instruction cannot be reviewed.

Instructions.

In an action for death, an instruction advising the jury as to the elements and measure of damages, if, under the evidence and instructions, they find defendant guilty, is not objectionable as authorizing the jury to predicate a finding on the instructions.

Same.

Where, in an action for death by a boiler explosion, the court instructs that the burden is on plaintiff to prove by a preponderance of the evidence not only what caused the injury, but that it resulted from defendant's negligence in some of the ways charged in the

Illinois Cent. R. Co. v. Prickett

declaration, a requested instruction that plaintiff must prove what was the cause of the explosion, and that it was caused by defendant's negligence, being a substantial repetition, is properly refused.

Death by Boiler Explosion—Liability.

In an action for death by a boiler explosion, an instruction that the defendant was not liable as an insurer against the dangers attending the operation of locomotive engines was properly modified to read against dangers which were ordinarily incident to the service.

Same—Presumptions.

Where, in an action for death by a boiler explosion, the instructions were such that the jury could not fail to understand that they were to indulge in no presumptions as to the cause of the explosion, a modification of a requested instruction so as to omit a charge that there was no presumption that the explosion was caused by defects in the boiler, rather than from the negligent acts of the engineer, was not prejudicial.

Same—Assumption of Risks.

In an action for death by a boiler explosion, a requested instruction may be properly modified by advising the jury that the damages and risks assumed by deceased were such as were ordinarily incident to his employment.

Same—Same—Instructions.

The modification of a requested instruction by striking out a clause stating that the deceased assumed the ordinary risks of the service is not prejudicial, where it was fully covered by other instructions.

Appeal from Appellate Court, Fourth District.

Action by Jennie Prickett against the Illinois Central Railroad Company. From a judgment of the Appellate Court (109 Ill. App. 468) affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. W. Bar (J. M. Dickinson, of counsel), for appellant.

John J. Bundy (F. F. Noleman and W. F. Bundy, of counsel), for appellee.

BOGGS, J. A judgment in the sum of \$4,000 in favor of the appellee administratrix, entered in the circuit court of Marion county against the appellant company, was affirmed by the Appellate Court for the Fourth District on appeal, and this judgment is before us for review by the further appeal of the appellant company.

Thomas J. Prickett, appellee's intestate, was a locomotive engineer in the employ of the appellant company. On the morning of the 17th day of May, 1900, he left Centralia, going south, on locomotive engine No. 915, which was drawing a passenger train. When approaching the station at Du Bois, about 20 miles south of Centralia, with slackening speed preparatory to stopping at such station, the boiler of the locomotive engine suddenly exploded with great violence, causing the death of the engineer, Prickett, and of the fireman of the locomotive, and injuring a section hand who was standing by the side of the track.

In proper order, the alleged errors of the court in its rulings as to the admission and exclusion of evidence present themselves for consideration.

The court allowed testimony to be produced to show the deceased had the reputation of a careful and competent engineer and of a sober man. Whether the explosion was occasioned by any lack of ordinary care on the part of the deceased was at issue. It was incumbent on the plaintiff to maintain the negative of that contention. That the decedent exercised ordinary care was susceptible of circumstantial proof; that is, it might be inferred from facts and circumstances appearing in the proof. *Chicago, Burlington & Quincy Railroad Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708; *Chicago & Eastern Illinois Railroad Co. v. Beaver*, 199 Ill. 34, 65 N. E. 144.

No one other than the fireman was in the cab of the engine, or so situated as to be able to see the acts and conduct of the deceased engineer. The fireman was also killed by the explosion. The exploding engine was seen by other witnesses, but they could not see what the deceased did at the time when and immediately before the explosion occurred. Such being the fact, we think the court properly regarded the evidence as to the general reputation of the deceased as a careful and competent engineer and a sober man to be admissible as testimony tending to establish that he exercised ordinary care on the occasion under investigation. *Illinois Central Railroad Co. v. Nowicki*, 148 Ill. 29, 35 N. E. 358; *Chicago, Burlington & Quincy Railroad Co. v. Gunderson*, *supra*.

The court did not err in permitting nonexpert witnesses to testify that the breaks and cracks in the broken stay bolts of the boiler of the exploded engine had the appearance of being old or new breaks or cracks. Whether a brake or crack in a stay bolt was old or new was indicated by the appearance of the broken or cracked portions of the bolts. This could not be produced so palpably to the jurors as it was observed by the witnesses, in any other manner than by stating the appearance of such broken or cracked portions of the bolts, and denominating the appearance as old or new. Such conclusions, stated in connection with the facts on which they were based, so far as such facts could be reproduced in words, were competent. *West Chicago Street Railway Co. v. Fishman*, 169 Ill. 196, 48 N. E. 447; 12 Am. & Eng. Ency. of Law (2d Ed.) 488, 489.

Nor was it error to permit the introduction of proof to show when the locomotive was built, or that it had during its years of service run over half a million miles, or that in 1896 it collided with another engine. This evidence tended to aid the jury in determining the cause of the explosion, and in determining whether the appellant company exercised the requisite degree of care and vigilance in the matter of inspecting and repairing the locomotive engine. The declaration charged that the appellant company negligently furnished to the decedent, to be operated by him, an engine which "was in an unsafe condition and repair, and the boiler

of which was composed of materials that were deficient in strength and not capable of standing the strain," etc., and this testimony tended to support this allegation.

It was competent for the appellant company to prove the general custom of well-regulated and prudently managed railroad companies with reference to the time and manner of making inspections of their engines and boilers. The objection was therefore properly sustained to the question propounded by appellant's counsel, viz.: "What was the usual time of railroad companies for inspecting engines?" The inquiry should have been limited to the custom of well-regulated and prudently managed companies. Aside from this, the witness to whom the question was sought to be propounded, in response to other interrogatories, was permitted to testify as to the custom adopted by the appellant company and two other railroad companies,—presumably all the companies as to the customs whereof he had knowledge, as he was not again restricted in any wise by court or counsel.

It was immaterial whether the widow and next of kin of the deceased engineer had been paid or were entitled to receive any sum of money as beneficiaries in a policy of insurance on the life of the husband and father. Any such mortuary benefit would accrue from a collateral source, wholly independent of the appellant company, and would present no ground for an abatement of the pecuniary loss occasioned by the death of the appellee's intestate to his widow and next of kin. *Pittsburg, Cincinnati & St. Louis Railway v. Thompson*, 56 Ill. 138; 1 *Sutherland on Damages*, § 158.

During the cross-examination of W. H. Rosing, assistant superintendent of machinery of the appellant company, witness was, over the objection of the appellant company, permitted to state: "The only sure preventive of accidents from stay bolts is to have hollow stay bolts, or solid ones drilled from the outside, to cause leakage when fracture takes place." It is argued this ruling was error, for two reasons: First, because, it is alleged, it was not germane to anything testified to by the witness in his examination in chief; and, second, the inquiry was not proper, because, as it is alleged, there was no averment in the declaration that the stay bolts had been improperly constructed. A sufficient answer to each of these grounds of complaint is that the objection was general, and hence only questioned the materiality and pertinency of the evidence. The objection that evidence is variant from the pleading, or that the inquiry on cross-examination is not within the limits of the examination in chief, must specifically point out the particular ground of objection. *St. Clair County Benevolent Society v. Fietsam*, 97 Ill. 474; *City of Joliet v. Johnson*, 177 Ill. 178, 52 N. E. 498; *Wrisley Co. v. Burke*, 203 Ill. 250, 67 N. E. 818. Moreover, we think the question was proper cross-examination of the witness. In his examination in chief he had stated that

there was no way of determining whether the stay bolts of an engine had become cracked, without taking the engine to pieces. The matter brought out on cross-examination tended to show that if stay bolts that were hollow or solid ones with holes drilled in them, were used, any crack or break in such bolts would admit the water and steam into the hollow or drilled hole, and the consequent leakage would disclose the injury to the stay bolt. The means or method of discovering that the stay bolts of the boiler had been cracked or broken was important to be known, as bearing upon the question of the exercise of reasonable care on the part of the appellant company, and also on the part of the engineer.

It was not error to overrule the motion presented by the appellant company for an instruction directing a peremptory verdict in its behalf. The grounds of the motion were that the evidence failed to show the explosion was occasioned by any negligence or omission of duty on the part of the appellant company, and that the evidence left the cause of the explosion unknown, and only a matter of conjecture or surmise. The case of Illinois Central Railroad Co. v. Behrens, 208 Ill. 20, 69 N. E. 796, was an action on the case by the appellee in that case to recover damages for injuries inflicted on his person by the same explosion. Behrens was the section hand who, as hereinbefore mentioned, was injured by the explosion. In this case the evidence disclosed the same material facts as were proven in that case, and also other pertinent facts not appearing in that record. In disposing of the question presented in that case—whether the evidence warranted the submission of the case to the jury—we set out and discussed the proofs in detail and at considerable length, and found that it fairly tended to charge the appellant company with such negligence and omission of duty as to make it a question of fact for the decision of the jury. The repetition of that discussion in this opinion would greatly lengthen the opinion, and is wholly unnecessary. The evidence in this case tended to show that the cause of the explosion was the negligence of the company, and that the decedent exercised ordinary care and skill in the management and operation of the engine. The case was properly submitted to the jury.

The objections desired to be presented in this court to instruction No. 1 given at the request of the appellee were not raised in the Appellate Court, and cannot be considered here. It appears that a portion of this instruction was inadvertently omitted in the printed abstract in the Appellate Court, and that the criticism advanced in that court was based upon the absence of the omitted phrase; counsel for the appellant company believing the instruction to be correctly printed. The criticisms sought to be raised in this court are said to be directed against the instruction as given. Counsel for appellee say the error which crept into the abstract of the instruc-

tion in the Appellate Court has not been corrected in the printed abstract filed by the appellant company in this court, and substantiate this assertion by filing an additional abstract showing the instruction as given. The unintentional error in the abstract in the Appellate Court has been inadvertently repeated in the abstract printed for this court. The action of the court in giving this instruction cannot be regarded as before us for review.

Instruction No. 2 given at the request of the appellee advised the jury as to the elements and proper measure of damages, if, to quote from the introductory phrase thereof, "under the evidence in this case and the instructions of the court, you find the defendant guilty." It is insisted the jury were by the introductory phrase authorized to "predicate a finding upon and from the instructions," and that the instruction is so framed in other respects as to authorize the jury to consider the anguish and bereavement of the widow and next of kin as an element of damages. It was the duty of the jury, in deliberating as to their verdict, to consider the evidence, and the law as given to them in the instructions, and the opening phrase of the instruction is but a recognition of that duty. We do not think the instruction could have been misunderstood by the jury to authorize the allowance of damages for any other than the pecuniary loss resulting from the death of the appellee's intestate.

It was not error to refuse to give appellant's instruction No. 12. It read as follows: "The jury are further instructed that, before the plaintiff can recover in this case, she must prove what was the cause of the explosion that killed her husband, and that the said explosion was caused by the negligence of the defendant; and, unless she proves both of said propositions by a preponderance of the evidence, you should find the defendant not guilty." We think this instruction, so far as it states the correct principle, is but a repetition of what was distinctly and more properly said to the jury in appellant's instructions Nos. 1, 6, 9, and 10. Instruction 1 was as follows: "The court further instructs the jury that the burden rests on the plaintiff to prove by a preponderance of the evidence in this case not only what caused the injury to the plaintiff's intestate, but that the injury to the plaintiff's intestate resulted from the negligence of the defendant in some one of the ways as charged in the plaintiff's declaration; and, unless the plaintiff has proved both of the above-mentioned propositions by a preponderance of all the evidence in this case, you should find the issues for the defendant." Instruction No. 6 asked and given for appellant was as follows: "The jury are further instructed that if the evidence in this case fails to disclose what was the cause of the explosion of the boiler of the locomotive, which explosion caused the death of Thomas J. Prickett, and if, from a careful consideration of all the evidence in this case, the cause of

such explosion is unknown, and if the plaintiff fails to prove by a preponderance of the evidence that the defendant was negligent as is charged in the plaintiff's declaration, then the plaintiff cannot recover in this case, and you should find the issues for the defendant." Instruction No. 9 distinctly charged the jury that the burden of proof was upon the appellee to show that the explosion occurred by reason of the unsafe condition and weakness of the boiler of the engine, and that the appellant company was guilty of negligence in failing to discover and remedy the defects and weaknesses therein. And instruction No. 10 given at the request of the appellant company told the jury there could be no recovery if the explosion resulted from some unknown cause.

Instructions Nos. 5, 7, 8, and 10 asked by the appellant company were modified by the court. Instruction No. 5, as asked, advised the jury that the appellant company was not to be held liable as an insurer against the dangers which attend the operation of locomotive engines, and it was so modified as to instruct that the appellant company was not liable as insurer against the dangers which "were ordinarily incident to the service," leaving it to be inferred, as counsel contend, that the company would be liable as insurer for other dangers than such as were ordinary and incident to the employment; and No. 7 was so modified as to omit the charge contained in it, as written, that there was no presumption that the explosion was caused by defects in the boiler, rather than from the negligent acts of the engineer. The jury were repeatedly and distinctly told in other instructions given at the request of the appellant company, as is hereinbefore shown, that it was incumbent on the plaintiff to prove by a preponderance of the evidence the cause of the death of appellee's intestate, and to disclose by proof what was the cause of the explosion of the boiler of the locomotive, and that if, after a careful consideration of all of the evidence, the cause of the explosion was unknown, or the alleged negligence of the appellant company not shown, there could be no recovery. Under these instructions, the jury could not fail to understand that no presumptions as to the cause of the explosion could be indulged in, and that no liability as insurer could by any possibility attach to the company. Therefore the modifications could not have prejudiced the cause of the appellant company.

The court so modified instruction No. 8 as to advise the jury that the dangers and risks assumed by the deceased were such "as were ordinarily incident to his employment," and modified instruction No. 10 by striking therefrom a phrase stating that the deceased assumed such ordinary risks of the service. The phrase was properly added to instruction No. 8, though it was unnecessary; being but a repetition of the same doctrine announced in the opening clause of the same instruction as framed by counsel for the appellant company.

Cleveland, etc., Ry. Co. *v.* Shanower

The rule that the appellee's intestate assumed the ordinary risks incident to his employment was fully and clearly stated to the jury, and no possible injury to the appellant's cause could have resulted from the modification of instruction No. 10.

We find no error of reversible character in the record, and the judgment must be, and is, affirmed. Judgment affirmed.

CLEVELAND, L. & W. RY. CO. *v.* SHANOWER.

(Supreme Court of Ohio, April 26, 1904.)

[71 N. E. Rep. 279.]

Fellow Servants—Engineer and Brakeman—Same Department.

An engineer and a brakeman, the latter not being under the actual direction and control of the former, being upon the same train of cars, and engaged in the common purpose and employment of operating the same train of cars, are in the same branch or department, and not in separate branches or departments, within the meaning of section 3365-22, Bates' Ann. St. (87 Ohio Laws, p. 149), and they are fellow servants.

Same—"Superior Officer and Fellow Servant" Defined—Effect of Accidental Parting of Train.

The conductor of such train, being in control of the same and the other employees thereon, in the absence of rules or proof of a custom or express authority to the contrary, is not deposed from such control by the accidental parting of the train en route, nor is the engineer thereby made the superior in direction and control of a brakeman who happens to be with him on a section of such divided train.

(Syllabus by the Court.)

Error to Circuit Court, Tuscarawas County.

Action by one Shanower against the Cleveland, Lorain & Wheeling Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

Plaintiff, by his petition, after certain formal allegations, alleged that on the 12th day of December, 1899, he was directed by the defendant (plaintiff in error here) to act as brakeman on one of its freight trains, which train consisted of about 32 cars, a locomotive engine, and caboose; that on said date, while the train was in motion and running northward on said railroad, a short distance north of Flushing, the train of cars parted about 22 cars from the locomotive engine, leaving about 10 cars and the caboose following the engine and 22 cars; that the engineer, with full knowledge that the train had parted, and that the said ten cars and caboose were following, carelessly and negligently permitted the said 10 cars and caboose to overtake and collide with the 22 cars and the locomotive engine, wrecking the said cars, and thereby injuring the plaintiff to such an extent that his left leg had to be, and was, amputated; that the plaintiff was in the exercise of ordinary care, and without fault or negligence on his

Cleveland, etc., Ry. Co. v. Shanower

part, and that the engineer was employed by the defendant, and actually had power and authority, as such employee, to direct and control the fireman employed by the defendant, and working upon said locomotive engine, attached to and hauling said train; and that the plaintiff, as such employee, had no authority to direct and control any employee or person in the service of the defendant. This petition was demurred to for the reason that it does not state facts sufficient to constitute a cause of action in favor of the plaintiff against the defendant. The demurrer was overruled, and, after answer and reply, trial was had in the court of common pleas; and at the close of the plaintiff's testimony, as well as at the close of all the testimony, the defendant requested the court to instruct the jury to return a verdict in favor of the defendant, which was refused, and the court charged the jury, among other things, as follows: "If you find by a preponderance of the evidence that the engineman actually had power or authority to direct or control the fireman, and that the plaintiff, a brakeman, had no power or authority to direct or control any employee in the branch or department in which he was employed, and I charge you that the engineman and the plaintiff were not fellow servants." The court of common pleas overruled the motion for a new trial, and, on petition in error in the circuit court, the judgment was affirmed. Defendant below prosecutes error to reverse both of the judgments below.

J. M. Lessick and Healea & Healea, for plaintiff in error.

Robert T. Scott and Bowers & Buchanan, for defendant in error.

DAVIS, J. (after stating the facts). This case is not controlled by the decision in *Railway Co. v. Margrat*, 51 Ohio St. 130, 37 N. E. 11. The facts of that case were held to justify the application of the statutory rule provided in the last clause of section 3365-22, Bates' Ann. St. 1892. Inasmuch as the engineer and the injured brakeman were engaged in distinctly separate enterprises—that is, the operation of separate trains—it was held that the engineer was a person "having charge or control of employees in any separate branch or department," and therefore the superior, and not the fellow servant, of the brakeman on another train, who had "no power to direct or control in the branch or department" in which he was employed. There may be reasons for doubting the soundness of that interpretation of the words "separate branch or department," but that question does not necessarily arise here.

The statute is in derogation of the common law, and therefore it cannot be enlarged beyond its terms. It declares that it is intended to add to the liability already recognized by law. It does this in two particulars: First, it makes obligatory upon the courts of this state the superior servant

Cleveland, etc., Ry. Co. v. Shanower

rule, which was first announced in this court in *Little Miami Railroad Co. v. Stevens*, 20 Ohio St. 415, and which was afterwards approved and followed in a number of other cases in this and other states, although it has been repudiated in many others; second, it creates, by force of the statute, a relation of superior and subordinate where none exists in fact, and brings it within the operation of the rule mentioned. The contention in this case is to bring the engineer and brakeman within the second particular, for it does not seem to be seriously contended that the brakeman was actually under the direction or control of the engineer. There is in evidence a rule of the railway company which contains this sentence: "When there is no conductor, or he is disabled, the engineman will have charge of the train, and will be governed by the rules prescribed for conductors." But there was a conductor on this train, and he was not disabled. Shall we assume that the mere breaking of a link or a coupling pin dethroned him, and delegated from the master to the engineer authority to control the brakeman? The rules which are in evidence disclose no such provision, and we discover no foundation in fact or in reason for making such an assumption. Upon cogent reasoning, this court held in *Railway Co. v. Ranney*, 37 Ohio St. 665, that the relation of superior and subordinate, as between an engineer and a brakeman, is not created by a rule which requires the engineer to give certain signals, and which also requires brakeman to work the brakes in response to the signals. And much less could such a relation be implied from, or created by, the brakeman signaling to the engineer the information that the train had parted, and by the answering signal of the engineer.

It is conceded that the fireman is subordinate to the engineer, but, in order that this case may be controlled by the last clause of section 3365-22, Bates' Ann. St., it is necessary that the engineer and the brakeman should be in different branches or departments of service. Whatever may be the exact definition of the words "branch or department," as used in the statute, it seems clear to us that the engineer and the brakeman were associated in a common employment and in the same branch or department, viz., that of operating the same train of cars. It does not appear that, as between them, there was any relation of superior and subordinate, either in fact or in law. Therefore if there was negligence on the part of the engineer which produced the injury complained of, it was the negligence of a fellow servant. It follows that the plaintiff has neither alleged nor proven a cause of action against the defendant.

It is insisted by counsel that this conclusion involves an injustice to somebody. For example, if we may suppose that the same act of negligence by the engineer which caused the injury to the plaintiff also caused an injury to another

Nelson v. Georgia, C. & N. Ry

brakeman on another train, yet the latter may recover, under *Railway Co. v. Margrat*, while the former may not. This is true, and, assuming that *Railway Co. v. Margrat* correctly construes the statute, the result is attributable to the statute itself. While attempting to modify the common law, it has not entirely abrogated it.

The court of common pleas erred in refusing to direct a verdict for the defendant below, and also erred in the charge. The judgment of the circuit court, affirming that of the court of common pleas, and the judgment of the court of common pleas, are both reversed, and judgment rendered for plaintiff in error.

SHAUCK, PRICE, CREW, and SUMMERS, JJ., concur.

NELSON v. GEORGIA, C. & N. RY.

(Supreme Court of South Carolina, April 19, 1904.)

[47 S. E. Rep. 722.]

Injury to Passenger—Res Gestæ.*

In an action to recover for injuries to a passenger, declarations of the conductor immediately after the accident were not part of the *res gestæ*.

Contributory Negligence—Instruction.

An instruction that the contribution to the injury which will defeat recovery is not a vague and remote contribution, but must have some bearing upon the act that was charged to have caused the injury, and must be a contribution to the particular act alleged to have caused the injury, and a direct and proximate contribution to that act, is sufficient.

Appeal from Common Pleas Circuit Court of Laurens County; Buchanan, Judge.

Action by Jas. F. Nelson against the Georgia, Carolina & Northern Railway. From a judgment for defendant, plaintiff appeals. Affirmed.

W. R. Richey and F. P. McGowan, for appellant.

J. J. Glenn and N. B. Dial, for respondent.

JONES, J. This action was brought to recover damages for personal injuries alleged to have been sustained by plaintiff through the negligence of the defendant, and resulted in a verdict and judgment for the defendant. Plaintiff's appeal involves two questions:

*Declarations of railroad employees as *res gestæ*, see foot-note appended to *Boone v. Oakland Transit Co.* (Cal.), 9 R. R. R. 601, 32 Am. & Eng. R. Cas., N. S., 601, where all the preceding authorities in this series are collected or referred to; *Briggs v. East Broad Top R. & C. Co.* (Pa.), 10 R. R. R. 316, 33 Am. & Eng. R. Cas., N. S., 316 (in action for injury to employee from broken rail, declarations of division foreman, made half an hour after the accident, were inadmissible as *res gestæ*).

Nelson v. Georgia, C. & N. Ry

1. Whether the court erred in excluding the declarations of F. H. Harold, the conductor, made after the collision in which plaintiff was injured; it being claimed that such declarations were admissible as part of the *res gestæ*, and as the statement of the representative of the defendant company within the scope of his agency.

In order to show precisely how the question arose, and the exact ruling of the circuit court, we quote from the "case" as follows: "Q. Was the conductor there? A. Yes, sir; he came down there and asked me was anybody hurt. The mail agent was knocked down, and I told him I had a lick over the head and was mashed in the stomach, but I did not know that it amounted to very much. It hurt me all the evening. Q. What were these cars shoved with? What was attached to them? A. The engine. Q. Was the engine attached to them when they struck the mail car? A. I declare, I do not know. All I know is what the conductor said. Mr. Glenn: We object to that. Mr. Richey: I think that he can tell what the conductor said. That is a part of the *res gestæ*. Mr. Glenn: I understand you to say that the conductor told you afterwards? A. I was down there, and he came there right after the accident. Mr. Richey: The conductor, may it please your honor, was there representing the master, and it was just the same as the railroad company itself speaking through the conductor. What he said there, I think, is perfectly competent to come in. Mr. Glenn: In the first place, your honor, it depends entirely upon what they were talking about. He certainly would not have the right to bind the company for matters that did not come within his business. He is not the general agent of the company. In fact, I do not understand that he has proven yet the extent of his authority, or anything of the kind. Mr. Richey: Who was the conductor in charge of the train? A. It was his first trip. He was down there the first time I ever seen him. Harold. I don't know for certain that was his name. Q. You have been connected with the railroad some time? A. Yes, sir. Q. What is the duty of the conductor? A. Running the train. Q. Who has supervision over the hands and engineer? A. The conductor. Q. Now, what was it the conductor said when he came down there to the mail car after the accident? Mr. Glenn: We object. The Court: I do not know what the answer will be. Did the conductor speak to you in reference to the accident? A. Yes, sir; he did. Mr. Richey: We can now ask him what he said. The Court: It is owing to what he said. If he was the master, and gave orders, he can state what order he gave him, but he cannot recite any words as to how it happened, in his opinion. Mr. Richey: I did not ask him how it happened. The Court: You know what his answer is going to be. I don't. This is your witness, and you are supposed to know what you are going to prove by

Nelson v. Georgia, C. & N. Ry

him. Mr. Richey: What did the conductor say in reference to that accident? Mr. Glenn: We object to that. The Court: The objection is sustained, so far as the court is now advised by the evidence now in."

With respect to the question whether the declaration was admissible as *res gestæ*, it will be noticed that the declaration was made after the collision, although doubtless a very short time after. This subject has been fully discussed in the recent case of *State v. McDaniel*, 47 S. E. 384, and reference may be had to that case for the rule governing the admissibility of declarations not strictly concurrent with the litigated transaction. Under the rule there stated, we do not think the circuit court committed reversible error. The case of *Crawford v. Railway Co.*, 56 S. C. 144, 84 S. E. 80, was quite different from this, for in that case the question was whether cattle had been negligently injured in transportation, and the declaration, "He would kill those d—n cattle before he got to Charlotte," was made by the person intrusted with the duty of running the train which carried the cattle while the train was being loaded with the cattle. With respect to the question whether the declaration was admissible because made by defendant's agent within the scope of his agency—on this point the court was careful to advise plaintiff's counsel that the witness could give the conductor's declarations as to orders by him, but that declarations of the conductor as to how the accident happened, in the opinion of the conductor, were not admissible. The conductor was not shown to have been operating the cars which brought about the collision, except through orders, and it is clear that the hearsay opinion of the conductor as to how the collision occurred was inadmissible. Even after the suggestion of the court, counsel failed to show the court that the proposed declarations were within the scope of the conductor's agency. The ruling was not erroneous.

2. The second question relates to the charges as to contributory negligence, the exception being as follows: "Because his honor erred in charging defendant's fourth request, which was as follows: '(4) Even if the defendant was guilty of negligence, and the plaintiff was injured thereby, yet, if the plaintiff by his own negligence contributed to his injuries, he cannot recover. The plaintiff must be free from fault himself.' The error being the omission from the proposition of the requisite that contributory negligence must be a direct and proximate cause to the injury, and without which the injury would not have happened." A reference to the "case" shows that the court did not charge the fourth request unqualifiedly, for in response to the request the court said: "I have already charged you that it must be a direct contribution. It must be a contribution to the particular act that caused the injury—must be that particular transaction charged in the com-

Hailey v. Texas & P. Ry. Co

plaint." The charge was full and clear on this point, as the following language of the court shows: "Now, the law says with reference to contributory negligence, notwithstanding the fact somebody else was guilty of negligence, yet if you contributed to it; but it is not a vague and remote contribution that robs one of his rights to recover, because in contributory negligence the contribution must be direct and proximate, and must have some bearing upon the act that was charged caused the injury, and it must be in that particular respect—must be a contribution to the particular act alleged to have caused the injury, not about something else, not in relation to some other transaction, but must be a direct and proximate contribution to that particular act of negligence done by a person who was charged to have been the author of the wrong." The exception is therefore without foundation.

The judgment of the circuit court is affirmed.

HAILEY v. TEXAS & P. RY. CO.

(Supreme Court of Louisiana, June 20, 1904.)

[37 So. Rep. 131.]

Injury to Brakeman—Assumption of Risks—Bridges—Absence of Tell-tales.*

The brakeman assumed ordinary risks, not risks arising from defendant's failure to erect "telltales," or "warning signals," at a distance of 150 feet from the approaches of an overhead bridge, in accordance with requirement of Act No. 39, p. 51, of 1882.

Duty to Warn.

The duty devolves upon the employer to unequivocally warn the servant.

Contributory Negligence.

It is not shown that the employee failed to exercise his senses, and that, knowing of the danger, he stood erect and met with the accident which caused his death.

Same—Failure to Warn.

He ducked his head, not in time to avoid the fatal blow. He was entitled to the statutory warning.

Injury to Brakeman—Assumption of Risks—Overhead Bridge.

The cars are not all of the same height. The ordinary car could pass the bridge overhead without the necessity of a stoop by the brakeman. The furniture car on which plaintiff was riding is several feet higher than the ordinary car. The testimony does not show that he had before passed the overhead bridge on a furniture car. The bridge was not so low that the brakeman had to stoop every time he passed.

Same—Same—Same.

In view of the number of low cars, as compared to the highest, it will not be inferred that he had such knowledge as relieves the defendant from liability.

*See foot-note appended to *Gay's Adm'r v. Southern Ry. Co. Va.*, 8 R. R. R. 537, 31 Am. & Eng. R. Cas., N. S., 537.

Hailey v. Texas & P. Ry. Co

Same—Same—Same.

The accident would not have occurred if the employee had been on an ordinary freight car, and nothing shows that he knew that it was sometimes necessary to stoop because the furniture cars are higher.

Same—Same—Same.

It is not certain, by any means, that persons working on a train and passing objects, such as an overhead bridge, in rapid motion, with attention fixed on their work, should be charged with knowledge, under the circumstances of the case, which relieved the employer, although under obligation to provide a warning.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo;
Thomas Fletcher Bell, Judge.

Action by Annie Hailey against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Modified.

Wise, Randolph & Rendall (Howe, Spencer & Cocke, of counsel), for appellant.

Scott & Jones and Hall & Jack, for appellee.

BREAUX, C. J. Plaintiff instituted this suit against the defendant, in her own right to recover the sum of \$7,000, and as natural tutrix to recover the further sum of \$8,000, with legal interest. The jury returned a verdict for \$10,500. One of the jurors did not concur in the verdict.

The defendant prosecutes this appeal.

The facts of the case are that the late husband of plaintiff, J. M. Hailey, aged 42 years, was a switchman of the defendant company at \$60 per month.

He applied in writing for the employment, and in the paper he signed, in answer to questions, he stated that he understood that it is necessary, in operating, for the company to have overhead and turn bridges at certain points on the line, and that he was aware of his exposures to injuries by being knocked off the side or stop of the cars, unless he used care to avoid injury, and he agreed to acquaint himself with overhead and turn bridges. He further stated that he agreed not to look to the company, but to his co-employees, for information of any kind regarding danger growing out of the use of machinery and appliances necessary to the proper performance of his duties.

He became an employee of the defendant company on the 24th day of August. His service terminated on the 30th of September. He returned to service for the company on the 2d day of December, 1902, and suffered injury on the 10th following, and died from the effect of these injuries about 8 days thereafter.

On the day that he was hurt, at about 7:30 in the morning, the train on which he was riding was made up of two cars—one a fruit car of ordinary height, and one Kansas City

Southern furniture car. This was the first trip on that day.

The deceased was on the top of the second or furniture car. They were going upgrade, and, leaving the lower or house yard on their way to the junction yard, they came to a bridge over Anna street, the only bridge on the run they were making—that is, from the home yard out to the junction, on which they frequently hauled furniture cars; but no witness testified that Hailey, the deceased, ever handled or worked as switchman on one of the furniture cars while it was running.

While passing under the Anna street bridge deceased stooped, not low enough, however, to avoid the bridge. He failed to clear the bridge, and was struck on the head; but it did not knock him off the car. The wound he received showed that he was in a stooping position. The wound was across his head, just above the forehead, half way between the crown of the head and the forehead. He lived about 8 days after he had received the injury which caused his death.

After they had passed the bridge and had gotten into the yard they (employees of defendant) heard groans, and, going up to the top of the high, or furniture, car in question, they found him (the deceased). He had been knocked down while passing under the bridge by the contact of his head with the bridge, as just stated.

The height of this bridge from the top of the rail to the lower edge of the girder of the bridge is 18 feet 4 inches. The cut over which is the bridge is a high cut. It averages 12 feet in height, as it runs zero to a high cut. The height of an ordinary box car from the top of the rail to the running board on the car is about 11½ feet.

The height of a furniture car is 13 feet 9½ inches. The clearance of an ordinary box car while passing under this bridge is about 6 feet 9 inches, and the clearance between a furniture car and the Anna street bridge was 4½ feet. We subjoin a copy of a diagram showing the situation of bridge and measurements made.

(Omitted as not essential.)

The height of cars is not uniform. The measurement given, we understand, is about the average height.

The height of the deceased was 5 feet 8 inches.

This bridge was maintained by the railway company, and we infer that it was also built by the railway in accordance with authority and direction of the authorities of Shreveport.

One of the serious grounds of plaintiff's complaint is that there were no light ropes or whip lashes suspended at a distance of 150 feet from the approach to the bridge; and in that connection the contention of plaintiff is that there is no evidence that the late husband of plaintiff had at any time passed under the bridge on a furniture car requiring him, for his safety, to stoop or duck his head to escape collision with the bridge, and that the deceased had no knowledge of the danger.

Hailey v. Texas & P. Ry. Co

Deceased left his wife and three minor children. He had earned better wages in times past, as he had been a conductor on a railroad. At the time he was injured he was receiving the wages before mentioned.

As relates to the law of this case, we do not attach the greatest importance to the written answers made by plaintiff to written questions propounded to him just prior to his going into service as switchman of the defendant company.

A written application for work may serve some purpose, not to the extent, however, of waiving ordinary diligence and attention of the employer. The state assumes that in enacting a statute, such as Act No. 39, p. 51, of 1882, for the protection of workmen and employees, that the employer will not fail to comply with its requirement.

The title of this act is suggestive of public policy adopted for the protection of human life. It reads: "To protect life and prevent accidents on trains and cars"—and to this end orders ropes, properly knotted, be suspended at a point on the track, the entire width of the track, low enough to warn any train hand by its touch.

This statute was overlooked by defendant, or disregarded. In either case it cannot be concluded that by the written application of the workman as before mentioned he waived or intended to waive the failure of the company to comply with a statute which we think should be considered mandatory in its character.

The bridge was constructed, as we understand, by the company, at a height sanctioned by proper authority, it is true. It none the less devolves upon the company immediately thereafter to comply strictly with the statute, which looked to the protection of its employees. The "telltale" in this case was not put up at all. It certainly was negligence on the part of the company to fail in taking the precaution against accidents plainly laid down in the statute.

In the absence of the statutory warning it becomes necessary, we think, on the part of the defendant company, in order to sustain the plea of plaintiff's knowledge of the danger growing out of the limited clearance, to show beyond question that he was aware of the insufficient clearance to enable him to pass with safety while standing on a furniture car passing under an overhanging bridge.

He was primarily entitled to the warning, as it was intended to notify him of the approaching danger. Not having received the notice, we would not feel justified in assuming that he knew how far he should have stooped to avoid the contact, which resulted in his death. Granted for a moment that there was a miscalculation; that decedent, in consequence, did not stoop sufficiently low—it may be that, had he received the warning intended for the protection of the trainmen on top of a car, he would not have made the miscalculation.

Let us examine into the facts urged by defendant to show

Hailey v. Texas & P. Ry. Co

that plaintiff was aware of the danger and did not sufficiently seek to avoid it.

In the first place, defendant, seeking to support that contention, says that while at his work he had frequently passed this place. This is true, but here it is proper to consider at this point that there were low or ordinary cars and high furniture cars. The number of the latter was small in comparison with the number of the former. We understand that there were other switchmen than Hailey on this run. It is not shown by the testimony that he ever was switchman on the high furniture cars. He had frequently, we understand, passed under the bridge on the ordinary cars. We repeat, there is no testimony before us showing that he ever passed this bridge on a high car.

Passing on the ordinary or low cars, as to height, was not of itself necessarily suggestive of the importance of keeping a lookout for the overhead bridge. If "telltale" had been in position, may it not be that the ropes, hanging low and striking him on the body, would have been a reminder to stoop and take no chance by standing.

Defendant, under the statute, owed a duty to plaintiff. Want of compliance on its part was negligence.

We do not think there was contributory negligence on the part of plaintiff; for it does not appear that the danger became known to the decedent in time to avoid the accident, as it might have been, had he received the warning the statute intended.

It is true that the failure to erect the "telltale" or "whip-ropes" will not excuse negligence on the part of the employee in attempting to cross without stooping, if he is well aware that he should stoop; but if it does not appear that he was aware of the necessity of timely stooping about two feet to be safe, knowledge will not be imputed in the absence of testimony fixing it upon him.

"The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his business, and he does not assume the risk of the employer's negligence in performing such duties. The employee is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for the operation." *R. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. —.

We are not certain that deceased knew and realized the difference in height between the two cars of the train—the one in front and the other the second, on which he was—sufficiently to have warned him. We have to presume that he had knowledge in order to find negligence against him.

May not the following serve to illustrate: When a pedestrian, in peril because of his obliviousness, is seen upon a track, the railroad company owes it to him to give notice of its trains by whistle, bell, or otherwise.

Stewart v. Texas & P. Ry. Co

No such signal is given. The pedestrian is injured. Would the carrier avoid liability by showing that he knew that it passed the spot where he had placed himself every day at about the same hour? Here the switchman had passed the bridge. He passed it on low cars. Can we assume that he would not have taken care of himself, had he been warned as the law requires?

We are brought to the last of the several objections ably and forcibly urged by learned counsel; that is, the quantum of damages. There is testimony before us regarding the expectancy of life of a man in good health, with good habits, at 43 years, whose occupation is not perilous. A great many live over the number of years mentioned, and a great many fall under it.

The average may be correct enough, although even that varies. Railroadings, we are inclined to think, looked upon as a dangerous occupation.

In view of the testimony, we think the amount should be less than allowed by the jury.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the amount of the verdict to \$7,500. As amended, the judgment is affirmed, at appellee's costs on appeal.

STEWART *v.* TEXAS & P. RY. CO.

(Supreme Court of Louisiana, June 20, 1904.)

[37 So. Rep. 129.]

Injury to Employee—Removing Debris from Trestle—Failure to Warn—Sufficiency of Light.

The small stream, owing to the rising waters, was about 300 feet in width, with a strong current. There was a railroad trestle across the stream, which was threatened by the drift jammed against it. A foreman and nine men undertook to remove the debris on a dark, cold night, with insufficient light. In pulling up the logs a limb broke from a tree, and a man seated on one of the cross-pieces of the trestle was thrown into the bayou and drowned.

The weight of the testimony, as found by the jury, was that he was not sufficiently warned of the danger; that he was ordered by the foreman to the place on the trestle from which he was thrown; that the light was dim, and not such a light as should have been provided to do dangerous work on a dark night.

Same—Same—Negligence.

The lower court and the jury decided that there was negligence on the part of defendant.

Same—Lights—Duty to Warn.

Sufficient light should have been provided, the situation explained, and the danger warned against.

Same—Assumption of Risks.*

An employee who obeys his foreman cannot be charged with hav-

*As to the assumption of risk of, and contributory negligence in doing dangerous work in obedience to orders, see foot-note appended to *Wrightsville & T. R. Co. v. Lattimore* (Ga.), 9 R. R. R. 58, 32 Am. & Eng. R. Cas., N. S., 58, where all the preceding authorities in this series are collected.

Stewart v. Texas & P. Ry. Co

ing assumed the peril when nothing shows that he (the employee) was aware of the great peril to which he was exposing himself.

Same—Mode of Performing Duty.

The servant did not select the mode of performing the duty. The lower court decided that it was selected for him. The record does not show the erroneousness of the conclusion.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by Mary E. Stewart against the Texas & Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Wise, Randolph & Rendall and Howe, Spencer & Cocke (William Wirt Howe, of counsel), for appellant.

David Thompson Land and Sidney Levy Herold, for appellee.

BREAUX, J. Plaintiff instituted this suit for damages in the sum of \$10,000 for the death of her son, Horace Stewart, who was accidentally drowned in Red Bayou, about two miles west of the point where it breaks out from Red river, while in the service of the defendant company, on the 24th day of February, 1903.

The case was tried before a jury, and a verdict returned of \$4,500, from which defendant appeals.

The waters of a stream known as "Red Bayou" had risen to a very high stage. February is sometimes a high-water month. On its strong current there floated down a number of trunks of trees and logs. The company owned a bridge which spanned the bayou near Gilliam, in Caddo parish. The logs and debris carried down by the current banked up against this bridge, and by their pressure threatened to carry the bridge away.

To avert the danger of destruction of the bridge, a foreman and nine men, including the deceased son of plaintiff, were sent by defendant company to remove the drift and debris. They arrived late in the evening, and soon after fell to work. The night was dark. The raft up above against the bridge was about 25 feet—that is, extended out in the stream from the bridge about 25 feet—and was jammed against the bridge all the way across the bayou. There were many trees, and some with limbs on them, in the raft. Other trees were large. They went to work to remove the logs from the raft by pulling them by means of an engine. A rope was fastened to a log, and then to another and another, and so on; thence it ran through a snatch block, and from it the rope was taken to the engine, by means of which they were pulled out of the raft. The snatch block was used to pull the drift from the bridge in order not to pull it down. Some of the logs were pulled to the bank and others were passed by, went through,

or floated under the bridge. The workmen also used a block and tackle in lifting the logs.

The bridge consisted of a trestle—piles driven in the ground and cross-pieces underneath the piling.

A pull of logs was made. There was a light under the trestle on one of the cross-pieces, a few feet above the raft. Suddenly the light went out, and deceased, who held it, fell over into the bayou, and was drowned. There was a crash heard just then, and deceased, we infer, was knocked off and fell into the water. A witness testifies that a limb of the tree was broken from its trunk and struck the trestle and knocked the young man off, and he fell at the very moment of the crash. A cry arose among the men, ropes were called for, the crew ran on the bridge, and in the excitement the foreman, who had managed to find a rope, ran back to the bridge, passed the deceased some 10 feet, returning, threw the rope to him, but failed to reach him. Thus passing him does not prove that there was ample light.

Plaintiff's first witness, Massey, who swore that he was a minister, said "that it was too dark to see him; if it had been light, he could have seen him." This was about 10 o'clock in the nighttime.

Immediately after some of the working party thought of making search for the body. The foreman said, as testified to by a witness for plaintiff, that it was useless, as they did not have sufficient light. True, this is denied by the foreman.

The lights were red hand lights carried by the workmen. There was ample light within easy reach. It was not used. The headlight of the engine was not turned on the work. It might well have thus been used.

There were two men on the raft fastening the rope to the timber, while the deceased held up the lantern, witnesses for plaintiff say, to enable them to see while at work.

Prior to the accident the decedent was standing on the bank. One of the witnesses testifies that he heard some one say to him to take a light, and get on the raft, and hold up the light for the workmen on the raft. He did not identify the person who thus directed the young man, Stewart, the deceased. He did not know the foreman. The witness who thus testified says that in attempting to pull up a tree a limb on the raft was broken, and Stewart, plaintiff's son, was knocked off. Armstrong, another witness, testifies that it was the foreman who gave the order just mentioned, and Parker, brother-in-law of plaintiff, testified that the foreman said to him after the accident that he had ordered him to go to the place from which Stewart fell and was drowned. The foreman, the witness Massey informs us, was standing on the bank near him, or he near the foreman, watching the work. We annex a sketch of the place where the accident occurred.

(Omitted as not essential.)

Stewart v. Texas & P. Ry. Co

The testimony in the main is corroborated by the other witnesses for plaintiff, who concur in testifying that there was not a boat or skiff at hand for use in case of an accident; that the light was dim; and that no warning was given.

The testimony is stoutly contradicted by the witnesses for defendant, and particularly by the testimony of the foreman.

The foreman says that the deceased was not at his post of duty; that, if he was under the bridge, he was seeking to avoid the heavy work. Now, it does appear strange that this workman sought to avoid work by going on the trestle with a light in his hands, which everybody could see and did see, except the foreman.

The jury heard these witnesses; had opportunity from personal observation to judge of the truth of their statement. They, in all probability, knew most of them, and had some knowledge of their reputation. That the work was dangerous no one denies.

Our learned Brother who presided over the court, had he been of the opinion that the defense was sustained by a preponderance of testimony, would have granted a new trial.

The weight of the testimony being, as we think, with plaintiff, from that point of view, we have to decide whether plaintiff has suffered personal injury for which the defendant is liable. We think this is affirmatively shown for the reason the work was rendered quite perilous and the employee was subjected to greater risks than actually necessary.

Although the foreman persistently asserts that he warned the workmen under him to be careful, there is evidence going to show that his order was not heard by witnesses who were present.

In view of the danger by which all were threatened it became evidently important for the foreman to keep his little band well in hand, and to see that none exposed themselves unnecessarily.

While this foreman seemed to have been active and zealous enough, according to his own statement, he did not have his little party entirely under his eyes while performing the perilous task on a dark, cold night.

The young man was in a perilous place. He held a light in hand, which others saw who were merely on-lookers. It behooved the foreman to see him, and issue needful orders for his protection.

The master is liable if he or those who represent him fail to give proper warning of danger to his employee, and to exert himself to a reasonable extent in preventing the loss of human life.

"It should not have been left to inference. The situation should have been explained, the danger pointed out, and unequivocally warned against." *Daly v. Kiel*, 106 La. 174. 30 South. 254.

As relates to signals due to every workman which should

Stewart v. Texas & P. Ry. Co

have been given just before proceeding to hoisting logs or trees, while it does appear that the engineer was amply notified to start his engine for the hard pulling up of the logs, it does not satisfactorily appear that all hands were warned to get out of the way at the particular time that the danger was the greatest, as made evident by the result. At any rate, the dangerous place at which deceased was seems to have been entirely overlooked.

The deceased was not at fault for assuming that all needful warning for his safety, under the circumstances, would be given, the service being particularly dangerous.

It has been held that the master must warn his employee of the danger of the employment when it is hazardous and perilous. This the evidence, as it comes to us, does not show was done as required. On the one hand, it is the duty of the employee, ordinarily, to obey his employer; on the other hand, it is the duty of the master reasonably to protect him from the peril required in the master's interest.

The master whose service is attended with great danger must use all reasonable means to prevent injury. There is a responsibility to which the employer, under well-considered authority, must be held, when, to protect his property, the servant must undergo extraordinary risk. It is then more particularly the duty of the master to follow as far as possible and protect his employee while at work.

The bridge was threatened at the time. On the day following it was swept away by the current. It was not reasonable to expect of the servant that he would stand back and decline the work because of the danger. He had a living to earn. Besides the good feeling which every servant owes to his employer impelled him, or should have impelled him, to put his hand to the work, and assist in saving property which was about to go to ruin.

In return for the work under these circumstances it devolves on the master to afford him at least a reasonable measure of protection. This, for one reason or another, it does not appear to us was accorded to the extent required.

This was the view of the jury. Our reading of the testimony has not resulted in finding that they were in error.

With reference to the amount of the damages, the plaintiff asks for an increase; the defendant complains that it is excessive.

The young man did send money to his mother from his wages. The amount sent (some \$14 a month), and other circumstances of the case, do not lead us to infer that large damages should be allowed. He earned about \$2 a day. He was 22 years of age, and in good health. We concluded to let the damages remain, as to amount, as fixed by the jury.

It is ordered, adjudged, and decreed that the judgment appealed from is affirmed.

TURNER v. DETROIT SOUTHERN R. CO.

(Supreme Court of Michigan, July 7, 1904.)

[100 N. W. Rep. 268.]

Injury to Section Hand—Projecting Car Steps—Absence of Negligence—Evidence.*

In an action against a railway company for personal injuries to a section hand, from being struck by a tie, which in turn was struck by a projecting step fastened to the side of a box car, used as a caboose, and extending about 15 inches from the car, but not extending so far as the widest projections on the engine of the train, evidence that the defendant had used such cars for four years without accident, and that they were in common use on other roads, showed that the defendant was not negligent in using such cars.

Same—Same—Negligence—Evidence.

In an action against a railway company for personal injuries to a section hand by reason of a projecting step on a caboose, the fact of injury to plaintiff was not evidence that defendant should have apprehended that the projecting step directly endangered the safety of its employees.

Error to Circuit Court, Lenawee County; Guy M. Chester, Judge.

Action by Ernest W. Turner against the Detroit Southern Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

Fellows & Chandler, for appellant.

Dickinson, Stevenson, Cullen, Warren & Butzel, for appellee.

CARPENTER, J. In October, 1901, plaintiff was a section man in defendant's employ. The gang of which he was a member was engaged in taking out old ties and replacing them with new. The projecting step of a caboose on a passing train hit one of the new ties strewn along the track, and threw it with great force against plaintiff, who was standing near the passing train, and seriously injured him. He brought this suit to recover compensation, claiming that defendant was negligent in permitting said step to project so far from the caboose. The issue was submitted to a jury, who rendered a verdict in favor of plaintiff. We are asked to reverse the judgment in plaintiff's favor upon several grounds, but, in our judgment, we need to consider but one: Was there any evidence that defendant was negligent in permitting the step in question to project from the caboose?

Defendant had four cabooses with projecting steps precisely like that in question. These cabooses were built over box freight cars, with doors at either end and at the sides.

*As to the degree of care due from a railroad company, as an employer, in furnishing appliances, see foot-note appended to *Roche v. Denver & R. G. R. Co.* (Colo.), 8 R. R. R. 955, 31 Am. & Eng. R. Cas., N. S., 955, where all the preceding authorities in this series are collected.

To enable the train crew to conveniently get in and out, steps made of strap iron, mortised to the sill, with the lower ends bent outward supporting a plank step, were suspended at the sides. This lower step was 20 inches below the floor of the car, and, according to plaintiff's testimony, projected 15 inches beyond the side. These cabooses had been used by defendant during the construction of its road and ever afterwards—for four years or more—and plaintiff's injury was the first known injury or accident resulting from their use. The cabooses passed back and forth over the road in daily use, and were generally known to the men in its employ. They were not, however, known to the plaintiff, who had been in defendant's employ but 10 days. The same or similar type of cabooses with the projecting steps were in use by the Cincinnati, Hamilton & Dayton Railroad, the Louisville & Nashville Railroad, the Lake Erie & Western Railroad, and the Detroit, Toledo & Milwaukee Branch of the Lake Shore & Michigan Southern Railroad. Undisputed testimony proves that parts of the smallest engines used on the defendant's road projected farther than did these steps. It was shown that the Wabash Railroad—the only road upon which defendant had had prior experience—and the main line of the Lake Shore & Michigan Southern Railroad had no cabooses with such steps. One witness, a Mr. Bray, who had been a master car builder, testified that he considered the construction improper; but his only objections to it are that the step might be knocked off by a bridge or other structure along the tracks, or might injure some one "standing close to the track, or something like that." The fact that these cabooses had been run this way for four years without accident is proof—if proof be needed—that the projecting step did not come in contact with bridges or other structures on defendant's road. And surely a railroad company is under no obligation to assume that persons will stand within 15 inches of a passing train, especially when it is shown that parts of the locomotive, which we must presume to be properly constructed, projected more than 15 inches. It cannot, therefore, be contended that defendant was negligent because it made no provision for the protection of such persons.

The jury were not warranted in finding negligence from the use of a projecting step which it may be said, on this record, was in common use, without evidence that it was so dangerous that an ordinarily prudent employer would discard it. See *Grand Rapids & Indiana Railroad Company v. Judson*, 34 Mich. 506. The fact that parts of the locomotive projected farther than these steps compels us to say, as we have already indicated, that defendant was not negligent in failing to apprehend that the steps would strike some person standing near the track. No lesson from its own experience—and defendant had a right to place great reliance on this

Cully v. Northern Pac. Ry. Co

experience (see *La Pierre v. Railway Company*, 99 Mich., at pages 214, 215, 58 N. W. 60)—or, so far as this record shows, from the experience of others, had taught defendant that these projecting steps were dangerous, for, until plaintiff was injured, their use had occasioned no injury. There is no evidence, then, in this record, from which it may be inferred that defendant should have apprehended danger to its employees from these projecting steps, unless the injury to plaintiff affords such evidence. It cannot be argued that the injury to plaintiff affords evidence that defendant should have apprehended that the projecting steps directly endangered the safety of its employees, for plaintiff was not directly injured by the step. He was injured because the step threw against him a tie, which, through the negligence of his fellow servants, was left too near the track. We think it cannot be seriously contended that defendant was negligent in failing to foresee and guard against so improbable a contingency. "It is a mistake for one to take his stand after an accident and impute responsibility from a view thus obtained. It is nearly always easy, after an accident has happened, to see how it could have been avoided." See *Bailey's Personal Injuries Relating to Master and Servant*, § 112; *Burke v. Witherbee et al.*, 98 N. Y. 562. In our judgment, the only negligence shown on this record is that of the fellow servant who placed the tie too near the track; and it follows, therefore, that the trial court erred in refusing to direct a verdict for the defendant.

Judgment reversed and a new trial granted. The other Justices concurred.

CULLY v. NORTHERN PAC. RY. CO. et al.

(Supreme Court of Washington, June 23, 1904.)

[77 Pac. Rep. 202.]

Trial—Interrogatories—Discovery.

Under 2 Ballinger's Ann. Codes & St. § 6009, providing that a plaintiff may at the time of filing his complaint or afterwards file interrogatories "for the discovery of facts and documents material to the support of the action," to be answered by the adversary, an employee of a railroad in a suit for personal injuries could not compel it to answer interrogatories disclosing confidential communications from its agent reporting or in regard to the accident.

Duty to Furnish Safe Place to Work—Gravel Beds.*

The rule that a master must furnish a safe place for the servant to work has no application to the employment of a man by a rail-

*See generally, note, appended to *Bradley v. Chicago, etc., R. Co.* (Mo.), 8 Am. & Eng. R. Cas., N. S., 728; *Larsson v. McClure* (Wis.), 8 Am. & Eng. R. Cas., N. S., 763; *Casey v. Grand Trunk Ry. Co.* (N. H.), 16 Am. & Eng. R. Cas., N. S., 361 (servant injured while shoveling coal by fall of coal); *Wolf v. Great Northern Ry. Co.* (Minn.), 12 Am. & Eng. R. Cas., N. S., 619 (servant tearing down wall does not assume risk of injury from its falling).

Cully v. Northern Pac. Ry. Co

road company to excavate gravel from a gravel bank and load it on the cars, as the place to work is being constantly changed, and is necessarily incomplete and dangerous.

Negligence—Sufficiency of Evidence.

In an action against a railroad company by an employee for personal injuries, evidence examined, and *held* insufficient to carry the question of defendant's negligence to the jury.

Negligence—Burden of Proof.

In an action against a railroad company by an employee for personal injuries, the burden of proving negligence of the defendant was on the plaintiff.

Appeal from Superior Court, Skagit County; Geo. A. Joiner, Judge.

Action by Alvin Lewis Cully, by Charles Cully, guardian ad litem, against the Northern Pacific Railway Company and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Gable & Seabury and Million & Houser, for appellant.

Jas. F. McElroy, B. S. Grosscup, and Wilbra Coleman, for respondents.

PER CURIAM. This is an action brought in the superior court of Skagit county by Alvin Lewis Cully, by Charles Cully, his guardian ad litem, plaintiff, against the Northern Pacific Railway Company and T. B. McDermott, defendants, to recover compensation for personal injuries sustained by said plaintiff. From a judgment of nonsuit and dismissal entered against him in the lower court, plaintiff appeals.

Appellant alleges in his complaint that on or about August 5, 1901, he sustained serious injuries through the negligence of respondents in failing to provide him a safe place in which to work. The following facts are amply borne out by the record: On or about the 29th day of July, 1901, respondent Northern Pacific Railway Company was engaged in taking gravel from a gravel bank near the town of Sedro-Woolley, in Skagit county. The crew of men engaged in the work of excavating the gravel and loading it on the cars was under the direction and control of respondent T. B. McDermott as foreman of the crew. On or about the day last mentioned, appellant, being at that time between 17 and 18 years of age, although doing a man's work and drawing a man's pay, was employed by said McDermott to assist the crew in the work in hand, the particular duties assigned him being to assist those of the crew whose duty it was to attend the jackscrews on the steam shovel and take up and relay the track upon which the steam shovel was operated, as the necessity of the work from time to time required its position to be changed. In the process of removing gravel from the bank and loading it on the cars a steam shovel was used. Respondents had been engaged for some time in taking gravel from the bank in question prior to the employment of appellant, and in the

process of so doing had cut into the face of the bank to a considerable extent, necessitating the building of the track on which the steam shovel was being operated and the side track used for the gravel cars within the cut. The excavation had advanced into the bank to such an extent that the height of the embankment caused by the excavation was between 30 and 40 feet on the day of the accident. Either early on the same day or the day before, a stratum of blue clay had been struck, which undoubtedly added to the danger of a slide taking place. On the afternoon of the 5th day of August, 1901, appellant was assisting another workman by the name of Hale Rhodes in laying and spiking down track in the rear of the steam shovel preparatory to moving the shovel to another position. Rhodes was engaged in spiking and appellant was holding or "pinching" the rails in position to be spiked by the use of a "claw" or "pinch" bar, respondent McDermott standing by. The bar which appellant was using was not working satisfactorily, and some one—it does not clearly appear who—suggested, "Get a line bar," whereupon McDermott, by pointing, directed attention to a bar lying a short distance away between the steam shovel and a car standing opposite on a parallel track. Appellant immediately proceeded down between the steam shovel and the standing car to get the bar pointed to, and was in the act of picking it up, when a large mass of the bank broke away from the top, and, before appellant had time to change his position, came down with great violence, striking the steam shovel with such force as to carry it off the track, carrying it over against the opposite car, and pinning appellant between the steam box of the steam shovel and the deck of the car, resulting in the injury. The separate answers of respondents put in issue the material allegations of the complaint, and further alleged, as separate defenses to the action, assumed risk, contributory negligence, and negligence of fellow servants. The affirmative matter in each answer was denied in the reply.

Prior to the trial, appellant, pursuant to section 6009, 2 Ballinger's Ann. Codes & St., propounded to respondent company certain written interrogatories, to all of which the respondent made answer, except interrogatories numbered 19 and 20, which are as follows: "No. 19. If such report was ever made, who made it, and to whom was it made, and what action, if any, was ever taken by the company with reference thereto? No. 20. Attach to your answers herein all reports regarding the accident, and all correspondence with the person or persons reporting said accident with reference thereto." On motion of counsel for the railway company these two interrogatories were stricken out by the lower court, on the ground that the same were incompetent, irrelevant, and immaterial, to which ruling appellant excepted. It appears from the transcript that the respondent

company answered in the affirmative interrogatory No. 18, that a report of appellant's said injury was made to the company. We are clearly of the opinion that these interrogatories were properly stricken. It seems to us that it would be a very dangerous and unjust practice to require the defendant in this character of cases to produce all of the correspondence, reports, and document which he may have touching a case at issue, all of which must necessarily be of a strictly confidential character. Assuming that this correspondence disclosed admissions of the confidential agents of the defendants against the interests of the defendants, they are not such admissions as would be admissible in evidence. We can conceive of no reason why a different rule should apply in this case than prevails in the case of privileged communications generally. The statute which authorizes the filing of "interrogatories for the discovery of facts and documents material to the support," etc., "of the action," does not contemplate that the plaintiff shall be permitted to have free access to the defendant's private correspondence and papers, in order that he may not only discover whether facts and documents material to the issue existed therein, but learn the defendant's line of defense as well. It is highly probable that sections 6009 and 6047, 2 Ballinger's Ann. Codes & St., were intended to supersede the old practice which authorized a bill of discovery; but Mr. Pomeroy, in his work on Equity Jurisprudence, at section 201, in referring to the old practice, says: "The fundamental rule on this subject is that the plaintiff's right to a discovery does not extend to all facts which may be material to the issue, but is confined to facts which are material to his own title or cause of action. It does not enable him to pry into the defendant's case, or find out the evidence by which that case will be supported," etc. The record fails to disclose the particular evidence sought to be obtained. Mr. Hageman, in his work on Privileged Communications, at page 32, says: "So where a plaintiff, at the instance of the solicitors, sent out a gentleman to India for the express purpose of acting as the solicitors' agent in the collection of evidence respecting a pending suit, letters written by the agent either to the plaintiff or his solicitors on the subject of the evidence have been regarded by the court as confidential communications." At page 750, vol. 6, Enc. Pl. & Pr., the rule is laid down that "communications to any person whose intervention is necessary to secure and facilitate the communication between attorney and client are privileged." It seems to us that the communications sought to be obtained in this suit come squarely within the rule above laid down as privileged. It may well be doubted whether, under section 6009, 2 Ballinger's Ann. Codes & St., the production of any documentary evidence could be demanded in view of the provisions of section 6047, 2 Ballinger's Ann. Codes & St., which makes

ample provision for the inspection of books and papers in the hands of the opposite party material to the issue, and for permission to make copies thereof.

Granting a nonsuit is the next error assigned. The appellant seeks to invoke the rule in this case that it is the duty of the master to furnish the servant with a safe place in which to work. This rule, however, has no application to this class of employment. As was said in *Kath v. Wis. Cent. Ry. Co.*, 99 N. W., at page 221: "The place to work is being changed constantly, and is necessarily incomplete and dangerous; and the employee knows it, and accepts such risks as are ordinarily present in such operations;" citing *Porter v. S. C. & M. Co.*, 84 Wis. 418, 54 N. W. 1019; *Gulf, C. & S. F. Ry. Co. v. Jackson*, 65 Fed. 48, 12 C. C. A. 507; *Moon Anchor, etc., Mines v. Hopkins*, 111 Fed. 298, 49 C. C. A. 347; *Armour v. Hahn*, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440. To the same effect, also, is *Swanson v. Great Northern Ry. Co. (Minn.)* 70 N. W. 978, and the statement of facts in that case is almost identical with that in the case at bar. In a concurring opinion by one of the justices it is said: "In this case the inferior servant injured knew, or should have known, as much about the dangers which he was encountering as the foreman knew, or could have been expected to know. They stood upon an equal footing."

* * * In this respect the case is different from *Carlson v. Exchange Co.*, 63 Minn. 428 [65 N. W. 914], where a large crack had formed in the soil above the excavation, which the foreman knew, but which the inferior servant injured did not know, and was not in a position to observe. He was injured by reason of the foreman's neglect in failing to warn him." The evidence shows that the foreman repeatedly informed the workmen of the danger incident to the employment; that the workmen frequently talked over the liability of a slide occurring, and were constantly on the lookout for a slide; and, although the plaintiff went upon the stand, he failed to give any evidence to the effect that he was not warned, or that he did not hear the talk between the workmen to the effect that a slide was likely to occur at any time. The appellant uses this language in his brief: "Nor is there a scintilla of proof to show that appellant ever joined in these discussions or ever heard them." From this statement we are led to believe that the appellant must have been laboring under the impression that the law imposed the duty upon the defendant to prove want of negligence. This, however, is not the law. The burden was upon the appellant to prove negligence upon the part of the respondents. The labor being performed was of a hazardous character, and the appellant's own witnesses upon cross-examination testified that the respondents constantly kept men upon the top of the bank to watch for indications of a slide, to keep the bank

Virginia & S. W. Ry. Co. v. Clowers' Adm'x

clear of logs, etc., and shoot down the bank when it became undermined. And there is no evidence that these men were not carefully selected with reference to the duty which they had to perform.

In our judgment, the respondents were clearly entitled to a nonsuit, and the judgment should be affirmed.

VIRGINIA & S. W. RY. CO. v. CLOWERS' ADM'X.

(Supreme Court of Appeals of Virginia, June 16, 1904.)

[47 S. E. Rep. 1003.]

Fellow-Servant Doctrine—Constitutional Rule.

Const. § 162, in effect relaxing the stringency of existing precedents as to fellow servants, in the interests of employees of railroad companies, is not to be strictly construed, but the true method of construction is to discover the intention of the framers of the Constitution.

Fellow Servants—Engineer and Telegraph Operator.*

Const. § 162, declares that a servant employed by a railroad company, and engaged in any work in the operation of an engine, shall be entitled to recover for injuries sustained because of the negligence of any one charged with dispatching trains or transmitting telegraphic or telephonic orders therefor: *held*, that a railroad company is liable to a locomotive engineer for injuries caused by the failure of a telegraph operator to transmit an order sent out from the train dispatcher's office in regard to the movement of trains.

Appeal from Corporation Court of Bristol.

Action by W. B. Clowers' administratrix against the Virginia & Southwestern Railway Company. Judgment in favor of plaintiff, and defendant brings error. Affirmed.

Bullitt & Kelley and D. D. Hull, for plaintiff in error.

H. G. Peters, W. F. Rhea, and E. Lee Twinkle, for defendant in error.

WHITTLE, J. This is an action of trespass on the case, brought by the administratrix of W. B. Clowers against the Virginia & Southwestern Railway Company, to recover damages for the alleged negligent killing of plaintiff's intestate by the defendant company. The jury rendered a verdict in favor of the plaintiff for \$5,000, the judgment upon which is the subject of review.

It is conceded that plaintiff's intestate, who was a locomotive engineer in the employment of the defendant company, lost his life in a collision between two of the trains of that company, occasioned by the failure of its telegraph operator at Big Stone Gap to transmit or deliver an order sent out

*As to whether train dispatchers and telegraph operators are fellow servants of other railroad employees, see foot-note appended to *Brommer v. Philadelphia & R. Ry. Co.* (Pa.), 8 R. R. R. 529, 13 Am. & Eng. R. Cas., N. S., 529.

Virginia & S. W. Ry. Co. v. Clowers' Adm'x

from the train dispatcher's office at Bristol to the conductor of one of the colliding trains. The single question therefore presented for decision is, were the telegraph operator and the engineer fellow servants, in contemplation of section 162 of the Constitution of Virginia?

The trial court instructed the jury that "if they believed from the evidence that the operator of the defendant company failed to deliver the message to the conductor on the train coming from Big Stone Gap to Bristol, and that by reason thereof the accident resulted which caused the death of plaintiff's intestate, then they should find for the plaintiff."

The instruction, it will be observed, was equivalent to telling the jury that plaintiff's intestate and the telegraph operator were not fellow servants, within the meaning of section 162. Counsel admit that prior to the promulgation of the Constitution, July 10, 1902, the parties would have been declared fellow servants, under the decisions of this court, and there could not have been a recovery against the company upon the facts of this case. The controlling question, then, is whether or not the telegraph operator falls within any of the exceptions of section 162, taking him out of the category of fellow servant of plaintiff's intestate.

The section reads as follows:

"The doctrine of fellow-servant, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of any other servant or servants of the common master, is to the extent hereinafter stated, abolished as to every employee of a railroad company, engaged in the physical construction, repair or maintenance of its roadway, track or any of the structures connected therewith, or in any work in or upon a car or engine standing upon a track, or in the physical operation of a train, car, engine, or switch, or in any service requiring his presence upon a train, car or engine; and every such employee shall have the same right to recover for every injury suffered by him from the acts or omissions of any other employee or employees of the common master, that a servant would have (at the time when this Constitution goes into effect), if such acts or omissions were those of the master himself in the performance of a non-assignable duty: provided, that the injury, so suffered by such railroad employee, result from the negligence of an officer, or agent, of the company of a higher grade of service than himself, or from that of a person, employed by the company, having the right, or charged with the duty, to control or direct the general services or the immediate work of the party injured, or the general services or the immediate work of the co-employee through, or by, whose act or omission he is injured; or that it result from the negligence of a co-employee engaged in another department of labor, or engaged upon, or in charge of, any car upon which, or upon the train of which it is a part, the injured employee is not at

the time of receiving the injury, or who is in charge of any switch, signal point, or locomotive engine, or is charged with dispatching trains or transmitting telegraphic or telephonic orders therefor; and whether such negligence be in the performance of an assignable or non-assignable duty. The physical construction, repair or maintenance of the roadway, track or any of the structures connected therewith, and the physical construction, repair, maintenance, cleaning or operation of trains, cars or engines, shall be regarded as different departments of labor within the meaning of this section. Knowledge, by any such railroad employee injured, of the defective or unsafe character or condition of any machinery, ways, appliances or structures, shall be no defence to an action for injury caused thereby. When death, whether instantaneous or not, results to such an employee from any injury for which he could have recovered, under the above provisions, had death not occurred, then his legal or personal representative, surviving consort, and relatives (and any trustee, curator, committee or guardian of such consort or relatives) shall, respectively, have the same rights and remedies with respect thereto as if his death had been caused by the negligence of a co-employee while in the performance as vice-principal, of a non-assignable duty of the master. Every contract or agreement, express or implied, made by an employee, to waive the benefit of this section, shall be null and void. This section shall not be construed to deprive any employee, or his legal or personal representative, surviving consort or relatives (or any trustee, curator, committee or guardian of such consort or relatives), of any rights or remedies that he or they may have by the law of the land, at the time this Constitution goes into effect. Nothing contained in this section shall restrict the power of the General Assembly to further enlarge, for the above-named class of employees, the rights and remedies hereinbefore provided for, or to extend the rights and remedies to, or otherwise enlarge the present rights and remedies of, any other class of employees of railroads or of employees of any person, firm or corporation."

The defendant company insists that inasmuch as the foregoing section tends to increase the common-law liability of railroad companies, it ought to be strictly construed, and that, when so construed, it leaves unchanged the relations which previously existed between these employees. Whatever may be said of the soundness of that proposition with respect to the construction of statutes in derogation of the common law, the rule has no application to remedial provisions of a Constitution ordained for the obvious purpose of relaxing the stringency of existing precedents in the interest of employees engaged in the dangerous occupation of constructing, maintaining, and operating railroads. The constitutional convention, in its wisdom, has deemed it salutary

and just to employees to modify the common-law fellow-servant doctrine so as to meet the exigencies arising from changed conditions in modern railroading. Under such circumstances it is the duty of the courts to give effect to that policy, rather than to defeat it by resort to narrow and technical rules of construction. The true purpose of construction is, at last, to discover the intention of the framers of the Constitution, and to promote the objects for the attainment of which that instrument was ordained; and, to that end, a fair interpretation must be given to the language employed, construing the words in their ordinary and popular acceptance, unless it clearly appears that they were intended to be used in some other sense. When language is plain and its meaning obvious, there is no room for construction. The proper rule for the exposition of a Constitution is thus stated by Judge Cooley in his work on Constitutional Limitations:

"It is also a very reasonable rule that a state Constitution shall be understood and construed in the light and by the assistance of the common law, and with the fact in view that its rules are still left in force. By this we do not mean that the common law is to control the Constitution, or that the latter is to be warped and perverted in its meaning, in order that no inroads, or as few as possible, may be made in the system of common-law rules, but only that for its definitions we are to draw from that great fountain, and that, in judging what it means, we are to keep in mind that it is not the beginning of law for the state, but that it assumes the existence of a well-understood system which is still to remain in force and be administered, but under such limitations and restrictions as that instrument imposes. It is a maxim with the courts that statutes in derogation of the common law shall be construed strictly—a maxim which we fear is sometimes perverted to the overthrow of the legislative intent—but there can seldom be either propriety or safety in applying this maxim to Constitutions. When these instruments assume to make any change in the common law, the change designed is generally a radical one; but as they do not go minutely into particulars, as do statutes, it will sometimes be easy to defeat a provision, if courts are at liberty to say that they will presume against any intention to alter common law further than is expressly declared. A reasonable construction is what such an instrument demands and should receive, and the real question is what the people meant, and not how meaningless their words can be made by the application of arbitrary rules." Cooley on Const. Lim. (7th Ed.) p. 94.

In light of these principles, this court has no difficulty in expounding that part of section 162 applicable to the case in judgment. The clause, in terms, abolishes the fellow-servant doctrine, so far as it affects the liability of the master for injuries to his servant resulting from the acts or omissions of a co-employee "charged with dispatching trains or trans-

mitting telegraphic or telephonic orders therefor." The object of train dispatching is to place in the hands of conductors who manage the trains of the company proper and safe orders for their guidance. The source of such orders is the office of the train dispatcher, from which they emanate, and their destination is the hand of the conductor of the train whose movements they are intended to direct and control. The order is in transitu from the time it leaves the one until it reaches the other, and every agent of the company through whose hands the order passes is necessarily engaged in its transmission until it reaches its ultimate destination. There can be no reason for holding, under the language of this provision, that a train dispatcher is not a fellow servant of the trainmen to be affected by the order, but that a telegraph operator, through whom the order is to be transmitted to the conductor, and the trainmen are fellow servants. Each constitutes part of a conduit through which the order is transmitted from its source to its destination, and the omission of either to discharge his important function defeats that object. The purpose of the provision is to hold the company responsible for the consequences of the negligence of its agents in dispatching trains or transmitting orders, and there is nothing in the language employed to justify the contention of the company that no operator on the line, except the dispatcher in the train dispatcher's office, is charged with the duty of dispatching trains or transmitting telegraphic orders therefor.

If "transmitting orders" for the movement of trains is, as contended, synonymous with "dispatching trains," there was no necessity for the use of both terms in the connection in which they occur. Nor is any authority adduced in support of the proposition that "transmitting" an order is to be construed to mean transmitting it by telegraph only. To subject the provision to that restricted interpretation would not only do violence to the language used, but would also defeat the manifest object of the framers of the Constitution. The clause means what the words import, and includes all agents of the company whose duty it is to transmit telegraphic or telephonic orders for the movement of trains to the conductors of such trains, no matter what instrumentalities may be employed to accomplish that purpose. It would be a vain thing for the framers of the Constitution to protect trainmen against the negligence of a train dispatcher, and leave them exposed to the carelessness of other agents of the company, through whom the train dispatcher's orders must be transmitted before reaching their final destination.

The judgment complained of is plainly right, and it must be affirmed.

GULF, C. & S. F. RY. CO. *v.* HOWARD et al.

(Supreme Court of Texas, April 25, 1904.)

[80 S. W. Rep. 229.]

Vice Principals—Roundhouse Hostler—Injury to Assistant.

Batts' Ann. St. art. 4560f, provides that persons engaged in 'the service of a railroad, who are intrusted with the superintendence of other servants in the performance of any duty, are vice principals of the railroad, and not fellow servants with their co-employees. Article 4560g provides that railroad employees who are employed in the same grade of employment, and who are working together at the same time and place, and at the same piece of work, and for the same purpose, are fellow servants with each other: *held*, that a hostler at a roundhouse, whose duty was to take charge of, operate, and handle engines about the roundhouse, who was given two assistants, neither of whom, without specific authority, were authorized to take charge of or move engines, but whose duties were to assist in coal-ing, switching, etc., was, as to them, a vice principal, but they, as to him, were fellow servants.

Persons Engaged in Operating Locomotive—Application of Fellow Servant Act.

A hostler employed about a locomotive roundhouse to take charge of engines was not, while on his way to take charge of a locomotive, and before he began to perform the act of operating the machinery, a servant 'engaged in the work of operating the cars, locomotives or trains' of a railroad, within the meaning of Batts' Ann. St. art. 4560ea, so as to give him or his representatives a right to recover for his injury, when caused through the negligence of a fellow servant.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by Lizzie Howard and others against the Gulf, Colorado & Santa Fe Railway Company. There was a judgment of the Court of Civil Appeals affirming a judgment for plaintiff (see 75 S. W. 803, 805), and defendant brings error. Reversed.

J. W. Terry and A. H. Culwell, for plaintiff in error.

Jno. W. Parker and W. C. Halbert, for defendants in error.

BROWN, J. The defendants in error sued the Gulf, Colorado & Santa Fe Railway Company to recover damages resulting from the death of J. D. Howard. The railway company answered by general demurrer, special exception, and plea of contributory negligence, and that the negligence which caused the death of Howard was that of his fellow servants. There were a verdict and judgment for the plaintiffs, which was affirmed by the Court of Civil Appeals. The findings of facts by the Court of Civil Appeals are as follows:

"J. D. Howard was in the employ of the defendant as a hostler at Temple, Texas. His duties were to take charge of, operate, and handle all engines in and about the roundhouse, coal chute, and cinder pit. He had two assistants—one named Hoherd, and the other Langford; but, in the ab-

sence of specific authority, neither of them were authorized to take charge of and move engines. Their duties were to assist in coaling, removing cinders, switching, etc. On the occasion in question, about 3 o'clock a. m., during a dark night, two engines coupled together, called a 'double header,' were left in the yard at Temple. These engines were taken charge of by Hoherd and Langford and placed at the coal chute, where one was coaled. They were then started back to the roundhouse; both engines, while going to the roundhouse, moving backward. A few minutes before the engines left the coal chute, Howard left the roundhouse, two or three hundred yards away, going in the direction of the two engines, for the purpose, presumably, of taking charge of them and running them to the roundhouse. In a very few minutes after the two engines started from the coal chute, Howard was found lying by the side of the track over which the engines had just passed; one of his legs being across one of the rails, and cut almost in two. There were also other severe and fatal wounds upon his body, and he died in about thirty minutes after he was found, without giving any explanation as to how the accident occurred."

Article 4560g of the Revised Statutes (Batts' Ann. St.) defines fellow servants as follows: "All persons who are engaged in the common service of such person, receiver, or corporation, controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment and are doing the same character of work or service and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow-servants with each other. Employees who do not come within the provisions of this action shall not be considered fellow servants." The original article was practically the same, except it had between the words "purpose" and "are" these words: "Neither of such persons being entrusted by such corporation, receiver, manager or person in control thereof with any superintendence or control over their fellow employees, or with the authority to direct any other employee in the performance of any duty of such employee." The Legislature omitted those words in the amendment, and enacted article 4560f, which reads thus: "All persons engaged in the service of any person, receiver or corporation, controlling or operating a railroad or street railway the line of which shall be situated in whole or in part in this state, who are intrusted by such person, receiver or corporation with the authority of superintendence, control or command of other servants or employees of such person, receiver or corporation, or with the authority to direct any other employee in the performance of any duty of such employee are vice-principals of such person, receiver or corporation, and are not fellow-servants with their co-employees." This article is, in effect, the same as the words which were omitted

from article 4560g, and excepts from the latter the class of employees mentioned in the preceding article. Howard was vice-principal of Hoherd and Langford, because he had authority over them. Therefore, under article 4560f, he was not their fellow servant in performing that work; that is, if either of them had been injured through his negligence, the railroad company would have been liable. But by the terms of article 4560g they were fellow servants with him. The three were doing the same character of work or service, working together at the same time and place, at the same piece of work, and to the common purpose of taking the locomotives into the roundhouse. *Railway Co. v. Warner*, 89 Tex. 475, 35 S. W. 364. Howard, if living, could not recover, under article 4560g, for the injuries received through the negligence of Hoherd or Langford. Therefore plaintiffs cannot recover, unless it be by virtue of article 4560ea.

The defendants in error cannot recover for the death unless Howard could himself recover for the injury if he were living and prosecuting this action. Could he recover under article 4560ea? "Art. 4560ea: Every person, receiver or corporation operating a railroad or street railway the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained by any servant or employee thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver or corporation, by reason of the negligence of any other servant or employee of such person, receiver or corporation, and the fact that such servants or employees were fellow-servants with each other shall not impair or destroy such liability." Counsel for defendants in error contends that that article gives right of action to persons who are employed to perform the classes of work named therein. If that be a correct construction of the statute, then Howard, being employed for the purpose of moving locomotives into the roundhouse, would come within its terms. We agree with the Court of Civil Appeals that, if Howard was engaged in the work of operating the locomotives, defendants in error should recover. The terms of the statute are that the persons, while engaged in the work of operating the cars, etc., are protected against the negligence of any servant or employee of the company. The word "while" places a time limit upon this protection, and means "during the time such employee may be engaged in the work of operating the locomotive." "work," as used in this statute, is synonymous with "act," and in its connection means the doing of those things which constitute operating the locomotives, etc.; and the person so engaged is protected against the negligence of any other employee during the time he is engaged in the act of operating the machinery. If Howard had been upon the locomotive, or had been working in connection with it for the purpose of moving it into the roundhouse, the case would come within the terms of this

Hinzeman v. Missouri Pac. Ry. Co

statute; but the evidence does not so place him. The best phase for the defendants in error that can be put upon the evidence is that Howard was on his way to take charge of the locomotive, and was, through the negligence of his fellow servants, who were operating the locomotive at the time, run over and killed before he began to perform the act of operating the machinery. *Medberry v. C., M. & St. P. Ry. Co. (Wis.)* 81 N. W. 659. That case construes a statute much like ours. A conductor of a train, in preparing it to be moved, was standing by a car, waiting for the removal of a bundle, when he should close and lock the door. He was injured by the negligence of a co-employee, but the court held that he was not operating the train.

If we consider the perilous position of men while actually engaged in the work of operating trains, and their attitude toward other employees, whether upon the same trains or not, which renders it very difficult to protect themselves against the negligence of others, the discrimination appears to be just, as a provision for such employees and their families if injured, and a wise policy, tending to excite the diligence of their employers to procure safe and reliable persons to perform the work effecting the safety of train service. When such employee is not actually engaged in the work out of which the danger grows, the reasons for the distinction between him and other employees cease, for there is no more reason why Howard, while walking upon the track, should be protected against the negligence of those who were upon the locomotive, than there would have been if he had been a section hand in the same situation, and had suffered the same injuries by the negligence of those handling the locomotive.

The effect of article 4560a is to suspend the law of fellow servants as to persons employed to operate cars, locomotives, or trains, while they are actually engaged in the work; but it does not affect their relations to other employees beyond the time of their active employment in that work.

It is ordered that the judgments of the district court and of the Court of Civil Appeals be reversed; and it appearing from the evidence that defendants in error have no right of recovery, it is further ordered that judgment be entered in favor of plaintiff in error, that it go hence without day, and that defendants in error take nothing by their suit.

HINZEMAN v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 1, May 25, 1904.)

[81 S. W. Rep. 1134.]

Killing of Section Foreman—Discovered Peril—Question for Jury.

In an action for the death of a section foreman, resulting from a collision with a train while he was in the discharge of his duties inspecting ties along the track, the evidence considered, and held to

Hinzeman v. Missouri Pac. Ry. Co

require the submission to the jury of the question whether the engineer and fireman saw the foreman in time to have saved his life by the exercise of ordinary care.

Same—Care Due in Running Train.*

Where a section foreman was struck by a train while inspecting ties, it was error to instruct that, unless the jury believed that the engineer in charge of the locomotive willfully, wantonly or recklessly ran deceased down and killed him, they should find for defendant.

Same—Same.

Where a section foreman was struck by a train, an instruction limiting the railroad company's duty in the emergency to stopping the train, and stating that if, when the peril was discovered, it was then too late to stop the train, the company was not liable, and omitting the duty of sounding the whistle, was erroneous.

Appeal from Circuit Court, Johnson County; W. L. Jarrott, Judge.

Action by Cordelia E. Hinzeman against the Missouri Pacific Railway Company. From an order granting plaintiff a new trial, defendant appeals. Affirmed.

R. T. Railey, for appellant.

C. E. Morrow and O. L. Houts, for respondent.

VALLIANT, J. The plaintiff's husband was struck and killed by a locomotive running on defendant's road, through, as plaintiff charges, the negligence of defendant's servants. The petition states that plaintiff's husband was in the employ of defendant as a section hand, and that on October 2, 1900, while he was engaged in the line of his duty near and upon the track, a locomotive and train of cars approached him from the rear, and he became and was in great and imminent peril of being run over and killed; that the defendant's servants in charge of the locomotive saw or by the exercise of ordinary care could have seen him, and became aware of his peril in time to have averted the injury by the exercise of ordinary care, by stopping, or placing the locomotive under control, or sounding the usual danger signals, but negligently failed to use the appliances at hand to stop or place the engine under control, or to sound a danger signal, and ran the locomotive against the man and killed him. The answer was a general denial and a plea of contributory negligence. The facts stated as constituting contributory negligence are that Hinzeman was a section foreman on that part of the road which was the place of the accident; that he had "actual and constructive notice" of the approach of the train; that he, "after having learned of the approach of said train, and with full knowledge of the danger to which he was then subjecting himself, negligently, carelessly, recklessly, unnecessarily, and suddenly stepped near the track upon

*As to the degree of care due a railroad employee from his company, see foot-note appended to *Scott v. Seaboard Air Line Ry. Co.* (S. Car.), 9 R. R. R. 148, 32 Am. & Eng. R. Cas., N. S., 148.

Hinzeman v. Missouri Pac. Ry. Co

which defendant's train was then running, within a few feet of said train, well knowing at the time that it was traveling at the rate of 25 or 30 miles an hour. Then followed a paragraph in the answer containing statements showing that it was in the line of his duty to know that train was coming and then due, and by that knowledge he had ample opportunity to avoid the danger, but negligently and suddenly stepped so near the track that he was struck, and that under those circumstances he assumed the risk. There was also in the answer a paragraph stating the duties, respectively, of the section foreman and the engineer, and drawing therefrom the conclusion that whilst Hinzeman and the engineer were not fellow servants, within the meaning of the statute, yet they were fellow servants under the common law, and therefore the defendant is not liable. The reply was a general denial.

The evidence on the part of the plaintiff tended to prove as follows: Hinzeman was the foreman of the section hands in charge of a section just outside the limits of Kansas City. The defendant's railroad at that place consisted of four tracks, lying east and west. The track farthest south was a switch track, the next was the main track for east-bound trains, the next the main track for west-bound trains, and the one farthest north was a switch track. Between the two main tracks is a space 9 feet wide. The Chicago, Milwaukee & St. Paul Railroad crosses defendant's tracks at a point between a quarter and a half mile west of the point of the accident. About 150 feet west of that crossing was a semaphore, designed to signal the engineer on a train approaching the crossing to stop or come on as the condition might warrant. The defendant's tracks, looking east from the crossing beyond the point of the accident, were straight and level, with nothing intervening to obstruct the view. On the morning of the accident Hinzeman had started out with his men, examining the cross-ties, with a view to removing the rotten ones and replacing them with sound ties. Hinzeman went ahead of his men, examining the ties, testing their condition with his pick, marking with his pick those he judged to be unsound, and the men followed, taking out those marked for removal, and putting sound ties in their places. He inspected every tie, and marked as unsound from two to five ties to the rail as he went along the route that morning. He did not apply the test of his pick to every tie, but examined them by sight and tested those whose appearance gave sign of decay. He walked on the north side of the south main track in the 9-foot space between the two tracks. When testing a tie, he would turn his face to the south, and, bending over the rail, would strike the tie with his pick. In going along the track in this way he had advanced more rapidly than his men, who were removing the ties he had marked, and was a considerable distance ahead of them.

Hinzeman v. Missouri Pac. Ry. Co

While he was in the act of testing a tie, or marking it with his pick for removal, bending over the north rail, and applying his pick, apparently noticing nothing else, he was struck by a locomotive drawing a passenger train, and received such injuries that he died in a short while. It was the regular east-bound passenger train, which left Kansas City at 8:10 that morning, and was on time at the place of the accident. On approaching the semaphore west of the Milwaukee crossing, it was necessary for the engineer to sound the whistle to notify the man at the semaphore that the train was approaching, and to do this in time to receive the signal from the semaphore, which was to inform the engineer whether to come on or stop. The engineer sounded the whistle and received the signal to come on. There was no other sound of the whistle after that until the plaintiff's husband was struck by the locomotive. One of the plaintiff's witnesses testified that the train made a loud noise as it passed over the Milwaukee crossing. The plaintiff's husband was in plain view of the engineer and fireman, and they saw him from the time they were 500 feet away until he was struck. When the engine struck him he was thrown up as high as the headlight of the locomotive, and fell diagonally across the space between the main tracks; his feet near to the north rail of the south main track. Just at the point where he was struck there were marks of the pick on two ties, and also on another tie the distance of a half rail to the west. Thence all along back to where the men were at work there were at intervals marks of the pick on ties which Hinzeman had condemned to be removed; but east of where he was struck there was no such mark. As soon as the man was struck, sharp blasts of the whistle were sounded and the train was stopped in about two train's lengths and back to the place of the accident. The man was found unconscious, but by the time one of the section men reached him and was bending over him he became temporarily conscious, and asked, "What hit me?" He was placed in a baggage car and carried to the defendant's hospital, where he died about 11 o'clock that morning. At the close of the plaintiff's evidence the defendant asked an instruction in the nature of a demurrer to the evidence, which the court refused.

On the part of the defendant the testimony tended to prove as follows: The plaintiff's husband, Hinzeman, had worked in the capacity of section hand several years. Before the present employment, he had served as foreman of a section gang on another part of the road. On this occasion he had served as foreman on this section about three weeks. His services as foreman altogether had been about three months. He was required to have, and did have, a time-table and a watch. He was instructed to study the time-table and to consult his watch, and from time to time compare his watch with watches of the conductors. He was also instructed to

Hinzeman v. Missouri Pac. Ry. Co

so regulate his work as to not unnecessarily obstruct the running of trains. The train in question was a regular passenger train, which left the Kansas City Union Depot at 8:10 that morning, and was due at the Southwest Junction at 8:25. It was on time. The Southwest Junction is about three-quarters of a mile east of the Milwaukee crossing. The engineer and fireman testified that as they approached the semaphore the whistle was sounded, whereupon, receiving the signal to come on, they proceeded on their course, running at the speed of about 25 miles an hour. After they passed over the Milwaukee crossing they saw Hinzeman. He was walking in the 9-foot space between the two main tracks, carrying his pick on his shoulder. The language of the engineer was: "Well, we left the Union Depot at 8:10, and stopped at Grand Avenue Depot. Between the Milwaukee crossing and the Southwest Junction, this man, Mr. Hinzeman, was walking between the east-bound track and the west-bound track, with a pick on his shoulder, going the same direction we were going with No. 921. And just as we got within 10 or 15 or 20 feet of him, he came right up on the track—I think about 15 feet—right up on the track, and stooped down to strike a tie." The engineer then said that immediately he threw on the air with his left hand and sounded the whistle with his right, and the train stopped in five car-lengths of where they struck the man. He said he saw Hinzeman 400 or 500 feet away before he was struck. He sounded the whistle on approaching the semaphore, but did not sound it again until the man stepped on the track within 10 or 15 feet of the engine; but the bell was kept ringing all the while. The fireman's testimony was substantially the same as the engineer's.

The cause was submitted to the jury on instructions, some of which are criticised, and those will be hereinafter considered. The verdict was for the defendant; but the court sustained the plaintiff's motion for a new trial on the ground that it had erred in giving defendant's instruction No. 4. From that ruling the defendant has appealed.

1. Appellant's first proposition is that, regardless of the instructions, the verdict was for the right party, and should be sustained, because there was no evidence to sustain the plaintiff's cause of action, and therefore the court ought to have given the instruction asked by the defendant at the close of the plaintiff's case, in the nature of a demurrer to the evidence. Both in the pleadings and the evidence, the conditions stated and attempted to be proven by the plaintiff are in direct conflict with those stated and attempted to be proven by the defendant. According to the plaintiff's theory, the deceased had placed himself in a position of peril; but that position was seen by the engineer and the fireman for a distance of 400 or 500 feet, an ample time for them, with the means at hand, to have averted the accident if they had exer-

Hinzeman v. Missouri Pac. Ry. Co

cised ordinary care. According to the defendant's theory the deceased was in a place of safety and continued there until the locomotive was within 10, 15, or, at the most, 20, feet of him, when he suddenly turned to the track and bent over the rail to strike a tie with his pick. There was direct and substantial evidence on each side to sustain its theory. There was evidence on each side, also, tending to show that the evidence on the other side was not trustworthy. Under that state of the evidence, the court was in duty bound to submit the case to the jury. If, after the verdict had been rendered, the trial judge had been of the opinion that it was against the weight of the evidence, he would for that reason, if there had been no other, have set it aside and granted a new trial. The law gives him that authority and imposes on him that duty. In that respect the trial court is more powerful than the appellate court. The circuit judge is close to the trial; is, in fact, a participant in it. He sees the other participants, parties, counsel, witnesses and jurors, and from his position and judicial knowledge is better able than any one else to know if the verdict fairly responds to the claim of justice.

The evidence for the plaintiff shows that the deceased was guilty of negligence that contributed to the accident. Bending over the rail in a position to mark a cross-tie with his pick, thus placing his body in a position to be struck by a train that was liable to pass, was negligence, and but for that negligence he would not have been struck by this locomotive. That he was in that position, and in it for a longer period than the engineer and the fireman stated, is shown, not only by the plaintiff's witness who observed him from the elevator window, but the testimony of other witnesses to the fact that just at the place where he was struck there were two ties marked with the pick, and at the distance of a half rail to the west was another tie, also so marked, and still further to the west along the route were other ties which he had marked. If that testimony is true, then it is not true that the man was walking the distance of 400 or 500 feet in the 9-foot space between the tracks, with his pick on his shoulder, and suddenly turned when the locomotive was within 10, 15, or, at the most, 20, feet of him, and bent over the rail to mark a tie. If the defendant's testimony is true, then the defendant is not liable, because it would have been impossible for the engineer with the means at hand to have averted the injury; but, if the plaintiff's testimony is true, the engineer, by giving in due time the danger signals with his whistle, could have aroused the deceased from his apparent inattention and have avoided the accident. The testimony of the section hand was that when he reached the place where the wounded man was lying, and bent over him on his first returning consciousness, he asked, "What hit me?" That was evidence tending to show that he had not seen the train before it

Hinzeman v. Missouri Pac. Ry. Co

struck him. He was, according to the plaintiff's evidence, bending over the rail, his face toward the track, apparently attentive only to his work. The engineer and fireman both saw him, according to the plaintiff's testimony, at least 300 feet; according to their own testimony, 400 or 500 feet.

We are referred to several cases, which learned counsel think are analogous to this, in which this court has held that an instruction for a nonsuit should have been given; but each of those cases stands on its own facts. As was said by the court, per Brace, J., in *Sharp v. Railway*, 161 Mo. 235, 61 S. W. 835: "The facts and circumstances which bring a case within this exception to the general rule that contributory negligence of the plaintiff or deceased precludes a recovery are as variant as the cases in which it has been invoked, and but little assistance can be derived from adjudicated cases, in which the facts are seldom analogous to the one in hand." In that case this court held that the trial court erred in overruling a demurrer to the evidence. There, as here, the man who was killed was a section hand, and struck by a train which he ought to have known was coming; but in that case, when the engineer approached the man near enough to see his danger, "he gave the usual danger signals, at a distance sufficient to have enabled the deceased easily to have withdrawn himself from his exposed position before the train reached him, as the engineer supposed he had done until he was afterwards informed that the deceased had been struck." In *Evans v. Wabash R. Co.*, 77 S. W. 515, the deceased was also a section hand. The whistle had been sounded at the whistling post, a quarter of a mile away from the station, then again on approaching the station, and again as a signal to the conductor. Then, after passing the station and coming in sight of the men at work, within 300 or 400 feet of them, the engineer sounded the danger signal by four blasts of the whistle. This court, in speaking through Burgess, J., held that a demurrer to the evidence should have been sustained. But in the case at bar the engineer failed to sound the whistle after he came in sight of the deceased.

The evidence does not show exactly how far away from the point of the accident the locomotive was when the whistle was sounded for the semaphore. Between the Milwaukee crossing and the point of the accident was said to be between a quarter and a half mile. The semaphore was 150 or 200 feet west of the crossing, and the whistle was sounded far enough west of the semaphore to warn the man in charge of the approach of the train in time to enable him to give the signal. It would not be unreasonable to estimate that the distance from where the whistle sounded for the semaphore was a half mile from the place of the accident, and that was the last signal given by the whistle until it was too late for a signal to do any good. If the engineer in this case had used the whistle as did the engineers in the *Evans* and *Sharp*

Cases above referred to, it is very probable the plaintiff's husband would not have been killed. This case differs essentially from those and other cases in which we have said the demurrer to the evidence should have been given. Under the evidence in this case the court could not have refused to submit to the jury the question whether the engineer and fireman saw the man in time to have saved his life by the exercise of ordinary care. The court did not err in refusing the instruction in the nature of a demurrer to the evidence.

2. Among the instructions given for the defendant was the following: "(4) Unless the jury believe, from the greater weight of the evidence, that the defendant's engineer, in charge of the locomotive which struck the deceased, willfully, wantonly, or recklessly ran deceased down and killed him, your verdict must be for the defendant." The trial court assigned the giving of this instruction as its reason for sustaining the plaintiff's motion for a new trial. The learned trial judge was right in condemning that instruction. If the engineer saw the man in a position of danger, apparently inattentive to the approaching train, and if, with the means at hand, by the exercise of ordinary care, he could have given him timely warning, yet neglected to do so, then the case falls within the exception to the rule that a plaintiff cannot recover if his own negligence has contributed to his injury. In discussing that exception to the general rule, the courts have characterized the conduct of an engineer under such circumstances as reckless, wanton, or willful; but those are words of characterization expressing a conclusion—a judgment. The fact upon which that conclusion is based is the neglect of the engineer under the given circumstances to exercise ordinary care with the means at hand to avert injury.

It is the duty of the court by instructions to submit to the jury questions of fact, and enlighten them as to the legal effect to be given to the facts when found. When a man has committed certain acts, we say that he has been guilty of negligence; but when we submit the case to a jury we do not say, "If you find that the defendant has been guilty of negligence, you should find for the plaintiff," but we define negligence in the instruction, and say to the jury, "If you find that the defendant has done certain acts in the manner covered by that definition, then he has been guilty of negligence, and you should find accordingly." Under our law there are no degrees of negligence. There are degrees of care, and a failure to exercise the degree of care required under the circumstances is negligence. Sometimes, in the discussion of cases that have come before this court, we have applied the term "gross negligence" to an act in question. But in instructions to the jury courts should define the word "negligence" only, and not obscure the definition by the use of adjectives. If an instruction should say to the

Hinzeman v. Missouri Pac. Ry. Co

jury, "Although you may believe from the evidence that the plaintiff was himself guilty of negligence that contributed to his injury, yet if you also find that the defendant recklessly, wantonly, or willfully ran him down and killed him, you should find for the plaintiff," that would be giving the jury license to render a verdict based on their individual conceptions of what were the proper adjectives to apply to the conduct. A railroad company would never sanction an instruction of that kind. Yet this instruction 4 is only the converse of that proposition. It tells the jury that, unless they find that the engineer willfully, wantonly, or recklessly ran the deceased down and killed him, the verdict should be for the defendant.

In the argument before the jury, counsel for defendant read this instruction, and said: "That means, everything that the taking of human life means. It means murder. It means—" Objection was interposed by the plaintiff, but the objection was not sustained. The counsel making the statement withdrew it, but, resuming his argument, again repeated it, saying: "That means everything that the taking of human life means." Objection by plaintiff was again interposed, but was not sustained. That instruction was erroneous and hurtful to the plaintiff's case. The court correctly ruled when it sustained the motion for a new trial on that account.

The sixth instruction given for the defendant is as follows: "If the jury believe from the evidence that Joseph Hinzeman was section foreman, and as such had charge of the section of defendant's road where he was struck; that the train which struck him passed over this section about the same time every morning, going east; that said deceased had his pick, and was going along between the tracks of defendant, marking defective ties, which were to be taken out by his men; that he was walking between defendant's tracks, in a place of safety, and suddenly stepped upon or close to the track on which said train was running, and thereby sustained the injuries complained of; that after he became in peril of being struck by said train it was too late to stop the train thereafter, and avoid the injuries aforesaid, by the exercise of ordinary care upon the part of defendant's servants—then the plaintiff is not entitled to recover, regardless of all other facts in the case." That instruction is also erroneous in this: It seems to limit the duty of the defendant in the emergency named to stopping the train, and says that if, when the peril was discovered, it was then too late to stop the train, the defendant is not liable. That leaves out of view the duty of sounding the whistle, which under the plaintiff's evidence was an obvious duty.

The trial court was justified in sustaining the motion for a new trial. The judgment is affirmed. All concur, except ROBINSON, J., absent.

HARRISON v. DETROIT, Y., A. A. & J. RY.

(Supreme Court of Michigan, July 7, 1904.)

[100 N. W. Rep. 451.]

Servant's Injuries—Assumed Risk—Evidence.*

A motorman killed by an electric shock while trying to fix a trolley pole, owing to the pole, when it was raised from its socket, coming into contact with a high-tension wire, or so near it that the current arced, and who knew the danger of the high potential current, assumed the risk, though he had not been instructed as to the danger, and the fact that if the pole came within a half inch of the wire the current would arc, since the conditions were obvious.

Error to Circuit Court, Washtenaw County; Edward D. Kinne, Judge.

Action by Phila Harrison, as administratrix of the estate of Herbert J. Harrison, deceased, against the Detroit, Ypsilanti, Ann Arbor & Jackson Railway. Judgment in favor of plaintiff, and defendant brings error. Reversed.

Corliss, Andrus, Leete & Joslyn, for appellant.

A. J. Sawyer & Son (J. C. Knowlton, of counsel), for appellee.

MONTGOMERY, J. This action is brought by the plaintiff, as administratrix of the estate of Herbert J. Harrison, deceased, who met his death while employed by the defendant as motorman on its electric car. The principal question discussed in this court is whether there was evidence tending to show culpable neglect on the part of the defendant, and whether there was contributory negligence on the part of the deceased and his co-employees, and whether the deceased assumed the risk of the conditions of the employment as they existed. For an understanding of the case a full statement of facts is essential, and we adopt the statement given by the counsel for the defendant, with such slight variations as the record makes essential:

For some years the defendant company operated an electric railway between Ann Arbor and Detroit by what may be termed the "direct trolley current system," and plaintiff's employment began while this current was used. Later the defendant acquired the necessary right of way from Ann Arbor to the city of Jackson. In order to operate an electric line for that distance it was at least commercially necessary to install a new system of transmitting electric power or current along the line, which is known as the "high-tension system." This system is a method of generating at the power house a large volume or current of electricity, but with a comparatively low voltage, and converting it into a

*As to the assumption of risks from obvious dangers, see foot-note appended to *Simmons v. Southern Traction Co.* (Pa.), 10 R. R. R. 362, 33 Am. & Eng. R. Cas., N. S., 362.

Harrison v. Detroit, etc., Ry

small current or volume with an exceedingly high voltage, and carrying it out along the line on small wires to be taken off at different points called "substations." At these substations the current is reconverted into the large volume again, with a pressure adjusted to the requirements of the trolley wire. The method of transmission of the current may be likened somewhat to transmitting water through pipes. If, for instance, the water passing through a four-inch pipe is to be sent through an inch pipe, the current or pressure in a small pipe must be many times greater than in the large pipe. If the pressure in the small pipe is greater than can be used at the other end, then it can be discharged in a four-inch pipe, when the current or pressure would be brought back to what it is in the four-inch pipe at the other end, less the friction. From the foregoing it will be seen that no more actual power, or even pressure, is used to propel cars than would be used by the direct trolley current. In fact, the same direct trolley current is used as before, but the surplus power carried along the line in a different form and manner until it is necessary to use it on the trolley wire. The ordinary mode of transmission of high potential currents is by what is called the "multiphase system." Technically, this consists of "the use of two or more alternating currents of equal period, but differing in phase." "Differing in phase" means that the two alternations or current waves do not come together, but one after or at a different time from the other. The three-phase system is used by the defendant. Three wires are strung along in the form of an equilateral triangle, each substation being fed from a set of these wires. Theoretically, in each of these triangular sets of wires, one of them at any given moment of time is dead, but, as it is so only for an infinitesimal part of a second, it is for all practical purposes very much alive at all times and dangerous, carrying a voltage of upwards of 22,000. To establish this system it was necessary to set a new line of poles. The high-tension wires were carried on two cross-arms, one above the other, the longer one being at the top, carrying four of these small wires, and the lower one carrying two. These six wires formed two triangles, with one of the points of each downwards. Below these cross-arms on the same pole is an arm long enough to extend a little past the center of the railway track, so as to carry suspended from it two trolley wires 6 inches apart and 18½ feet above the rails. The northerly trolley wire is used by the cars going west, and the southerly by the cars going east. From the poles to the center of the track it was 6 feet 4½ inches. The trolley arm, therefore, would have to be some 3 or 4 inches longer in order to carry the farther trolley wire. The lowest high-tension wires are between 26 and 27 feet above the rail, and between 4 and 5 feet to the side of the center of the track. The poles carrying these wires and trolley arms were 35-foot poles as a rule, ex-

Harrison v. Detroit, etc., Ry

cept in places where, to avoid trees and buildings, it became necessary to carry the high-tension wires to avoid contact. The undisputed testimony is that the 35-foot pole is the standard height for carrying high-tension wires in suburban railway construction.

In August, 1901, the reorganization of the line was begun. The work of stringing the wires commenced about the middle of November of that year, and was completed about the middle of February following, but a portion of the high-tension system was put in operation January 12, 1902, being something over a month before the entire work was completed. While the work of setting new poles and stringing the high-tension wires was going on, the defendant also reorganized its power house, and built its substations, and put in the new machinery and appliances for generating and handling the high potential currents as well as the necessary transformers and converters. The entire work was done by Westinghouse, Church, Kerr & Co., under the supervision of its superintendent, Mr. Charles Riley. It is not believed that there will be any dispute over the matters contained in this preliminary statement, nor that it will be necessary to go further into the details of construction in order to give a correct understanding of the general conditions of the railway at the time of the accident which is the origin of this suit.

Herbert J. Harrison began work for the defendant in September, 1900, first as conductor, then as a motorman, on the Ann Arbor city line, on which he remained for a little over a year. During nearly all of that period, if not all of it, he lived at Inkster, Wayne county, and most of the time went to Ann Arbor in the morning and returned in the evening, riding both ways over defendant's main line. While thus going back and forth he asked for and obtained permission to ride with the motorman, and received from him instructions in the operation of the large suburban cars. It is a conceded fact that he thus became a competent motorman. It should also be said that Mr. Harrison was a man of good habits and careful in the management of matters put in his charge. Mr. Harrison began operating suburban cars on the main line from Detroit to Jackson some time after August 7, 1901, which was the time he left the Ann Arbor city line. It may have been immediately afterward, as there is no evidence of his laying off. This would be about the time the work of laying out the new system began. He thus had an opportunity of daily observing the work of setting the poles and stringing the wires as it progressed. Moreover, the general headquarters of the road are at Ypsilanti. The power house at Ypsilanti was a general rendezvous of the conductors and motormen, where the work of reconstructing the system and the coming installation of the high-tension current was a matter of daily discussion and inquiry by them. Mr. Harri-

Harrison v. Detroit, etc., Ry

son was very frequently there, and made many inquiries of Mr. Riley, superintendent of construction, about the new system. He asked how high the voltage was to be, and other similar and most natural questions for one who was to use the current. Under the old system it was usual, if the trolley wire was down on the track, to pass a rope around it to pull it off, or to take a piece of dry board and push it away. Harrison asked Riley if it would be safe to put a rope around a high-tension wire. Riley said, "No; keep away from it." It was a matter of common knowledge among all the employees that the current was dangerous, and that they should use the utmost care to prevent making a contact with the high-tension wires. Harrison himself warned one of the men to be very careful.

The trolley poles in use on defendant's line are 11½ feet long. Each of defendant's cars carry an extra trolley pole lashed to the top of the car, to be used in case the one in use becomes disabled. One of the duties of the men operating the car is to climb on the top of the car to change the trolley pole whenever it becomes necessary, and this is one of the duties about which they are instructed. All the men were well informed of and understood the danger of contact with a high potential current, and were warned to "avoid in every way possible from getting a shock." On the night of March 11, 1902, at about 9 o'clock in the evening, car No. 6 was coming east from Jackson in charge of Henry J. Pullen, conductor, and Herbert J. Harrison, motorman. About three miles west of Chelsea, the trolley jumped from the wire twice. Then Pullen gave a signal to Harrison to come back and see what was the trouble. He did so, and discovered that the wheel or trolley would not revolve. The night was dark, and it had been raining hard, so it was decided to run to Chelsea before changing the trolley. When they arrived there they climbed upon the car to change poles. The pole which had been in use was allowed to stand nearly upright, and Pullen took hold of it while Harrison loosened the burrs or nuts which held the pole in the socket. It is customary to first loosen the pole, and then both persons lift it out, and both take hold of the new one and place it in the socket. On this occasion Harrison loosened the burrs until Pullen said he thought it would come out. Harrison said, "Wait a minute," and then straightened up and took hold of the trolley. They both lifted, but could not get it out. Harrison said, "I will have to loosen it a little more," and proceeded to do so. Pullen still had hold of the pole, and was twisting it and lifting, and said again, "It is loose enough now, Herby," and, without waiting for Harrison to help him, he lifted it, and he said, "It gave way all at once; it just shot right up." Then there was a flash, and that was all Pullen could remember of the transaction.

The socket is a part of the revolving stand on the top of the

car. It has a very strong spring attachment which will cause the trolley pole to stand upright, or nearly so, when the trolley is taken off the wire. In removing the trolley pole the trolley stand is left so that the pole can swing back lengthwise of the car. When in that position there is no possible way of making the pole swing sidewise while it remains in the socket. While the trolley pole is standing up, it is quite close to the trolley wire. It does not reach as high as the lowest high-tension wire, and it is between 4 and 5 feet to the side of it. It cannot be brought nearer any of the high-tension wires until taken out of the socket. The trolley stand has a ground connection, so that in removing the trolley pole care must be taken not to make contact with the trolley stand and at the same time with the trolley pole after the latter is removed from the socket. If such a contact be made, then if the trolley pole touches either the trolley wire or the high-tension wires a dangerous, and perhaps fatal, shock will be received. It was the claim of the plaintiff, and the testimony was such as to warrant a finding of fact by the jury, that the trolley pole came in contact with the high-tension wires, and by this means the death of Harrison was caused.

It appears from the measurements which the defendant presented in the case that, when the trolley stand was revolved so that the trolley pole would run at right angles with the car, the trolley could be raised within 1 foot 6½ inches of the nearest high-tension wire, which was between 4 and 5 feet to the side of the center of the car. The lowest high-tension wire is between 6 and 7 feet higher than the trolley wire, which is 5 feet 11 inches above the running board, which is on top and the highest part of the car. It was shown that the distance from the trolley to the nearest high-tension wire is fully as great on the defendant's road as that of any other road in the country. The overhead construction of the road is fully as good, if not better, than any other seen by the defendant Riley, who is personally familiar with over 50 electric railways using the high-tension system. The same witness also testified that the distance the poles were set from the center of the track is the standard set. Another expert, Alfred C. Marshall, who is chief engineer of the Rapid Railway system, stated that the 35-foot pole is the approved standard. There was no proof offered tending to show a faulty construction of any kind, nor was it claimed that there is any overhead construction anywhere in the country where the distance between the high-tension wires and trolley is greater.

In our view of the case, the question of first importance is whether the deceased assumed the risk of the conditions as they existed. The general rule upon the subject of assumed risk is too well settled in this state to make it necessary to quote from the decided cases at any great length. The em-

Harrison v. Detroit, etc., Ry

ployee is, as matter of law, held to have assumed the risk of all such dangers accident to the employment as he knows to exist or should have acquainted himself with. *Railway Company v. Smithson*, 45 Mich. 221, 7 N. W. 791; *Ragon v. Railway Company*, 97 Mich. 265, 56 N. W. 612, 37 Am. St. Rep. 336; *Balhoff v. Railroad Company*, 106 Mich. 606, 65 N. W. 592; *Bauer v. American Car & Foundry Co. (Mich.)* 94 N. W. 9; *Bradburn v. Railway Company (Mich.)* 96 N. W. 929. The rule is recognized by plaintiff's counsel, but it is contended that in the present case the plaintiff should not be held to have assumed the risk, for the reason that Harrison was not informed that the high-tension wire came within one foot and six inches of the end of the trolley pole when placed on a direct line from the trolley stand, and that the trolley pole was therefore in danger of coming in contact with the high-tension wire while the attempt was being made to remove the pole; that it was not shown that Harrison was instructed or knew that it was dangerous to remove the trolley pole on the side of the car towards the high-tension wire; that he was not instructed that, if the trolley pole came within one-half inch of the high-tension wire, electricity would arc.

Were instructions of this character essential before it be said that the deceased assumed the risk? He knew of the fact that contact between the trolley pole and the high-tension wire would be exceedingly dangerous. Indeed, contact between the pole and the trolley wire with a pole removed from the socket was dangerous only in less degree. He certainly knew that this wire was near enough to be reached by the trolley pole upon its being removed from the socket. Knowing, as he did, of the high voltage in the conducting wires, it would seem obvious that during the term of his employment he should have noticed that they were near enough to come in contact with this pole if the pole was directed toward them. The occasion for special instruction that this pole of 10½ feet in length would reach that distance in whatever direction it was extended is not manifest. And that the distance from the car to the high-tension wire could be as easily estimated by deceased and his co-employees as by any alter ego of the defendant is equally manifest. This being so, it would be understood by him, as well before any instruction in that regard as after, that if this trolley pole was removed in the manner in which it was on this occasion it was likely to, or at least might, come in contact with this high-tension wire. It is undoubted that, knowing this, he knew that any such contact was almost sudden death to one in whose hands the trolley pole was at the time. It seems clear to us, therefore, that the danger was obvious, and that it was one assumed by the deceased.

The suggestion that he did not have knowledge that electricity would arc is of little force. The testimony shows

Harrison v. Detroit, etc., Ry

that electricity arcs when a conductor like the trolley pole in question in this case is brought either in contact with the high-tension wire or within half an inch of it. If the case were one in which in the performance of the duty of the employee it became necessary for him to bring this conducting trolley pole within half an inch of the high-tension wire in the ordinary discharge of his duty, a different question might be presented. But the suggestion that he might make nice calculations as to carrying this pole within half an inch of this dangerous current, but would be guilty of negligence himself, or at least held to have assumed the risk, if the pole came in actual contact with the wire, is without force.

Plaintiff's counsel cite us, as sustaining their contention that this was a case for instruction, *Smith v. Peninsular Car Works*, 60 Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542; *Ribich v. Lake Superior Smelting Co.*, 123 Mich. 401, 82 N. W. 279, 48 L. R. A. 649, 81 Am. St. Rep. 215; *Walker v. Railway Company*, 104 Mich. 606, 62 N. W. 1032. In the *Smith* and *Ribich* Cases the duty which was neglected by the master was that of notifying the employee of a latent danger which consisted of properties of substances with which he was bound to deal, which might be unknown to an ordinary workman. In the present case the properties of this high-tension wire were unquestionably known to the deceased. No further instruction was required as to that. The contention of plaintiff gets down to this: that he should have been told the precise location of this wire with reference to the top of the car, and that the wire could be reached by a pole of the length of the trolley pole. These facts were open to his observation and to the observation of every employee who passed over this road. The case of *Walker v. Railway Company*, *supra*, was one in which the danger to the injured party arose out of a want of knowledge of conditions which were not obvious. In the present case we think the danger was obvious and it was assumed, and upon this ground a verdict should have been directed for the defendant. We find it unnecessary to discuss the other questions in the case.

The judgment will be reversed, and new trial ordered. The other Justices concurred.

NORMILE *v.* NORTHERN PAC. RY. CO.

(Supreme Court of Washington, Sept. 21, 1904.)

[77 Pac. Rep. 1087.]

Carriage of Freight—Delivery to Consignee—Theft from Car on Siding.*

Plaintiff shipped an engine, together with certain tools and a cable used in connection therewith, consigned to himself at a flag station on defendant's road where defendant maintained a warehouse and a side track, but no station or agent. The consignment was shipped on an open flat car, and on its arrival plaintiff, in passing through the town, discovered the car set out on the side track, and notified his bookkeeper to confer with defendant's agent at an adjoining station, and ascertained if the tools belonged to plaintiff, and, if so, to unload the same. Plaintiff's bookkeeper was unable to obtain this information until it was too late to unload the material the next day, and during the night the tools and cable were lost or stolen from the car: *held*, that the mere setting out of the flat car on the siding, without more, did not constitute a delivery.

Same—Same—Same—Liability.*

The carrier, not having placed the tools and cable in its warehouse on their arrival, as it might have done, was liable to plaintiff for their loss.

Same—Notice of Arrival.

Where tools were consigned to the shipper at a flag station, and on arrival the consignee, in passing through the town, noticed a car containing similar goods standing on the side track, whereupon he immediately took steps to ascertain if the shipment belonged to him, no notice of arrival on the part of the carrier was required.

Same—Same.†

Notice of the arrival of tools shipped, addressed by the carrier's agent to the consignee at the point of destination, and mailed, is sufficient.

*As to when the carrier's liability on account of freight terminates after its arrival at destination, see foot-note appended to *Stapleton v. Grand Trunk Ry. Co.* (Mich.), 9 R. R. R. 332, 32 Am. & Eng. R. Cas., N. S., 332, where all the preceding authorities in this series are collected; *New Orleans & N. E. R. Co. v. George & Co.* (Miss.), 9 R. R. R. 786, 32 Am. & Eng. R. Cas., N. S., 786 (what constitutes delivery under demurrage rules).

†As to whether it is the duty of a carrier to give notice of the arrival of freight at destination, see foot-note appended to *Alabama & V. R. Co. v. Pounder* (Miss.), 9 R. R. R. 268, 32 Am. & Eng. R. Cas., N. S., 268, where all the preceding authorities in this series are collected.

As to what constitutes notice to consignee of arrival of freight at destination, see *Alabama & V. R. Co. v. Pounder* (Miss.), 9 R. R. R. 268, 32 Am. & Eng. R. Cas., N. S., 268 (though the carrier notified by mail the consignee of the arrival of freight; it was negligent in not notifying one well known to it to be the representative of the consignee and who had several times called and inquired for the freight); note, 20 Am. & Eng. R. Cas., N. S., 453 (sufficiency of notice of arrival of cars to fix liability of shipper for demurrage charges); *Galveston, Harrisburg, etc., R. Co. v. Hunt* (Tex.), 2 Am. & Eng. R. Cas., N. S., 731 (sufficiency of notice of arrival of freight to fix liability for demurrage charges).

Normile v. Northern Pac. Ry. Co

Same—Removal of Freight—Laches.†

A consignee of tools shipped was not guilty of laches in that he was not prepared to receive and remove the same until the day following the day on which he received notice of arrival.

Same—Same—Question of Law.

In an action against a carrier for the loss of goods, where there is no dispute about the material facts, the question what is a reasonable time in which the goods should have been removed by the consignee is for the court.

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Action by S. Normile against the Northern Pacific Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Bennett & Whitham, for appellant.

Jas. F. McElroy, B. S. Grosscup, and A. A. Booth, for respondent.

PER CURIAM. Action brought in the superior court of King county by plaintiff, S. Normile, against defendant, the Northern Pacific Railway Company, on account of the loss of freight. The cause was tried to the court without a jury. The following findings of fact and conclusions of law were made in the trial court: "(1) That on December 11, 1901, at Portland, Oregon, the defendant received from the plaintiff for shipment to Fremont, Washington, for the sum of \$34, the following goods, wares, and merchandise, to wit, one donkey engine and tool box and two coils of steel cable. (2) That the allegations set forth in paragraph three of plaintiff's complaint are untrue, and that the defendant did safely carry and deliver to the said plaintiff, at Fremont, Washington, in accordance with its contract of carriage, the goods, wares, and merchandise hereinabove described, and that plaintiff has suffered no damage whatsoever. (3) That the allegations set forth in the fourth paragraph of plaintiff's complaint are each and all untrue, and that plaintiff has suffered no damage in the sum of one hundred dollars, or in any other sum; that there was no failure on the part of the defendant to deliver said property to plaintiff. Wherefore the court finds as conclusions of law that plaintiff take nothing by his said action; that the defendant is entitled to judgment for its costs and disbursements herein." Plaintiff duly excepted to each of these findings and conclusions, save as to the first finding of fact above noted. These exceptions were overruled in the lower court. Plaintiff excepted, and judg-

†As to what is reasonable time within which to remove freight, see *Pennsylvania R. Co. v. Midvale Steel Co. (Pa.)*, 1 R. R. R. 777, 24 Am. & Eng. R. Cas., N. S., 777; note, 20 Am. & Eng. R. Cas., N. S., 461; *Tallassee Falls Mfg. Co. v. Western Ry. of Alabama (Ala.)*, 20 Am. & Eng. R. Cas., N. S., 455; *Berry v. W. Va. & P. R. Co. (W. Va.)*, 11 Am. & Eng. R. Cas., N. S., 103; *Swan v. Louisville & N. R. Co. (Tenn.)*, 20 Am. & Eng. R. Cas., N. S., 446.

Normile v. Northern Pac. Ry. Co

ment was entered dismissing the action, from which plaintiff prosecutes this appeal.

Paragraph 3 of the complaint, which is referred to in the findings, is in the following words and figures: "That the defendant did not safely carry and deliver the said goods pursuant to said agreement, nor any part thereof, except the said engine, but, on the contrary, the said defendant so negligently conducted and so misbehaved in regard to the same, in its calling as carrier, that the said plow, steel cable, and the said tool box, together with the tools contained therein, were wholly lost to plaintiff, to his damage in the sum of \$243, the same being the value of said property which the said defendant has failed to deliver to plaintiff." The respondent company denied the material allegations of the complaint, and pleaded as a separate defense: "That at the time said goods were received by defendant for shipment, to wit, December 11, 1901, at Portland, Oregon, it was agreed and understood that said defendant should not be responsible for the loss of any article shipped upon open cars; that said goods were shipped upon open cars and at plaintiff's risk." Appellant, Normile, by his reply, denied all the allegations of this affirmative defense. It was stipulated at the trial that the value of the goods lost was \$243, as alleged in the complaint. Fremont was, at the time of the alleged grievances, what was termed a flag or prepaid station located on respondent's line of railroad in King county. The respondent company had no regular agent at such station. The nearest agent of the company at that time was located at Interbay, and had charge of other stations near by, including Fremont, in the matter of the delivery of freight from the cars of respondent company to consignees. Mr. Normile, the appellant, testified that this railway company had a warehouse or some kind of a building at Fremont; that he received the donkey engine, which was shipped with the tools and cables, from the flat car in proper condition; that these tools and cables were designed for use in connection with such engine; that he knew about the shipment of this property from Portland on December 11, 1901; that witness expected it would arrive at its place of destination in three or four days thereafter, and that he purchased such property for use in connection with his business, which was that of a contractor; that in going through Fremont on the street car about 4 o'clock in the afternoon of December 16, 1901, he noticed a donkey engine on one of respondent's flat cars, which he supposed was his property; that the next morning he found his bookkeeper, to whom he gave directions to go and ascertain if his said property had arrived; that when appellant had procured a dray on the morning of December 18th for the purpose of removing this property, the tools and cable were missing; that he did not get his mail at Fremont, and received no notice

Normile v. Northern Pac. Ry. Co

of the arrival of this freight through the mail; that he did not know that Fremont was a flag or prepaid station; that the weight of this merchandise in question was about 1,500 pounds, and was in two parcels. Mr. Maitland R. Sanford, appellant's bookkeeper, testified in part as follows: "Well, it was on the morning of the 17th, possibly half past nine, that I met Mr. Normile, and he informed me that in passing through Fremont the night before he had seen a donkey engine on a flat car there. Well, he was expecting an engine for his work on the canal, and he instructed me to look the matter up, and ascertain if that was his, and, if so, to order a dray and remove it. Now, I tried to find the agent; done some telephoning * * * in order to ascertain if that was Mr. Normile's engine before ordering the dray; but I failed to do so. * * * It was nearly noon then; perhaps 11:30. I found a drayman that had a dray of sufficient size to remove the engine, but it was too late for him to get then to Fremont and remove the engine—too late in the day. Well, of course, if it was too late for him, it was too late for any other drayman to get there. So that was all I could do. I could not get the drayman to take it off on that day. So this drayman came the following morning, and it was too late then. The stuff was taken off then; that is, the tool chest and contents and cable." Witness, continuing his testimony, said that after he was notified by appellant of the arrival of the freight, it took an hour and a half to find the agent of respondent before ordering the dray; that he did not find any agent at Fremont station; that there was none there permanently. A. S. Pattullo, the secretary of the Columbia Digger Company, the consignor of this shipment, testified by deposition that "the Columbia Digger Company had nothing to do with the way it was to be shipped, and there was no arrangement in regard to any reduction of freight." On the part of the defense the affidavit of Mr. Jas. F. McElroy by stipulation was read in evidence. This affidavit related to the testimony of witness Tillotson, who was in the employ of appellant at the time of the arrival of this freight, and was to the effect that the engine and other property which Mr. Normile stated were there for delivery were at Fremont on the morning of December 17, 1901, in the same condition as when loaded on the flat car at Portland, where Tillotson helped load this freight; that the dray Mr. Normile had engaged to convey such property from the car to be used on the Lake Washington Canal did not arrive till December 18, 1901; that witness then went with four assistants to unload such freight from the car on to the dray, and found that the tools and cable had been removed. W. S. Clark, a witness for respondent, testified in part that in December, 1901, he was respondent company's agent at Interbay; that he had in his possession the data with reference to the shipment of the above property to appellant; that it arrived at Fremont on

Normile v. Northern Pac. Ry. Co

December 14, 1901; that the bill of this shipment was received by witness about 9 o'clock in the morning of that day; that he sent notice of the arrival of this freight to appellant by postal card, which he deposited in the post office at Ballard on the afternoon of December 14th, directed to Mr. Normile at Fremont; that the first time witness learned about the loss of this freight was about December 26, 1901, when he received a letter through the mails from appellant's attorney, Mr. Whitham.

The respondent contends that appellant, by preparing to remove these goods on the 17th day of December, 1901, accepted the delivery thereof on the side track at Fremont. For the purposes of this controversy, we think that it is immaterial whether this freight arrived at Fremont on the 14th or 16th of December, 1901, though, from the testimony adduced in appellant's behalf and the statements contained in Mr. McElroy's affidavit, it would seem that the latter date is the correct one. There is no question but that these goods arrived at Fremont in the same condition as when the same were loaded on the car at Portland, and they were at such station on December 17, 1901. We must bear in mind that the days at that season in the year were and are of short duration. "Where goods are shipped to a place where there is a side track, but no depot, platform, or agent of the carrier, and this is known to the parties, and is not unreasonable in view of the small amount of business, it has been held that leaving the car of goods upon the side track is a good delivery, and relieves the company from further responsibility." Vol. 4, Elliott on Railroads, § 1521. The rule was enunciated in the case of *Kirk v. Chicago, etc., Ry. Co.*, 59 Minn. 161, 60 N. W. 1084, 50 Am. St. Rep. 397, that while it is usual for the consignees themselves to unload and carry away certain kinds of freight, such as coal, lumber, and the like, directly from the cars, "it is also true * * * that there is nothing to prevent a carrier, at least under special circumstances, from using the car as its warehouse for the storage of freight. But in the case of portable boxes or packages of valuable merchandise we think that under any ordinary circumstances, * * * in order to terminate the carrier's liability, he must remove the goods from the car in which they were transported, and place them for safe-keeping in his freight house." It is impossible to formulate any general rule, applicable to all cases, as to what constitutes a good and sufficient delivery of freight by the carrier to consignees. Each case must necessarily to a great extent depend upon its own particular circumstances. The question of delivery to a consignee is usually a question of fact, or a mixed question of law and fact, for the jury under proper instructions from the court. Sometimes, where the facts are undisputed, a question of law only is presented for the decision of the court. Elliott on Railroads, *supra*, § 1517, and authorities

Normile v. Northern Pac. Ry. Co

cited. "It may be stated, generally, that every delivery must be made to the right person, at a reasonable time, at the proper place, and in a proper manner. These are all requisites of a valid delivery, except in so far as a compliance with them may be waived by the party entitled to the goods." Hutchinson on Carriers (2d Ed.) § 340. Unquestionably, as a general rule, the manner of delivery may be regulated by contract, but, in the absence of any specific stipulation upon the subject, it is in a great measure determined by custom. The carrier must, however, afford the consignee an opportunity to unload and remove his goods. On the other hand, the consignee must exercise reasonable diligence in the matter of the receiving and removal of his freight. The appellant prepaid the regular freight charges on this shipment, and was entitled to the protection that the law afforded him in that behalf. The following propositions of law pertinent to this controversy are enunciated by a learned author: "The carrier's responsibility does not end by mere delivery on the platform or dock at the place of destination. There must be such actual delivery as fills the contract of carriers; or, if not applied for by the consignee, the goods must be safely warehoused. Then the liability as carrier ceases, and that of warehouseman begins. * * * And so jealous is the law in guarding the rights of shippers against contracts of carriers exempting themselves from the consequences of their own negligence, and so obligatory is the duty of carriers to furnish suitable vehicles and appliances for the transportation of property received to be carried, that the knowledge of shippers of the character of cars furnished will not exempt the company from liability for loss occasioned by the insufficiency thereof, although the contract of shipment be that there shall be no such responsibility on the part of the company." 2 Rorer on Railroads, pp. 1292, 1293. While it is true that these goods which were lost or stolen were intended for use in connection with the donkey engine, and that it was more convenient for the respondent to load the whole shipment on one flat car, as such engine could not well have been placed in a box car for shipment, and that it was intended by both carrier and consignee to be unloaded and received direct from the flat car at the place of destination, still it does not appear by any testimony in the record but that this respondent company might have placed these particular goods (the tools and cable) in its warehouse or building at Fremont station; that otherwise respondent is liable to appellant for their value. It would seem from the showing made in the record that appellant was not afforded a reasonable opportunity to enable him to remove these particular goods from the car prior to their loss, and that such loss should be borne by the respondent.

The principal authority cited by respondent's counsel in support of their contentions is *Allam v. Pennsylvania R. R.*

Normile v. Northern Pac. Ry. Co

Co., 183 Pa. 174, 38 Atl. 709, 39 L. R. A. 535. The points decided are fairly presented by the syllabus: "As a general rule, a common carrier must give to the consignee of goods notice of their arrival at the point of destination. While a common carrier cannot stipulate for a release from the consequences of his own negligence or fraud, yet he can modify his liability as such so far as to provide that notice of the arrival of goods need not be given at small stations where no station house has been built and no freight agent located. A contract that at such stations the goods shall be at the 'risk' of the owner until loaded into cars and when unloaded therefrom is not against public policy, and will be enforced. Where goods are carried under such a contract all responsibility for protecting the same after the goods reach their destination is assumed by the consignor." It would seem that in the matter of such shipments the consignor acts as the agent of or represents the consignee. In this Pennsylvania case the bill of lading under which the goods were received by the carrier contained the following provision: "When merchandise is destined to or from way stations and platforms where station buildings have not been established by the carrier, or where there are no regularly appointed freight agents, it shall be at the risk of the owner until loaded into the cars and when unloaded therefrom; and when received from or delivered on private turnouts it shall be at the owner's risks until cars are attached to and after they are detached from the train." We find no such stipulation in the bill of lading which was received in evidence in the action at bar. Furthermore, it appeared in the authority last cited that at Strafford, the place where the goods were to be received, there was no shelter, and no regular agent of the carrier company to take charge of the freight upon its arrival. "The only convenience at Strafford for the receipt and delivery of goods was a platform by the side of the road." Thus it is plain to be seen that the facts in the Allam Case are noticeably dissimilar to those in the present controversy; that while it may have been inconvenient for the respondent to have unloaded the goods in question, and stored them in its station house or building at Fremont, still, in the absence of any express stipulation, it was bound to properly care for these goods upon their arrival both in the capacity of a carrier and warehouseman, under the well-established rules of the common law in that regard. See Rorer on Railroads, pp. 1292, 1293, *supra*. Regarding the matter of notice to Normile, the consignee, we think that under the facts as disclosed by the record no notice was required; but, assuming that such notice was necessary, the agent, unless otherwise advised, had the right to assume that notice addressed to the consignee at the point of destination would reach him in the due course of the mail. Appellant, on the arrival of these

Norfolk & W. Ry. Co. v. Briggs

goods at Fremont station, pursued the safer method of first communicating with the agent on the 17th day of December, 1901, before removing the same from the car. It would therefore seem unreasonable to charge the appellant with laches in not being prepared to receive and remove this freight until the morning following the date last named. There is no showing made in the record other than that the appellant acted with reasonable diligence in this particular. Where there is no dispute about the material facts, this question of reasonable time in which goods are to be removed by the consignee is one of law for the court. *Hedges v. Hudson River R. R. Co.*, 49 N. Y. 223.

The judgment of the lower court is reversed, and the cause remanded, with instructions to enter a judgment for the agreed value of the goods lost.

NORFOLK & W. RY. CO. v. BRIGGS.

(Supreme Court of Appeals of Virginia, Sept. 29, 1904.)

[48 S. E. Rep. 521.]

Fires Set by Locomotives—Evidence of Other Fires.*

In an action against a railroad for alleged negligence in setting fire to property by sparks from its engines, after plaintiff has identified the engine alleged to have communicated the fire complained of, he is not entitled to introduce other evidence as to fires having been communicated along the defendant's right of way without having first shown that such other fires were communicated from the same engine.

Appeal.

Where it appears on appeal that illegal evidence has been admitted, the judgment must be reversed, as it cannot be said what effect it may have had on the minds of the jury.

Fires Set by Locomotives—Evidence—Speed at Other Points.†

In an action against a railroad for setting fire to property by sparks from its engines, testimony as to the speed of a train at a point about two miles distant from the scene of the fire is inadmissible.

Same—Same—Origin.

Where a witness had testified touching a fire near the defendant's right of way, it was error to permit him to answer the question whether he saw anything from which the fire could have started except the railroad.

Same—Same—Other Fires.*

The refusal of the court to permit a witness to testify, at the in-

*As to the admissibility of evidence of other fires, see foot-note appended to *Mills v. Louisville & N. R. Co.* (Ky.), 9 R. R. 409, 32 Am. & Eng. R. Cas., N. S., 409, where all the preceding authorities in this series are collected; *Alabama Great Southern R. Co. v. Clark* (Ala.), 9 R. R. 589, 32 Am. & Eng. R. Cas., N. S., 589; *St. Louis, etc., Ry. Co. v. Lawrence* (Ind. Terr.), 9 R. R. 414, 32 Am. & Eng. R. Cas., N. S., 414; *Cheek v. Oak Grove Lumber Co.* (N. Car.), 10 R. R. 667, 33 Am. & Eng. R. Cas., N. S., 667.

†As to what evidence is admissible to show speed of trains, see foot-note appended to *Mathiesen v. Omaha St. Ry. Co.* (Neb.), 11 R. R. 777, 34 Am. & Eng. R. Cas., N. S., 777, where all the preceding authorities in this series are collected.

Norfolk & W. Ry. Co. v. Briggs

stance of the defendant, with reference to fires in the same vicinity, set out by duly equipped locomotives on the lines of other railways, was proper.

Trial—Examination of Plaintiff.

That in the examination of the plaintiff leading and improper questions were propounded is not cause for reversal, the defendant having been left free to cross-examine the witness.

Damages—Evidence.

It was proper to permit the plaintiff in an action to recover for a stock of merchandise destroyed by fire to give an estimate of the total amount of purchases made by him while he had occupied the property up to the time of the fire and his annual sales during the same time.

Same—Same.

It was proper to allow a witness to state the valuation of the goods plaintiff had on hand on the day prior to the fire, based on a cursory view, not made with any purpose of valuation, nor any expectation such as would have caused him to give special attention to the matter.

Same—Same.

It was not error to permit a witness to give an estimate of the value of the goods seen at plaintiff's store two days before the fire.

Error to Circuit Court, Warren County.

Action by Robert L. Briggs against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Downing & Richards, for plaintiff in error.

A. Moore, Jr., for defendant in error.

CARDWELL, J. This action was brought by the defendant in error, Robert L. Briggs, to recover from the plaintiff in error, the Norfolk & Western Railway Company, damages sustained by reason of the loss of a stock of merchandise by fire, which it is alleged was communicated to the building containing the merchandise in question from an engine of the plaintiff in error on the 13th of November, 1901.

The building was situated on the east side of the railway tracks at Ashby station, about 33 feet from the main line, and there was within 15 feet of this building a warehouse. On the day named the fire was discovered on the roof of the warehouse, about 20 minutes after train No. 88, drawn by engine No. 169, had passed the buildings, going north. The warehouse burned, and communicated the fire to the building occupied by the defendant in error, and both were totally destroyed.

It appears from the evidence that, if the fire was caused by the plaintiff in error, it emanated from this particular engine.

The jury rendered a verdict in favor of the defendant in error assessing his damages at \$2,600, with interest, and the court, having refused to set the verdict aside, rendered judgment thereon, and from that judgment the case is before us on a writ of error awarded by one of the judges of this court.

The first question to be considered arises out of the exceptions taken to the rulings of the circuit court admitting evidence introduced by the defendant in error over the objection of the plaintiff in error.

The declaration charged that the fire was caused by sparks or ignited cinders thrown upon or against the building from one of plaintiff in error's engines—that is, by sparks emitted from the smokestack; the negligence thereby imputed being that the engine setting out the fire was not properly equipped with a spark arrester, or that the engine in question was not operated with due care and caution.

After the introduction of evidence to show that the fire was communicated to the building from a certain engine in use by the plaintiff in error which passed Ashby station about 20 minutes before the fire on the roof of the warehouse was discovered, defendant in error introduced evidence to prove that other fires had originated along plaintiff in error's right of way, without showing first that these fires were set out by the engine alleged to have communicated the fire to the building at Ashby, or that they were set out by reason of plaintiff in error failing to provide its engines with reasonably safe spark arresters, or to use due care and caution in the conduct and management of the engines from which these fires were communicated. The precise question, therefore, presented is whether or not, after the plaintiff in an action of this character has identified with certainty the engine alleged to have communicated the fire complained of, it is admissible to introduce other evidence as to fires having been communicated along the railway's right of way, without having first shown that these other fires were communicated from the engine in question.

In *Brighthope Ry. Co. v. Rogers*, 76 Va. 445, the engine in question was identified, and the court held that evidence of other fires caused by the same engine was admissible.

In *New York, P. & N. R. Co. v. Thomas*, 92 Va. 606, 24 S. E. 264, such evidence was admitted without objection, and the court merely held that the lower court did not err in instructing the jury that it might consider this evidence after it had been thus admitted.

In *Patteson v. C. & O. Ry. Co.*, 94 Va. 16, 26 S. E. 393, the evidence admitted was as to other fires caused by the same engine.

The case of *Kimball & Fink v. Borden*, 95 Va. 203, 28 S. E. 207, seems to sustain the admissibility of evidence as to other fires in a case like the present, but the record in that case shows that, after the offending engine was identified in the course of the trial, no evidence of fires caused by other engines was objected to, and therefore the question here under consideration was not involved in the ruling of the court.

In *White v. New York & N. R. Co.*, 99 Va. 357, 38 S. E.

180, the engine was identified, and all that was said by this court which has any sort of bearing upon the question under consideration was: "Notwithstanding these conditions, so inviting to fire from the sparks of a passing engine, it is an established fact in this case that no fire occurred at any point along the entire route, other than that alleged in this case, as a result of sparks emitted by the engine in question after it came from the repair shops." Whether or not this is to be considered as an implied recognition that the only evidence as to other fires which would have been competent would have been as to fires caused by sparks emitted by the engine in question, it is not authority for the proposition that evidence is admissible as to other fires not shown to have been set out from the engine in question. Nor does the case of *N. & W. Ry. Co. v. Perrow*, 101 Va. 345, 43 S. E. 614, have any bearing upon the question here, as all of the evidence in that case was as to sparks emitted and fires caused by the same train which caused the fire in question.

Plaintiff in error here, as we have seen, is not charged with the general habit of negligence, nor with frequent defects in its engines. Therefore, if convicted of negligence in this case, it must be by proof of defects in the engine No. 169, or of the omission of duty upon the part of the crew which operated it upon the day of the fire which destroyed the property of defendant in error.

The question here under consideration has repeatedly arisen and been passed upon by the highest courts in other states, which have uniformly held that, where the engine was identified which it was claimed had set out the fire, evidence as to other fires along the line of the railway, not shown to have been set out by the identified engine, is not admissible.

In *Hygienic Plate-Ice Mfg. Co. v. Raleigh & Augusta A. L. R. R. Co.*, 126 N. C. 797, 36 S. E. 279, the opinion says: "This evidence of fires at various times and at other places, caused by sparks from other engines, both before and after August 29th, we must hold to be incompetent, as it does not tend to prove the condition of engine No. 228, nor to throw any light on the question directly before the jury. It is well calculated to divert the mind of the jury, and lead them to an unsafe verdict."

In *Henderson v. P. & R. Ry. Co.*, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652, it was held that, where the injury complained of is shown to have been caused, or, in the nature of the case, could only have been caused, by sparks from an engine which is known and identified, the evidence should be confined to the condition of that engine, its management, and its practical operation. Evidence tending to prove defects in other engines of the company is irrelevant, and should be excluded. That case, in many particulars, is very like the case here under consideration. See, also, *Adkins v. Georgia Ry., etc., Co.*, 111 Ga. 815, 35 S. E. 671;

Norfolk & W. Ry. Co. v. Briggs

Jacksonville, etc., Ry. Co. v. Peninsula, etc., Co. (Fla.) 9 South. 661, 17 L. R. A. 33, 65; Ireland, etc., v. Cinti, W. & M. R. Co. (Mich.) 44 N. W. 426.

In *Lesser Cotton Co., etc., v. St. L., etc., Ry. Co.*, 114 Fed. 136, 52 C. C. A. 95, after it was established that the only engine which could have set the fire was the defendant's engine No. 577, evidence of other fires alleged to have been set out by other engines of the defendant, or that other engines of the defendant were in the habit of throwing igniting sparks at other times and places, was offered and rejected. The opinion by Sanford, J., says: "The only question at issue was whether or not engine No. 577 set the fire. If the offer of counsel had been to show that some of the engines of the defendant set fires at other times and places, it might have formed the basis for a more plausible argument, because it might have been said that engine No. 577 might have been one of the engines which set fires at other times. This, however, was not the offer. Their proposal was to prove that other engines threw sparks sufficiently large and live to set fires. They did not offer to show that such engines were constructed in the same way, or were in the same condition, as the locomotive which alone could have set the fire. How this testimony could have had any tendency to lead a rational mind to the belief that engine No. 577 was the cause of this fire, passes our understanding. Neither the fact that other engines set fires, nor the fact that they threw sparks, nor the fact that their operators were in the habit of negligently constructing, repairing, or caring for them, had any logical or rational tendency to show that the engine here in question either set the fire, threw the sparks, or was negligently cared for or operated, because there was better and conclusive evidence upon all these questions—the evidence of its actual construction and condition and of the method in which it was actually operated at the time when the fire occurred."

That case is in point here, and numerous authorities are cited in the opinion of the court to sustain the conclusion reached.

Another case in point is *Inman v. Elberton A. L. R. Co.*, 16 S. E. 958, 35 Am. St. Rep. 232, where the question was whether the fire in question was set out by one or the other of two distinctly identified engines, and it was not claimed that the fire was caused by any other, the opinion saying: "The question before the jury was whether it was caused by one of these, and the negligence alleged was negligence in the condition and management of these two. How, then, could it be material or relevant to show negligence on other occasions, and in regard to other engines than these, especially when there was no attempt to show that such other engines were of like construction. The cases cited in support of the contention that this testimony should have

been admitted are clearly distinguishable from the present case. In some of them the evidence as to other occasions related to the particular engine which was alleged to have caused the fire, and in the other cases the engine that caused the fire was not identified. Where the engine that caused the fire cannot be fully identified, evidence that the defendant's engines frequently emitted sparks on former occasions near the time of the fire in question is generally held to be relevant and competent to show habitual negligence, and to make it probable that the plaintiff's injury proceeded from the same quarter. But when the engine is identified the same reason does not operate, and evidence as to the condition of other engines and of their causing fires is clearly irrelevant."

The text-writers sustain the view taken in the cases above cited. See 2 Shearman & Redfield on L. of Neg. (5th Ed.) § 675, and notes; 3 Elliott on Railroads, § 1245.

As well remarked by counsel in the argument of the case here, plaintiff in error might have had other defective engines; its employees may have been guilty on other occasions of negligence of the most culpable character; yet if engine No. 169, and all of its attachments, so far as these were connected with the prevention of fires, were on the 13th of November, 1901, such as the law prescribes, and if the crew which was operating it upon that day at the time it passed Ashby station were guilty of no omission of duty, then plaintiff in error could not in this case be held liable for the fire in question.

"The party who affirms negligence must establish it by proof sufficient to satisfy reasonable and well-balanced minds. The evidence must show more than a probability of a negligent act. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established. This court has repeatedly held that, when liability depends upon carelessness or fault of a person or his agents, the right of recovery depends upon the same being shown by competent evidence, and it is incumbent upon such a plaintiff to furnish evidence to show how and why the accident occurred; some fact or facts by which it can be determined by the jury, and not be left entirely to conjecture, guess, or random judgment, upon merely supposition, without a single known fact." *Chesapeake & O. Ry. Co. v. Heath* (just decided by this court) 48 S. E. 508, and the authorities there cited.

The evidence set out in bills of exceptions 1, 2, and 3 was illegal, and should have been rejected.

"It is a well-settled rule of this court that, where illegal evidence has been admitted, the judgment must be reversed, as it cannot be said what effect the illegal evidence may have had on the minds of the jury." *Southern Mut. Ins. Co. v. Trear*, 29 Grat. 255, and authorities there cited.

At the trial the testimony of Charles Fuller was introduced

by defendant in error, over the objection of plaintiff in error, as to the speed of the train at a point a mile and a half or two miles distant from the scene of the fire in question, and this is assigned as error. We are of opinion that this evidence was wholly irrelevant, and should have been rejected.

A witness—David Wedlock—having testified touching a certain fire near the right of way of plaintiff in error, was allowed to answer the question whether he saw anything from which the fire could have started except the railroad, to which he made a negative reply; and this also is assigned as error.

We are of opinion that the question was not only leading and suggestive, but called merely for an opinion of the witness, which was improper, and should not have been permitted.

The next assignment of error is to the refusal of the circuit court to permit a witness to testify at the instance of the plaintiff in error, with reference to fires in the same vicinity, set out by duly equipped locomotives on the lines of other railway companies. This evidence was clearly irrelevant, and was properly rejected.

The next assignment of error relates to the manner of the examination of defendant in error as to what his stock of goods consisted of, and the contention is that the questions propounded were leading and improper.

The questions propounded to the witness were unmistakably leading or suggestive questions, but it cannot be said that plaintiff in error was prejudiced thereby, since it was left free to cross-examine the witness touching his examination in chief, and thus test his accuracy, veracity, and credibility.

"When and under what circumstances a leading question may be put is in the discretion of the trial court, and, as a general rule, is a matter which cannot be assigned as error. 1 Greenleaf on Ev. § 435. But, if it could be, no injury resulting to the opposing party in allowing the question to be asked, it would not be reversible error." *Richmond, etc., Ry. Co. v. Rubin* (Va.) 47 S. E. 834.

The seventh assignment of error is to the ruling of the trial court permitting the defendant in error to give to the jury an estimate of the total amount of purchases made by him since he had occupied the location at which he was at the time of the fire, and his annual sales from the same date.

This evidence may be of little value, but it was not error to permit it to go to the jury, to be considered by them for what it was worth. The owner of a stock of goods destroyed by fire is often unable to produce the best and most direct evidence as to the value of the goods, and he can only be required to prove their value by the best evidence obtainable.

What was said with reference to the next preceding assignment of error applies to the eighth and ninth assignments. In the eighth a witness was allowed to give the valuation of

Spangler v. St. Joseph & G. I. Ry. Co

the stock of goods which the defendant in error had on hand on the day prior to the fire, based upon a cursory view, not made with any purpose of valuation, nor any expectation such as would have caused him to give special attention to the matter; and in the ninth the matter complained of is the admission of the estimate of a witness of the value of the goods seen at the store two days before the fire. We do not think that the plaintiff in error could have been prejudiced by that evidence. It was of little value, and was doubtless so considered by the jury.

The eleventh, twelfth, thirteenth, fourteenth, and fifteenth assignments of error relate to the action of the trial court in giving certain instructions for defendant in error, the refusal of certain instructions asked for by the plaintiff in error, and the giving of the court's own instructions in lieu of those refused.

We shall not attempt to review these several assignments of error, as we consider it sufficient to say that the instructions given covered the whole law of the case, stated in a plain and careful manner, so as to guard the rights of both parties.

The remaining assignment of error is to the refusal of the court to set aside the verdict of the jury as contrary to the law and the evidence, and because the verdict is excessive. As the case has to go back for a new trial on the grounds hereinbefore stated, we deem it inexpedient to discuss the evidence certified in the record.

The judgment of the circuit court will be reversed and annulled, the verdict of the jury set aside, and the cause remanded for a new trial to be had in accordance with the views herein expressed.

SPANGLER *v.* ST. JOSEPH & G. I. RY. CO.

(Supreme Court of Kansas, Dec. 12, 1903.)

[74 Pac. Rep. 607.]

Carriers—Protection of Passengers.*

It is the duty of a railroad company to exercise the strictest diligence to protect passengers upon its trains from the misconduct and assaults of fellow passengers, not only while such fellow passengers remain on the train, but also after they have alighted therefrom at the station of their destination, whenever the company knows of the threatened injury, or reasonably might have anticipated that under all the circumstances it would occur.

(Syllabus by the Court.)

Error from District Court, Marshall County; Sam Kimble, Judge.

Action by Ada Spangler, by her next friend, Agnes Spangler, against the St. Joseph & Grand Island Railway Com-

*See foot-note appended to *Penny v. Atlantic Coast Line R. Co.* (N. Car.), 10 R. R. R. 606, 33 Am. & Eng. R. Cas., N. S., 606.

Spangler v. St. Joseph & G. I. Ry. Co

pany. Judgment for defendant, and plaintiff brings error. Reversed.

Jno. G. Parkinson and W. W. Redmond, for plaintiff in error.

R. A. Brown, J. A. Broughten, and W. S. Glass, for defendant in error.

BURCH, J. Among the many restless rushings to and fro of fretful man upon the earth was a Sunday excursion in July, 1901, from St. Joseph to Excelsior Springs, Mo., and return, conducted by the St. Joseph & Grand Island Railroad Company. The little town of Gower, located some 14 miles from St. Joseph, contributed 8 or 10 young men to the ferment of the teeming train. The schedule gave the day to the excursionists at the Springs. On the return homeward in the evening it soon became distressingly apparent that the Gower boys had abused their holiday into a drunken spree. Hilarity was presently succeeded by effrontery, which readily descended to vulgarity, and tended constantly to reach the pitch of maudlin fuss and quarrel. They surged back and forth along the aisles of the cars with swagger and oath and a hubbub of babble and a fanfaronade of clubs they had cut for canes, corrupting the air with the fumes of liquor and of cigarettes, hectoring men and insulting women, entirely beyond the endurance of the rasped nerves and galled sensibilities of the decent people on the train. Some of the passengers were intimidated and made afraid. Many protests and appeals were made to the trainmen, whose efforts to preserve order were quite feeble. Passengers themselves remonstrated with the young men, and one of them, after witnessing an indignity to a young woman, collared a rowdy, and took him out of the car. Because the St. Joseph passengers interfered with the prerogative of the Gower boys to be vulgar and vicious and vile, the latter became incensed, and turned their distempered thoughts to the subject of revenge. They cursed the St. Joseph people, and swore they would get even when they got off the train at Gower. Many persons in many parts of the train heard these threats, and heard them repeated many times. They kept saying they would fix the St. Joe people when they got off at Gower; they would even up with the St. Joe people; they would have revenge on the St. Joe people when they got off the train. This threatening talk continued for a long time before the town of Gower was reached. The train officials frequently passed by while it was going on. One man who went through the train with the conductor heard it, and many men and women heard it in the presence of the conductor. Upon its arrival at Gower the train had stopped but a moment until these threats were being carried out. No sooner had the Gower party alighted, than some of them assailed the persons who remained upon the train with a

fusilade of cinders and gravel and dirt thrown through the open windows, and which, scattering, beat noisily against the outside of the cars. Men and women suffered alike, and one gentleman was struck on the side of the head with a rock. Others of the ruffians walked forward and back, ramming their rude canes into the car and punching the passengers. As he did so one of them ejaculated, "How do you like that?" While this was going on, one of the two conductors in charge of the excursion assisted the passengers to alight, and then walked to the forward end of the train, where the other conductor was found reading orders to the engineer. As the train started, both conductors stepped on the steps at the front end of the first passenger car, where they remained until a switch had been passed and closed, and then they went inside the car. This constituted the sum total of their watchfulness over the human beings in their care. As passengers on the train that night were Ada Spangler, a maiden of 17 years, and her escort, Joseph Manon. Their homes were in St. Joseph. They occupied a seat together in the forward part of the second passenger coach from the engine, and, though certain ugly circumstances of the turmoil of that night had transpired near them, they had not become involved in it themselves. The air was pleasanter near the window, and she sat on that side of the seat. It was nearing 10 o'clock when they approached Gover, and she had been leaning her head upon an improvised pillow he had made for her, but had not been asleep. At Gover they were both sitting upright, and while the train was standing still heard the storm of cinders and gravel striking against the side of the car. During the confusion one of the Gover boys came to their open window, and thrust his club cane through it, striking her in the breast, and causing her to cry out "Oh!" Mr. Manon immediately closed the window, and just after the train had started a heavy iron burr from off a bolt, hurled by the hand of one who dropped his cane to do so, came crashing through the glass and struck her in the eye. She fell forward, and, as he caught her, all limp and apparently unconscious, and endeavored to support her head with his arm, the fluid portions of her eye ran out upon his hand. Upon the trial of an action for damages brought against the railroad company for this injury a demurrer to evidence from which the foregoing facts are gleaned was sustained, and Miss Spangler brings the case here for review.

The law of the case is clear enough. "It is the duty of a railroad company carrying passengers to provide for their quiet and comfort, and secure them against the annoying and offensive conduct of other passengers; and where the conduct of a passenger is such as to render his presence dangerous to fellow passengers, or such as will occasion them serious annoyance and discomfort, it is not only the right, but the duty, of a railroad company to exclude such pas-

Spangler v. St. Joseph & G. I. Ry. Co

senger from its train." *A. T. & S. F. R. Co. v. Weber*, Adm'r, 33 Kan. 543, 6 Pac. 877, 52 Am. Rep. 543. This duty to make passengers secure is not limited to conduct exhibited in the interior of the train, but applies to assaults coming from the outside of the car as well. If the danger threatens from alongside the car, it should be averted precisely the same as if impending on any of its platforms or in any of its apartments. It would be a lame rule, indeed, which required nothing more than that a vicious person should be put off the train, and then left raging up and down its length, firing missiles through its window. The Gower boys could have been separated from the orderly and sober part of the passengers while on the train, and when discharged from the car could have been sent away from it, and kept away from it until it was safe to proceed. For this purpose the conductor had the right, if necessary, to call upon all the trainmen and such passengers as were willing to assist. While not an insurer of the safety of its passengers, the railroad company was bound to exercise the strictest diligence in protecting them. "If the conductor did not do all he could to stop the fighting, there was negligence. Whilst the conductor is not provided with a force sufficient to resist such a raid as was made upon the train in this instance, he has, nevertheless, large powers at his disposal, and, if properly used, they are generally sufficient to preserve order within the cars, and to expel disturbers of the peace. His official character and position are a power. Then he may stop the train, and call to his assistance the engineer, the fireman, all the brakemen, and such passengers as are willing to lend a helping hand; and it must be a very formidable mob, indeed—more formidable than we have reason to believe had obtruded into these cars—that can resist such a force. Until he has put forth the forces at his disposal, no conductor has a right to abandon the scene of conflict. To keep his train in motion, and busy himself with collecting fares in forward cars whilst a general fight was raging in the rearmost car, where the lady passengers had been placed, was to fall far short of his duty." *Pittsburg, Ft. W. & C. R. Co. v. Hinds*, 53 Pa. 512, 517, 91 Am. Dec. 224.

These rules, however, are subject to the qualification that the carrier shall know of the threatened injury, or shall have opportunity to know of it, or reasonably might have anticipated, under all the circumstances, it would happen. 5 A. & E. Encycl. of L. 553; *Flint v. Norwick & N. York Transportation Co.*, 34 Conn. 554, Fed. Cas. No. 4,873. In 1 Fetter on Carriers of Passengers, § 96, the subject is summed up in the following manner: "Carriers of passengers are not insurers of the entire immunity of their passengers from the misconduct of fellow passengers or of strangers, any more than they are insurers of the absolute safety of passengers in other respects. Nor can the carrier be held liable for such

Hewitt v. East Jordan Lumber Co

misconduct on the principle of respondeat superior, as in the case of the misconduct of his servants. But, although the doctrine is of comparatively recent growth, it is now firmly established that a carrier of passengers must exercise the same high degree of care to protect them from the wrongful acts of their fellow passengers or of strangers that is required for the prevention of casualties in the management and operation of its trains, namely, the utmost care, vigilance, and precaution consistent with the mode of conveyance, and with its practical operation. While not required to furnish a police force sufficient to overcome all force when unexpectedly and suddenly offered, it is the carrier's duty to provide help sufficient to protect the passenger against assaults from every quarter which might reasonably be expected to occur, under the circumstances of the case and the condition of the parties; and, having furnished such force, the carrier is chargeable with their neglect in failing to protect a passenger from assaults by strangers. This strict rule of duty must, however, be applied in view of the relation which the carrier sustains to all the passengers, and the circumstances of each particular case calling for its exercise. Knowledge of the existence of the danger, or of facts and circumstances from which the danger may be reasonably anticipated, is necessary to fix a liability upon the carrier for damages sustained in consequence of failure to guard against it." Such being the law applicable to the facts, the question remains whether or not the facts disclosed were sufficient to entitle the plaintiff to the verdict of a jury upon them. A critical analysis of the testimony is not necessary. From the evidence relating to the character, condition, and conduct of the young men it is reasonable to conclude that some depredation was to be committed upon the St. Joseph passengers at Gower. It is fairly inferable that the conductor knew, or should have known, of this danger, and hence that he should have exercised the highest vigilance and diligence to subvert it; that he failed to employ to that end of any the means at his command; and that the plaintiff's injury was the result of his negligence.

Therefore the judgment of the district court is reversed, with the direction that a new trial be granted. All the Justices concurring.

HEWITT v. EAST JORDAN LUMBER CO.

(Supreme Court of Michigan, March 23, 1904.)

[98 N. W. Rep. 992.]

Death by Wrongful Act—Statute under Which Brought—Appeal—Failure to Object.

Where, in an action for death by a wrongful act, no objection is taken below on the ground that recovery is erroneously sought under the "Death Act" instead of the "Survival Act" it cannot be made on appeal.

Hewitt v. East Jordan Lumber Co**Damages—Instructions.**

In an action by a wife, as administratrix, for negligently causing the death of her husband, the court's omission, in instructing on the measure of damages, to refer to the possibility of plaintiff's remarriage, is not ground for reversal, where defendant, though preferring several requests to charge, did not suggest any further instruction on the subject.

Injury to Brakeman—Assumption of Risk.*

A competent railroad brakeman, who had been in defendant's employ for more than a year, was killed, while attempting to couple cars, by the slipping of a moveable platform placed on the trucks for the purpose of converting a logging car into a freight car. The car was constructed by two pairs of trucks being connected by heavy timbers, from which iron braces extended upwards to the bolsters over the trucks both before and behind them. The movable platform had beneath it a cleat, placed there, as plaintiff claimed, to prevent its slipping when a car was shunted. But this cleat, before coming in contact with the bolster, struck the inclined strip of iron, up which it would slide if the collision between the cars was sufficiently great. This method of construction was alleged as negligent: *held*, that the decedent did not, as a matter of law, assume the risk.

Same—Contributory Negligence—Coupling Cars—Negligent Construction of Car.*

While it would be contributory negligence for a railroad brakeman to attempt a coupling from the inside of a curve where the danger of doing so was apparent, yet if the danger arose only from the negligent construction of the car permitting a moveable platform thereon to slip forward, in the absence of which negligent construction the brakeman's entering from the inside of the curve would have been a safe procedure, his doing so would not be contributory negligence.

Error to Circuit Court, Charlevoix County; Frederick W. Mayne, Judge.

Action by Margaret Hewitt, as administratrix of the estate of Daniel C. Hewitt, deceased, against the East Jordan Lumber Company. Judgment for plaintiff, and defendant brings error. **Affirmed.**

Brennan, Donnelly & Van De Mark, for appellant.

E. N. Clink (Halstead & Halstead and Converse & Perkins, for counsel), for appellee.

MOORE, C. J. This suit was brought to recover damages because of injuries received by Daniel C. Hewitt while coupling cars belonging to the defendant company, which resulted in his death. From a judgment in favor of the plaintiff the case is brought here by writ of error.

It is said by defendant this action was brought under the "Death Act," when it should have been brought under the "Survival Act." The circuit judge states in the bill of exceptions that no mention was made during the trial of the cause that recovery was erroneously sought under the "Death Act," instead of the "Survival Act." Under these circumstances this court will not consider the question. *Mower v. Verplanke*, 105 Mich. 398, 63 N. W. 302; *Wierengo v. American Fire Ins. Co.*, 98 Mich. 621, 57 N. W. 833; *Hutchi-*

*See note at end of case.

Hewitt v. East Jordan Lumber Co

son Mfg. Co. v. Pinch, 107 Mich. 12, 15, 64 N. W. 729, 66 N. W. 340; Rogers v. Ferris, 107 Mich. 126, 129, 64 N. W. 1048; Broughton v. Jones, 120 Mich. 462, 465, 79 N. W. 691; Storrie v. Elevator Co. (Mich.) 96 N. W. 569.

It is claimed the court erred (we quote from brief of counsel) in charging the jury as follows: "Evidence has been introduced intending to enable you to determine the loss which she has sustained. I have forgotten, but you will remember, the amount which she testified she received per year from Mr. Hewitt. Under the law, her expectancy is 26 years; that is, a healthy person at her age, as they average, will live 26 years. This does not mean that she will necessarily live that many years, of course." The court should have also explained that the jury were to take into consideration the possibility of Mrs. Hewitt's remarriage. *Jones' Adm'x v. McMillan* (Mich.) 88 N. W. 206.

Counsel for defendant preferred several requests to charge, but none as to the use which the jury might make of the mortality tables, and did not suggest to the judge that he ought to charge further upon that subject. In view of this situation, we think the following language, used by the court in *Kinney v. Folkerts*, 84 Mich. 616, 48 N. W. 283, is in point: "If the defendants desired fuller instructions, it was their duty to have asked them. Parties cannot remain silent, and thereby lie in wait to ground error, after the trial is over, upon a neglect of the court to instruct the jury as to something which was not called to its attention at the trial, especially in civil cases." See, also, *Mahiat v. Codde*, 106 Mich. 387, 64 N. W. 194; *Publishing Co. v. Merwin*, 115 Mich. 10, 72 N. W. 998; *McGee v. Baumgartner*, 121 Mich. 287, 80 N. W. 21; *Field v. Magee*, 122 Mich. 556, 81 N. W. 354.

It is claimed the deceased assumed the risk, and the court should have given the following request: "The testimony shows conclusively that whatever dangers were encountered by plaintiff's decedent in the operation of coupling and operating defendant's train were well known to him, and were risks assumed by him, and therefore the verdict of the jury must be for the defendant." This contention is based upon the claim that deceased was a competent brakeman in the employ of defendant for upwards of a year; that he saw the cars which caused the mischief, and knew, or should have known, as much about the use of them as any one. The following description of the construction of the cars and of the claim of the plaintiff in that regard is from the opinion of the court: "They consisted of the trucks—four wheels to each truck, two pairs of trucks to each car; these trucks connected by two heavy timbers called 'leaders,' which were near the center of the bunks or bolsters. When logs were loaded on these cars they were loaded right onto these bolsters; but when they desired to

carry gravel, sand, bark, or wood it was necessary to have a platform. They therefore had constructed platforms, which they placed upon the cars when they wanted to use them for this purpose. These were made by heavy planks placed side by side of about the length of the cars, and held together by a two or three inch plank beneath, placed across said planks. The plaintiff claims that this plank was placed there for the purpose of keeping the platform from slipping backwards or forwards while the cars were being shunted. Plaintiff also claims that there were extending from the leaders to the top of the bunks, at an angle, heavy iron straps for the purpose of bracing and rendering the framework of the cars more stiff; that these straps or braces extended from the leaders both forward and back of the bolsters; that when the platform was placed upon them that the cross-plank didn't go up tight to the bunk or bolster, but that at about two or three inches back of the bolster this cross-piece struck the strap, which, of course, extended at an angle from the top of the bolster down to the leader, and that by reason of the force of the impact when they came together the platform would slide forwards or backward, raising up on the strap or brace which was placed at an angle, and that it would not have done so had the cross-piece been placed directly next to the bolster and this strap had not come between them at this angle. It is this method of constructing the platforms and placing them upon the cars and keeping them there in which, it is claimed, the negligence of the defendant consisted; the plaintiff claiming that some other appliance should have been used to keep the platform from slipping backwards and forwards when the car was being shunted. The defendant claims that this cross-piece was not placed there for the purpose of preventing the platform from slipping, but that its sole purpose was to form the platform itself, and to keep the planks stationary, and that it was not placed there for the purpose of keeping them from moving backward or forward." It is the claim of plaintiff that the situation of these straps of iron and of the cross-pieces or cleats nailed under the planks, and their relation to each other, was not obvious to the deceased in the discharge of his duties. It is evident the mechanic who constructed the cars and the movable platforms knew the method of construction, and, if he had stopped to think, would have known that the angle at which the iron braces were put would make an inclined plane, up which the cleat on the under side of the platform would travel, lifting and shifting the platform if the collision between the cars at the time they were coupled was sufficient. Justice McGrath, in speaking for the court in *Piette v. Brewing Company*, 91 Mich. 605, 52 N. W. 152, said: "The risks incident to an employment, and which an employee assumes, are those which are inseparable from the employment, and which the exercise of ordinary care on the part of

Hewitt v. East Jordan Lumber Co

the employer in the selection, use, and operation of appliances cannot avoid. A danger which exists only because of defective appliances of which an employee has no notice cannot be said to be one of the risks which the employee assumes." In *Bradburn v. Wabash Ry.* (Mich.) 96 N. W. 929, there is a full discussion of the doctrine of assumed risk, in which Justice Carpenter said, among other statements: "The principle of assumed risk rests upon the ground that it is an implied contract between the employer and the employee that the employee shall assume the risk of all dangers obviously incident to his employment. See *Bauer v. American Car & Foundry Co.* (Mich.) 94 N. W. 9. The employee assumes the risk of all dangers obviously incident to his employment. * * * The doctrine of assumed risk applies, and is limited in its application, to dangers which the employee either actually knows or should know. *Balboff v. M. C. R. R. Co.*, 106 Mich. 606, 65 N. W. 592." See, also, *Swoboda v. Ward*, 40 Mich. 420; *Morton v. R. R. Co.*, 81 Mich. 423, 46 N. W. 111; *Smizel v. Iron Co.*, 116 Mich. 149, 74 N. W. 488; *McDonald v. M. C. R. R. Co.* (Mich.) 93 N. W. 1041. The court charged the jury upon this subject, among other things, as follows: "An employee entering upon his employment under this implied contract that the machinery or appliances are safe must thereafter use reasonable care and diligence in the conduct of the business, and if defects which are unknown to the employer should arise which the employee might have discovered by the exercise of due and reasonable care and caution in the business for which he is employed, then the employee assumes the responsibility, and not the employer, and he cannot recover from the employer by reason of any defects which might have been discovered by the exercise of due and reasonable care and caution and the use of his faculties, and his employer would not be liable where these defects were unknown to him. * * * So that in charging you that if you find that the deceased had actual knowledge of the faulty construction, if you find there was a faulty construction, and use of those cars and defects and wrongs alleged in the declaration, the plaintiff cannot recover. Or if you should find that by the exercise of due care—due ordinary and reasonable care and caution—in his employment he would have discovered them, then the law implies a notice which is equivalent to actual knowledge, and he cannot recover. You will observe, therefore, the importance that attaches to the fact as to whether there was knowledge of these defects on the part of the deceased." We do not think it can be said as a matter of law that deceased assumed the risk growing out of the construction of the car and platform.

It is said deceased was guilty of contributory negligence in attempting to couple the cars while on the inside of the curve, and for that reason a verdict should have been directed

Hewitt v. East Jordan Lumber Co

in favor of defendant. On the part of the plaintiff it is claimed that it was a comparatively straight track where the stationary car was standing when the coupling was made, and that no harm would have come to deceased if the platforms had not shifted. The court instructed the jury upon that feature of the case as follows: "Before the plaintiff can recover, you must find negligence on the part of the defendant, and the negligence must be that negligence described in the declaration; that is, the faulty construction of the cars, and the defects alleged therein, and the use of the same as I have explained it to you, and that it occurred by reason of the platforms slipping as described in the declaration. You must also find that there was no contributory negligence on the part of the deceased, and, unless you so find from the evidence, you must return a verdict of no cause of action. Now, in relation to this curve on the switch. If you find that the deceased stepped between the cars for the purpose of coupling the same, and that he received the injury in the manner described in the declaration, but that, if he had gone to the other side of the switch—that is, to the outer side of the curve—he could have made the coupling, and not have received the injury, then your verdict will be 'No cause of action,' because it would be contributory negligence for the deceased to step in to make the coupling between the cars on the inside of the curve where the danger was apparent, if he could make the coupling all right and without danger to himself by standing on the outside of the curve and stepping between the cars on that side. If he voluntarily used the inside instead of the outside, when he might have used either, and the inside was dangerous and the outside was not, then he assumed the responsibility of taking the dangerous side instead of the safe side, and the injury would be the result of his own negligence. It will be necessary, therefore, for you to consider whether the deceased was sick upon that day or not, as testified to by some of the witnesses. If you should find that he was taken ill, and that while ill he continued in his employment, and by reason of his sickness he did not see the car approaching, and was, by reason of his distress or illness, injured, when he would not have been had he been well and attending to his business, your verdict must be 'No cause of action.' The defendant in this case knew nothing of his illness—If you find he was ill—consequently they could not be held liable or responsible for any injury which resulted to him by reason of his sickness. So that, if this sickness of deceased—if you find he was sick—contributed toward the injury, then he was the one who was in fault in continuing at work when he was ill, and not the defendant, and the plaintiff cannot recover. If, however, you should find that he was ill, but that the illness in no way contributed toward the injury, then you will not consider it in your verdict at all. * * * If he could

Note

have entered there in safety to himself had it not been for the slipping of the platforms, then the fact that he entered from the inner side would be immaterial, and would not affect the plaintiff's right to recover, because then the accident would be the direct result of the slipping of the platforms, and not of his entering from the inner side of the curve. If it had been safe for him to have gone in there, and he would not have been injured, except for the slipping of the platform, then he may recover." There was testimony tending to support the several claims of the plaintiff and defendant. This made it a question of fact. The judge submitted the question of fact in a very carefully considered charge, which properly stated the law.

Judgment is affirmed. The other Justices concurred.

NOTE.

COUPLING CARS—ASSUMPTION OF RISKS.

I. Ordinary Dangers.

1. In General.
 - a. General Rule.
 - b. Other Statements of General Rule.
 - c. Mere Existence of Danger.
2. What Are Ordinary Dangers.
 - a. Cars of Different Patterns.
 - (1) General Rule.
 - (2) Bolt Projecting—Not Familiar with Style of Car.
 - b. Cars Differing in Height.
 - (1) General Rule.
 - (2) Meeting of Drawheads.
 - (3) Coupling Old Car Lower than Others.
 - (4) Drawheads of Different Heights and Unsuitable Link Pins.
 - c. Mismatched Couplings.
 - (1) Coupling Freight Car and Passenger Service Engine.
 - (2) Foreign Cars.
 - (3) Dangerous Construction of Coupling Appliances of Foreign Cars.
 - (4) Miller Couplings.
 - (5) New Device Adopted.
 - (6) Makeshift Coupler.
 - (7) Couplings in General Use.
 - d. Unsafe Kind of Drawbar.
 - e. Double Deadwoods.
 - f. Same—Foreign Cars.
 - g. Old Style Bumper.
 - h. Movements of Cars.
 - (1) Trains Entering on Switches.
 - (2) Stepping between Cars While Slack Was Being Given.
 - (3) Custom to Back until Signaled.
 - (4) Repairing Coupling.
 - (5) Negligence.
 - i. Projecting Loads.
 - (1) General Rule.
 - (2) Projecting Iron.
 - (3) Loaded with Railroad Iron—Opportunity to Examine.
 - (4) Shifting of Rails.
 - (5) Projecting Lumber.
 - (6) Coupling at Night.

Note

j. Fellow Servants' Negligence.

- (1) Existence of Relation—Conflict of Authority.
- (2) General Rule.
- (3) Who Are Fellow Servants.
 - (a) Conductor Injured—Negligence in Using Defective Coupling Link.
 - (b) Conductor Signaling to Back Train.
 - (c) Conductor's Violation of Rule.
 - (d) Disabled Car—Failure to Prop Drawhead.
 - (e) Engineer Ordering Brakeman to Couple.
 - (f) Engineer or Fireman—Negligence in Backing Train.
 - (g) Engineer's Negligence.
 - (h) Engineer's Negligence in Backing Train—Injury to Conductor Acting for Brakeman.
 - (i) Engineer's Negligence in Moving Cars.
 - (j) Engineer's or Fireman's Negligence—Injury to Conductor of Shifting Crew Acting as Brakeman.
 - (k) Fireman's Negligence in Dumping Cinders upon Track.
 - (l) Fireman's Negligence in Repeating Signals.
 - (m) Inspector's Negligence—Defective Foreign Car.
 - (n) Ordered to Detach Car from Engine Having Short Drawbar.
 - (o) Sectionman's Failure to Remove Obstructions.
 - (p) Switchman's Failure to Substitute Sound Coupling Link.
 - (q) Trainmen—Car Left on Side Track.
 - (r) Yardmaster—Backing Train without Warning.
- (4) Who Are Not Fellow Servants.
 - (a) Brakeman Killed by Giving Way of Handhold Not Fellow Servant of Inspector.
 - (b) Car Improperly Loaded—Negligence in Accepting for Transportation.
 - (c) Conductor.
 - (d) Conductor's Failure to Inspect.
 - (e) Conductor's Negligence—Sudden Movement of Cars.
 - (f) Conductor's Order to Couple in Improper Manner.
 - (g) Conductor Uncoupling Cars without Warning.
 - (h) Engineer and Brakeman—Employees of Different Companies.
 - (i) Fireman's Negligence in Switching.
 - (j) Inspector's Negligence.

k. Incompetency of Fellow Servant.

- (1) Incompetency of Switchman.
- (2) Fireman's Incompetency—Switchman Continuing to Work Relying on Company's Promise.

II. Unusual Dangers.

1. General Rule.
 - a. Coupling Appliances—Defects.
 - b. Inexperienced Employee.
2. Defects and Peculiar Appliances and Dangers.
 - a. Defects.
 - (1) Risks Assumed.
 - (a) Car upon Repair Track—Broken Coupling Attachment.
 - (b) Cars in Inspection Yard—Defective Drawhead.
 - (c) Removing Car to Repair Track—Coupling Car with Broken Drawhead.
 - (d) Defective Coupling Appliances.
 - (e) Damaged Cars.
 - (f) Handling Damaged Cars—Broken Brake.
 - (g) Defective Brake.

Note

- (h) Brakeman Replacing Drawhead after Loss of Spring.
- (i) Sagging Drawhead.
- (j) Insufficient Space between Cars.
- (k) Knowledge of Only One Defect in Coupling Appliances.
- (2) Risk Not Assumed.
 - (a) Absence of Bumper—Coupling at Night.
 - (b) Double Deadwoods—Unusual Use—Inexperienced Employee.
 - (c) Drawbars Passing because of Latent Defects.
 - (d) Latent Defects in Coupling Appliances.
 - (e) Duty to Examine Couplings—Employee's Actual Knowledge of Defects the Test.
 - (f) Defect in Coupling Seen by Brakeman.
 - (g) Foreign Cars—Defective Couplers.
- b. Peculiar Appliances and Dangers.
 - (1) Risks Assumed.
 - (a) Coupling Pilot Car to Box Car.
 - (b) Hook on Rear of Locomotive Tender.
 - (c) Peculiar Kind of Coupler.
 - (d) Short Drawhead.
 - (e) Three Link Couplings.
 - (f) Unequal Heights of Drawheads—Cinders on Track.
 - (g) Use of Faulty Coupling Apparatus.
 - (h) Road Engine as Substitute for Switching Engine.
 - (i) Inferior Oil for Lantern.
 - (j) Insufficiency of Hands.
 - (2) Risks Not Assumed.
 - (a) Drawbar Sliding Back under Car—Promise to Repair.
 - (b) Drawbars of Unequal Height.
 - (c) Drawbars Passing—Cars of Different Gauge—Brakeman Injured at Night.
 - (d) Mismatched Couplers—Inexperience.
 - (e) Negligence in Selecting Couplings.
 - (f) Unusual Construction of Drawhead—Dark Night.
 - (g) Use of "Goose Neck."
- c. Unsafe Place to Work.
 - (1) Risks Assumed.
 - (a) In General.
 - (b) Unblocked Rails and Frogs.
 - (c) Unblocked Frog—Inability to Extricate Foot the Second Time.
 - (d) Frogs Unblocked at Numerous Street Crossings.
 - (e) Work of Digging between Ties in Progress—Unblocked Frog—General Warning.
 - (f) Condition of Side Tracks.
 - (g) Unsafe Roadbed.
 - (h) Curves in Track in Yard.
 - (i) Ditches across Track.
 - (j) Fall into Drain.
 - (k) Fish Chute.
 - (l) Cattleguard.
 - (m) Location of Cattleguard.
 - (n) Slivered Rails.
 - (2) Risk Not Assumed.
 - (a) Ballasting Temporarily Removed.
 - (b) Space between Ties Not Properly Filled.
 - (c) Unballasted Track of Another Road.
 - (d) Unblocked Frog—Knowledge and Failure to Notify Company.
 - (e) Choosing Dangerous Mode of Uncoupling—Custom—Unblocked Rail.

Note

- (f) Fish Chute Too Near Main Track.
- (g) Hole under Tie—Latent Defect—General Warning.
- (h) Knowledge of Custom to Empty Ash Boxes on Track—Brakeman Injured at Night.
- (i) Knowledge That Stones Fall from Gravel Trains.
- (j) Wood Scattered along Track—Question for Jury.
- d. Dangerous Customs and Methods.
 - (1) General Rule.
 - (2) Risks Assumed.
 - (a) Custom to Kick Cars without Notice to Car Coupler.
 - (b) Uncoupling Moving Cars.
 - (c) Coupling Cars Moving Too Fast.
 - (d) Uncoupling Moving Cars—Obedience to Orders.
 - (3) Risks Not Assumed.
 - (a) Custom of Operating Engine without Fireman—Engineer's Failure to Observe Signal.
- e. Acting outside Scope of Employment.
 - (1) General Rule.
 - (2) Brakeman Assuming Duty of Another.
 - (3) Brakeman Going between Cars to Couple by Hand in Obedience to Orders.
 - (4) Conductor.
 - (5) Conductor Coupling Cars—Insufficient Force—Relying on Promise.
 - (6) Conductor Going between Cars to Unchain Defective Couplings.
 - (7) Fireman Attempting to Couple.
 - (8) Obeying Order without Objection.
 - (9) Switchman Attempting to Couple Cars Contrary to Direction.
 - (10) Foreman of Bridge Builders Attempting to Couple.
 - (11) Servant of Lumber Dealer Attempting to Uncouple without Authority.
 - (12) Volunteer Assisting Servant of Company—Emergency.
 - (13) Passenger Coupling Cars by Conductor's Direction.
- f. Violation of Automatic-Coupler Acts.
 - (1) Federal Statute.
 - (2) North Carolina Act.
 - (3) South Carolina—Constitutional Provision.

I. ORDINARY DANGERS.

1. IN GENERAL.

a. General Rule.

An employee who undertakes the hazardous duty of coupling and uncoupling cars is chargeable with notice of the ordinary dangers of such occupation and assumes the risks from them as one incident to his employment.

England.—*Shipp v. Eastern Counties R. Co.*, 9 Exch. (Eng.) 223.

United States.—*Atchison, etc., R. Co. v. Myers*, 63 Fed. 793; *Brooks v. Northern Pac. R. Co.* (C. C.), 47 Fed. 687; *Chesapeake & O. R. Co. v. Hennessey* (C. C. A.), 16 Am. & Eng. R. Cas., N. S., 515; *Cincinnati, N. O. & T. P. Ry. Co. v. Mealer* (C. C. A.), 50 Fed. 725; *Hodges v. Kimball* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 755; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. Rep. 298; *Johnson v. Southern Pac. Co.* (C. C. A.), 117 Fed. 462, 5 R. R. R. 12, 28 Am. & Eng. R. Cas., N. S., 12; *Lindsay v. New York, N. H. & H. R. Co.* (C. C. A.), 112 Fed. 384, 1 R. R. R. 378, 24 Am. & Eng. R. Cas., N. S., 378; *Northern Pac. R. Co. v. Blake* (C. C. A.), 63 Fed. 45; *Peirce v. Bane* (C. C. A.), 80 Fed. 988; *Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. Rep. 530; *Texas & P. Ry. Co. v. Rhodes* (C. C. A.), 71 Fed. 145; *Tuttle v. Detroit G. H. & M. Ry.*, 122 U. S. 189, 7 Sup. Ct. Rep. 1166; *Woodworth v. St. Paul, M. & M. Ry. Co.* (C. C.), 18 Fed. 281.

Alabama.—*Alabama G. S. R. Co. v. Richie*, 99 Ala. 346, 12 So. 612;

Note

Davis v. Western Ry., 107 Ala. 626, 18 So. 173; *East Tenn., etc., Ry. Co. v. Turville*, 97 Ala. 122, 12 So. 63; *Louisville & N. R. Co. v. Boland*, 96 Ala. 626, 11 So. 667; *Mobile, etc., R. Co. v. George*, 94 Ala. 199, 10 So. 145; *Southern R. Co. v. Arnold*, 114 Ala. 183, 21 So. 954.

Arkansas.—*Little Rock, etc., R. Co. v. Townsend*, 41 Ark. 382; *St. Louis, etc., Ry. Co. v. Brown (Ark.)*, 16 Am. & Eng. R. Cas., N. S., 440; *St. Louis, etc., R. Co. v. Higgins*, 44 Ark. 293, 21 Am. & Eng. R. Cas. 629.

California.—*Long v. Coronado R. Co.*, 96 Cal. 269, 31 Pac. 170.

Florida.—*Jacksonville, T. & K. W. Ry. Co. v. Galvin*, 29 Fla. 636, 11 So. 231.

Georgia.—*Mayfield v. Savannah, etc., R. Co.*, 87 Ga. 374, 13 S. E. 459; *Nelson v. Central R., etc., Co.*, 88 Ga. 225, 14 S. E. 210; *Ousley v. Central R., etc., Co.*, 86 Ga. 538, 12 S. E. 938; *Richmond & D. R. Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290; *Western & Atl. R. v. Bishop*, 50 Ga. 465.

Illinois.—*Atchison, T. & S. F. R. Co. v. Alsdurf*, 47 Ill. App. 200; *Chicago, etc., R. Co. v. Bragonier*, 119 Ill. 51, 7 N. E. 688; *Chicago, etc., R. Co. v. Clark*, 108 Ill. 113, 15 Am. & Eng. R. Cas. 308; *Chicago, B. & Q. R. Co. v. Montgomery*, 15 Ill. App. 205; *Chicago & A. R. Co. v. Bush*, 84 Ill. 570; *Henderson v. Coons*, 31 Ill. App. 75; *Illinois Cent. R. Co. v. Harris*, 53 Ill. App. 592; *Indianapolis, etc., R. Co. v. Flanigan*, 77 Ill. 365; *Joliet, etc., R. Co. v. Velie (Ill.)*, 26 N. E. 1086; *Meyer v. Illinois Cent. R. Co. (Ill.)*, 12 Am. & Eng. R. Cas., N. S., 694; *Peoria, D. & E. Ry. Co. v. Puckett*, 42 Ill. App. 642; *Toledo, etc., R. Co. v. Black*, 88 Ill. 112; *Wabash, St. L. & P. Ry. Co. v. Deardorff*, 14 Ill. App. 401.

Indiana.—*Louisville, etc., R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Sheets v. Chicago, etc., Coal R. Co.*, 139 Ind. 682, 39 N. E. 154; *Umbach v. Lake Shore & M. S. Ry. Co.*, 83 Ind. 191; *Wabash R. Co. v. Ray (Ind.)*, 12 Am. & Eng. R. Cas., N. S., 593.

Iowa.—*Baldwin W. C. & R. I. & P. R. Co.*, 50 Iowa 680; *Box v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 16 Am. & Eng. R. Cas., N. S., 527; *Gorman v. Minneapolis & St. L. Ry. Co. (Iowa)*, 3 R. R. R. 293, 26 Am. & Eng. R. Cas., N. S., 293, 90 N. W. 79; *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa 357; *Mays v. Chicago, R. I. & P. R. Co.*, 63 Iowa 562, 19 N. W. 680; *Muldorney v. Illinois Cent. R. Co.*, 39 Iowa 615; *Van Winkle v. Chicago, M. & St. P. Ry. Co.*, 93 Iowa 509, 61 N. W. 926; *Williams v. Central R. Co.*, 43 Iowa 396.

Kansas.—*Atchison v. T. & S. F. R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204; *Brown v. Chicago, etc., Ry. Co. (Kan.)*, 11 Am. & Eng. R. Cas., N. S., 408; *Clark v. Missouri Pac. Ry. Co.*, 48 Kan. 654, 29 Pac. 1138.

Kentucky.—*Arnold v. Louisville & N. R. Co. (Ky.)*, 19 Am. & Eng. R. Cas., N. S., 272; *Brick v. Louisville & N. R. Co. (Ky.)*, 9 S. W. 288, 38 Am. & Eng. R. Cas. 38; *Chesapeake, etc., R. Co. v. McMannon*, 10 Ky. L. Rep. 248, 8 S. W. 18; *Southern Ry. in Kentucky v. Clifford (Ky.)*, 62 S. W. 514, 21 Am. & Eng. R. Cas., N. S., 229.

Louisiana.—*Wallis v. Morgan's L. & T. R. & S. Co.*, 38 La. Ann. 156 (in absence of statutory provision).

Maine.—*Gillin v. Patten & S. R. Co. (Me.)*, 16 Am. & Eng. R. Cas., N. S., 508.

Massachusetts.—*Boyle v. New York, etc., R. Co.*, 151 Mass. 102, 23 N. E. 827; *Lothrop v. Fitchburg R. Co.*, 150 Mass. 423, 23 N. E. 227; *Yeaton v. Boston & L. R. Co.*, 135 Mass. 418, 15 Am. & Eng. R. Cas. 253; *Young v. Boston & M. R. Co.*, 168 Mass. 219, 46 N. E. 624; *Wood v. Locke*, 147 Mass. 604, 18 N. E. 578.

Michigan.—*Botsford v. Michigan Cent. R. Co.*, 33 Mich. 256; *Brennan v. Michigan Cent. R. Co.*, 93 Mich. 156, 53 N. W. 358; *Brewer v. Flint, etc., R. Co.*, 56 Mich. 620, 23 N. W. 440; *Crawford v. Detroit, G. R. & W. R. Co. (Mich.)*, 86 N. W. 817, 22 Am. & Eng. R. Cas., N. S., 42; *Day v. Toledo, etc., R. Co.*, 42 Mich. 523, 4 N. W. 203, 2 Am. & Eng. R. Cas. 126; *Dysinger v. Cincinnati, S. & M. Ry. Co.*, 93 Mich. 646, 53 N. W. 825; *Fort Wayne, etc., R. Co. v. Gildersleeve*, 33 Mich. 133; *Fuller v. Lake Shore, etc., R. Co.*, 108 Mich. 690, 66 N. W. 593; *Huffman v. Michigan Cent. R. Co. (Mich.)*, 5 Am. & Eng. R. Cas., N. S.,

Note

542; *Loranger v. Lake Shore & M. S. Ry. Co.*, 104 Mich. 80, 62 N. W. 137; *Michigan C. R. Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791; *Phelps v. Chicago & W. M. Ry. Co.* (Mich.), 16 Am. & Eng. R. Cas., N. S., 302; *Second v. Chicago & M. L. S. R. Co.*, 107 Mich. 540, 65 N. W. 550; *Smith v. Potter*, 46 Mich. 258, 9 N. W. 273; *Stanly v. Chicago & W. M. Ry. Co.*, 101 Mich. 202, 59 N. W. 393.

Minnesota.—*McLaren v. Williston*, 48 Minn. 299, 51 N. W. 373; *Woods v. St. Paul & D. R. Co.*, 39 Minn. 435, 40 N. W. 510.

Mississippi.—*Hatter v. Illinois Cent. R. Co.*, 69 Miss. 642, 13 So. 827.

Missouri.—*Jackson v. Railroad Co.*, 104 Mo. 448, 16 S. W. 413; *Rutledge v. Missouri Pac. Ry. Co.*, 110 Mo. 312, 19 S. W. 38; *Schaub v. Hannibal & St. J. Ry. Co.*, 106 Mo. 74, 16 S. W. 924; *Thomas v. Missouri Pac. Ry. Co.*, 109 Mo. 187, 18 S. W. 980.

Nebraska.—*Chicago, etc., R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42; *Missouri Pac. R. Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044.

New York.—*Albert v. New York Cent., etc., R. Co.*, 89 Hun (N. Y.) 153; *Appel v. Buffalo, etc., R. Co.*, 111 N. Y. 550, 19 N. E. 93; *Arnold v. D. & H. C. Co.*, 125 N. Y. 15, 25 N. E. 1064; *Beadin v. Central Vermont R. Co.*, 14 N. Y. Supp. 700; *DeFoust v. Jewett*, 88 N. Y. 264; *Dye v. Delaware, etc., R. Co.*, 130 N. Y. 671; *Edall v. New England R. Co.*, 18 N. Y. App. Div. 216; *Hannigan v. Lehigh & H. R. Ry. Co.* (N. Y.), 12 Am. & Eng. R. Cas., N. S., 605; *Ireland v. Gardner*, 7 N. Y. Supp. 608; *McCosker v. Long Island R. Co.*, 84 N. Y. 77; *McNeil v. New York, G. & W. R. Co.*, 24 N. Y. Supp. 616; *Spencer v. New York Cent., etc., R. Co.*, 67 Hun (N. Y.) 196; *Welch v. New York Cent. & H. R. R. Co.*, 17 N. Y. Supp. 342.

North Carolina.—*Crutchfield v. Richmond, etc., R. Co.*, 78 N. Car. 300.

Ohio.—*Railroad Co. v. Henly*, 48 Ohio St. 608, 29 N. E. 575.

Oregon.—*Scott v. Oregon R., etc., Co.*, 14 Ore. 211, 13 Pac. 98; *Tucker v. Northern Pac. Terminal Co. (Ore.)*, 4 R. R. R. 66, 27 Am. & Eng. R. Cas., N. S., 66, 68 Pac. 426.

Pennsylvania.—*Northern Cent. Ry. Co. v. Hunsan*, 101 Pa. St. 1; *Philadelphia, etc., R. Co. v. Schertle*, 97 Pa. St. 450, 2 Am. & Eng. R. Cas. 158.

South Carolina.—*Simms v. South Carolina Ry. Co.*, 26 S. Car. 490, 2 S. E. 486.

Tennessee.—*East Tenn., etc., R. Co. v. Smith*, 89 Tenn. 114, 14 S. W. 1077, 44 Am. & Eng. R. Cas. 596; *Nashville, C. & St. Louis R. Co. v. Wheelass (Tenn.)*, 10 Lea 741.

Texas.—*Ely v. San Antonio, etc., R. Co.* (Tex. Civ. App.), 40 S. W. 174; *Gulf, etc., R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573; *Houston, etc., R. Co. v. Barrager (Tex.)*, 14 S. W. 242; *Johnson v. Galveston, etc., R. Co.* (Tex. Civ. App.), 30 S. W. 95; *Mexican Cent. R. Co. v. Shean*, (Tex.), 18 S. W. 151; *Rio Grande & E. P. Ry. Co. v. Lynch* (Tex. Civ. App.), 1 R. R. R. 419, 24 Am. & Eng. R. Cas., N. S., 419, 66 S. W. 712; *Missouri, etc., R. Co. v. Wood* (Tex. Civ. App.), 35 S. W. 879; *San Antonio, etc., Pass. R. Co. v. Adams*, 11 Tex. Civ. App. 198; *Watson v. H. & T. C. Ry. Co.*, 58 Tex. 434.

Utah.—*Seley v. Southern Pac. R. Co.*, 6 Utah 319, 23 Pac. 751.

Virginia.—*Darracott v. Chesapeake & O. R. R. Co.*, 83 Va. 288, 2 S. E. 511; *Eckles v. Norfolk, etc., R. Co. (Va.)*, 25 S. E. 545; *McDonald's Adm'r v. Norfolk & W. R. Co. (Va.)*, 8 Am. & Eng. R. Cas., N. S., 552; *Norfolk & Western R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *Norfolk, etc., R. Co. v. Emmert*, 83 Va. 640, 3 S. E. 145; *Norfolk & Western R. Co. v. Houchins' Adm'r (Va.)*, 8 Am. & Eng. R. Cas., N. S., 616; *Norfolk & Western R. R. Co. v. McDonald*, 88 Va. 352, 13 S. E. 706.

West Virginia.—*Oliver v. Ohio River R. Co.*, 42 W. Va. 703, 8 Am. & Eng. R. Cas., N. S., 552, 26 S. E. 444.

Wisconsin.—*Kelly v. Abbot*, 63 Wis. 307, 23 N. W. 890; *Whitwam v. Wisconsin & M. R. Co.*, 58 Wis. 408, 17 N. W. 124; *Zahn v. Milwaukee & S. Ry. Co. (Wis.)*, 3 R. R. R. 268, 26 Am. & Eng. R. Cas., N. S., 268, 89 N. W. 889.

Note

b. Other Statements of Rule.

Brakeman must be held to understand the ordinary hazards attending the coupling and uncoupling cars, and to assume such risks when they enter upon their duties. So held in *Atchison, T. & S. F. R. Co. v. Alsdurf*, 47 Ill. App. 200.

A brakeman when making or unmaking couplings, assumes all risks necessarily incident to such employment, and to give him a right of action against his company for injuries sustained in the performance of such duties, the company must have owed him some duty, arising from the contract or from the relation itself; and the failure to perform that duty must have been the proximate cause of the injury. So held in *Little Rock & Ft. S. Ry. v. Townsend*, 41 Ark. 382.

In *Oliver v. Ohio River R. Co.*, 42 W. Va. 703, 26 S. E. 444, an action brought against a railway company to recover for injuries received by an employee while engaged in coupling cars, it was held that where an employee of a railroad company has knowledge of any danger connected with his employment which may be avoided by the use of ordinary care, and appreciates the danger to which he exposes himself, if he continues in such employment after such knowledge, without protest or complaint on his part, or promise on the part of such railroad company that such danger shall be removed, he will be held to have assumed the risk of such danger, and to have waived all claims for damages in case of injury.

c. Mere Existence of Danger.

It cannot be held that a car coupler, as matter of law, does not assume the risk of coupling cars merely because they cannot be coupled without any danger of his being squeezed. So held in *Van Winkle v. Chicago, M. & St. P. Ry. Co.*, 93 Iowa 509, 61 N. W. 926.

2. WHAT ARE ORDINARY DANGERS.**a. Cars of Different Patterns.****(1) General Rule.**

A railroad company owes no duty to servants who are required to couple or uncouple cars to provide cars or engines of but one pattern, and any risk to them arising from an obvious difference in construction of particular cars or engines from those to which they are accustomed is assumed by such servant.

United States.—*Kohn v. McNulta*, 147 U. S. 238; *Northern Pac. R. Co. v. Blake* (C. C. A.), 63 Fed. 45; *Woodworth v. St. Paul, etc., R. Co.*, 18 Fed. 282; *Peirce v. Bane* (C. C. A.), 80 Fed. 988.

Alabama.—*East Tenn., etc., R. Co. v. Turvaville*, 97 Ala. 122, 12 So. 63; *Louisville & N. R. Co. v. Boland*, 96 Ala. 626, 11 So. 667; *Southern R. Co. v. Arnold*, 114 Ala. 183, 21 So. 954.

Arkansas.—*St. Louis, etc., R. Co. v. Higgins*, 44 Ark. 293, 21 Am. & Eng. R. Cas. 629.

Illinois.—*Chicago, etc., R. Co. v. Montgomery*, 15 Ill. App. 205; *Illinois Cent. R. Co. v. Harris*, 53 Ill. App. 592; *Indianapolis, etc., R. Co. v. Flanigan*, 77 Ill. 365; *Toledo, etc., R. Co. v. Black*, 88 Ill. 112.

Iowa.—*Baldwin v. Chicago, etc., R. Co.*, 50 Iowa 680; *Williams v. Central R. Co.*, 43 Iowa 396.

Kansas.—*Atchison, W. T. & S. F. R. Co. v. Wagner*, 33 Kan. 660.

Michigan.—*Botsford v. Michigan Cent. R. Co.*, 33 Mich. 256; *Brewer v. Flint, etc., R. Co.*, 56 Mich. 620, 23 N. W. 440; *Fort Wayne, etc., R. Co. v. Gilderslave*, 33 Mich. 133; *Hathaway v. Michigan C. R. Co.*, 51 Mich. 253, 16 N. W. 634; *Michigan Cent. R. Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791, 1 Am. & Eng. R. Cas. 791.

Minnesota.—*McLaren v. Williston*, 48 Minn. 299, 51 N. W. 373.

Mississippi.—*Hatter v. Illinois Cent. R. Co.*, 69 Miss. 642, 13 So. 827.

Missouri.—*Hulett v. St. Louis, etc., R. Co.*, 67 Mo. 239; *Thomas v. Missouri Pac. R. Co.*, 109 Mo. 187, 18 S. W. 980, 53 Am. & Eng. R. Cas. 146.

Nebraska.—*Chicago, etc., R. Co. v. Curtis*, 51 Neb. 442, 71 N. W. 42.

New York.—*Beaudin v. Central Vermont R. Co.*, 14 N. Y. Supp. 700; *Dye v. Delaware, etc., R. Co.*, 130 N. Y. 671, 53 Am. & Eng. R. Cas. 286; *Edall v. New England R. Co.*, 18 N. Y. App. Div. 216.

Note

Ohio.—*Railroad Co. v. Henly*, 48 Ohio St. 608, 29 N. E. 575.

South Carolina.—*Simms v. South Carolina Ry. Co.*, 26 S. Car. 490, 2 S. E. 486.

Tennessee.—*Nashville, etc., R. Co. v. Wheless* (Tenn.), 10 Lea 741, 15 Am. & Eng. R. Cas. 315.

Texas.—*San Antonio, etc., Pass. R. Co. v. Adams*, 11 Tex. Civ. App. 196.

Virginia.—*Norfolk, etc., R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496; *Norfolk & Western R. R. Co. v. McDonald's Adm'r*, 88 Va. 352, 13 S. E. 706; *McDonald's Adm'r v. Norfolk & W. R. Co.* (Va.), 8 Am. & Eng. R. Cas., N. S., 552.

Wisconsin.—*Kelly v. Abbot*, 63 Wis. 307, 23 N. W. 890, 20 Am. & Eng. R. Cas. 633; *Whitwam v. Wisconsin, etc., R. Co.*, 58 Wis. 408, 17 N. W. 124, 12 Am. & Eng. R. Cas. 214.

Thus in *Mich. Cent. R. Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791, it is said in the opinion: "The Michigan Central is a great common way for the cars of all the railroad companies of the country, and every man in the employ of the defendant, if he has ordinary intelligence, is perfectly cognizant of the fact. He knows, too, that the cars of the several railroad and transportation companies differ, and that one time and another all these differences may appear in the cars he may be called upon to couple or uncouple. Every train is likely to have several kinds, and he cannot assume as he passes from one to another that the two will be alike; much less that the whole train will be. To notify him specially of the differences would not only be troublesome and expensive, and oftentimes, as above explained, confusing, but it would be a work of supererogation; for any man capable intelligently of performing the duty would be no wiser after the notice than before; and a man who would not heed the information the very nature and course of the business would impart to him would be protected by no notice. The best notice is that which a man must of necessity see and which cannot confuse or mislead him; he needs no printed placard to announce a precipice when he stands before it."

(2) Bolt Projecting—Not Familiar with Style of Car.

But where the evidence tended to show that a brakeman undertook to couple a freight car equipped with link and pin coupler to a coach equipped with a miller hook; that the coupling bars slipped by one another, leaving a space of about twelve inches between the end of the cars; that there was on the freight car a bolt projecting several inches from the end of the car and beyond the end of the nut. He was killed in the collision. The only wounds due immediately to the collision were a bruise over the heart the size of a silver dollar and a small bruise on the back opposite the first. The bolt was so situated that as he stood between the cars it would strike him about where the wound was found. It was held that he did not assume the risk, the car not being one with which he was familiar, and it not being shown that such a construction was common among the cars he habitually handled. *Thompson v. Missouri Pac. Ry. Co.* (Neb.), 71 N. W. 61.

b. Cars Differing in Height.

(1) General Rule.

The rule that an employee cannot recover for an injury resulting from one of the usual risks connected with the business into which he has entered is applicable where an employee is required to couple cars of different heights.

United States.—*Hodges v. Kimball* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 755; *Woodworth v. St. Paul, etc., R. Co.*, 18 Fed. 282.

Arkansas.—*St. Louis, etc., R. Co. v. Higgins*, 44 Ark. 293, 21 Am. & Eng. R. Cas. 629.

Illinois.—*Railway Co. v. Ashbury*, 84 Ill. 429; *Railway v. Black*, 88 Ill. 112; *Railroad Co. v. Flanigan*, 77 Ill. 365.

Indiana.—*Pennsylvania Co. v. Ebaugh* (Ind.), 4 Am. & Eng. R. Cas., N. S., 201.

Note

Iowa.—*Baldwin v. Railroad Co.*, 50 Iowa 680; *Way v. Railroad Co.*, 40 Iowa 341; *Williams v. Central R. Co.*, 43 Iowa 396.

Michigan.—*Botsford v. Michigan Cent. R. Co.*, 33 Mich. 256; *Brewer v. Flint, etc.*, R. Co., 56 Mich. 620, 23 N. W. 440; *Fort Wayne, etc.*, R. Co. *v. Gildersleeve*, 33 Mich. 256; *Railroad Co. v. Smithson*, 45 Mich. 212, 7 N. W. 791; *Smith v. Potter*, 46 Mich. 258, 9 N. W. 273.

Minnesota.—*McLaren v. Williston*, 48 Minn. 299, 51 N. W. 373.

Missouri.—*Hulett v. Railway Co.*, 67 Mo. 239.

New York.—*Dye v. Delaware, etc.*, R. Co., 130 N. Y. 671; *Edall v. New England R. Co.*, 18 N. Y. App. Div. 216.

Wisconsin.—*Kelly v. Abbot*, 63 Wis. 307, 23 N. W. 890; *Whitwam v. Railroad Co.*, 58 Wis. 408, 17 N. W. 124.

In *Kelly v. Wisconsin Central R. R. Co.*, 63 Wis. 307, 23 N. W. 890, 21 Am. & Eng. R. Cas. 633, it is said in the opinion: "The difference in the elevation of the coupling irons of the foreign car and the caboose of other cars of the defendant's road would not have been very easily or readily observed when they were distant from each other, and yet the company is sought to be held liable for its want of ordinary care in not knowing this difference when consenting to take this foreign car into its train. When the car and the caboose were brought nearly together, this difference could have been at least much more readily seen and observed by comparison. The company is charged with negligently endangering the lives of its brakemen by not knowing of this difference, and, if presumed to know of it, in allowing this car to be attached to its train; and the intestate is alleged to have been in the use of proper care when he endangers his own life by not seeing, observing or knowing of such difference, in the elevation of the coupling iron. Did not the intestate have the same, if not superior, means of knowing this difference; as or to that of the company? If the negligence of the intestate and that of the company, in this respect, are equally balanced, ought the plaintiff to recover? The duty of the company to know of this difference is not absolute, and it is not presumed to know of it as a matter of law."

"* * * The liability of the railway company in such cases does not depend upon its general and absolute duty to furnish safe and proper machinery and other appliances with which its employees may work, but upon its knowledge, actual or presumed, that such coupling appliances will not properly fit and connect with each other. I have therefore briefly compared the means of knowing this unfitness of the coupling apparatus which the company and the intestate had, in order to see whether the greater negligence should be imputed to the company rather than to the intestate."

A brakeman engaged in coupling cars, with knowledge that he may have to handle the cars of other companies, and that the bumpers of such cars do not always match in height with those of his employer's cars, assumes the ordinary risks from coupling cars differing from each other in this respect. *Hodges v. Kimball* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 755.

Where a brakeman is injured, while coupling cars, by reason of the fact that the bumpers are of different heights, when the cars are moving slowly, the fact that when the cars are moving rapidly such an accident might occur, though the cars were in good order, does not bring the accident within the ordinary risk of the employment. So held in *Goodrich v. New York Cent. & H. R. R. Co.*, 116 N. Y. 398, 22 N. E. 397, 41 Am. & Eng. R. Cas. 259.

A railroad company is not guilty of such negligence in making use in its trains of an old mail car which is lower than the others, as to be liable to its employee who knowingly incurred the risk, for an injury resulting from the coupling of such car with another, though the danger was greater than with cars of equal height. So held in *Fort Wayne, I. & S. W. R. Co. v. Gildersleeve*, 33 Mich. 133.

(2) Meeting of Drawheads.

The meeting of the drawheads is an ordinary incident of coupling

Note

cars, and, therefore, a risk assumed by one engaged in such work. So held in *Hannigan v. Lehigh & H. R. Ry. Co.* (N. Y.), 12 Am. & Eng. R. Cas., N. S., 605.

(3) Coupling Old Car Lower than Others.

In *St. Louis, I. M. & S. Ry. v. Higgins*, 44 Ark. 293, 21 Am. & Eng. R. Cas. 629, it is held that a company in using in its trains an old car which is lower than the others, is not guilty of such negligence as to be liable to its servants who knowingly incur the risk of such difference, for an injury resulting from the coupling of the old car with another, though the danger be greater than with cars of equal height.

(4) Drawheads of Different Heights and Unsuitable Link Pins.

A brakeman injured by reason of cars furnished by defendant railroad company having defendant drawheads and link pins testified that he had been a brakeman five or six months before the accident, and knew the kind of cars used on defendant's road, and knew that none of the link pins were of the proper kind. A witness of the brakeman testified that the latter knew the difference in height of the drawhead. There was evidence that the railroad was only twenty six miles long, and only used fifty-eight or fifty-nine cars, and that there were only two kinds of drawheads and link pins in use, and that the brakeman had knowledge thereof: held to show an assumption of risk by the brakeman which would preclude a recovery. *Rio Grande & E. P. Ry. Co. v. Lynch* (Tex. Civ. App.), 66 S. W. 712, 1 R. R. R. 419, 24 Am. & Eng. R. Cas., N. S., 419.

c. Mismatched Couplings.

A brakeman of ordinary intelligence and experience assumes the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers and deadwoods, because these are ordinary risks and dangers of his service. So held in *Johnson v. Southern Pac. Co.* (C. C. A.), 117 Fed. 462, 5 R. R. R. 12, 28 Am. & Eng. R. Cas., N. S., 12.

In *Norfolk & Western R. R. Co. v. McDonald's Adm'r*, 88 Va. 352, 13 S. E. Rep. 706, 8 Am. & Eng. R. Cas., N. S., 552, it is held that there can be no recovery for the death of a brakeman resulting from the use of cars having mismatched couplings where he continues to use them for over a year without company's promise to change them, as he thereby assumes the extra risk incident thereto.

In an action against a railway company to recover for the death of a brakeman who was killed while attempting to couple mismatched couplers, it appeared that on entering into the service of the company, deceased had been informed that mismatched couplers were used by the company, had been told of the danger in making couplings with them, and had been instructed how to make them safely; that he continued to use such couplers in the company's service for nearly a year, and made no remonstrance or complaint. It was held that he assumed the risk. *Norfolk & W. R. Co. v. McDonald's Adm'r*, 88 Va. 352, 8 Am. & Eng. R. Cas., N. S., 552, 13 S. E. Rep. 706.

In this case, it is said in the opinion: "The case of *Railroad Co. v. Ampey*, 93 Va. 108, 25 S. E. 226, 5 Am. & Eng. R. Cas., N. S., 706, was relied on by the plaintiff in error as authorizing a recovery. This case is wholly unlike that, and is easily distinguishable from it. Here the mismatched coupler had been used by the company and handled by the deceased for upwards of a year—during all the time of his service. The dangers attending their use were open and obvious, and he was aware all of that time of the difficulty of coupling cars with them, and the risks he encountered; but, with every opportunity to do so, made no remonstrance or complaint. There the defects in the couplings were not discovered by the brakeman Ampey until he was required to couple the cars into the train, which was then on its journey. There was no one to whom he could report the bad condition of the couplings except the conductor of the train. This he promptly did, with the result that he was ordered to couple

Note

the cars. The coupling was a necessity of the occasion. The duty to make it devolve on Ampey by virtue of his employment. He saw that he could couple the cars without injury to himself if extraordinary care and caution were exercised, and he aimed to do what the exigencies of the occasion required of him in the discharge of the service he owed the defendant, after stipulating with the conductor for the observance of the precautions which the unsafe implements he had to use suggested, but which were not observed, and he was consequently hurt. That case does not constitute a precedent for a like decision in this case."

(1) Coupling Freight Car and Passenger Service Engine.

In *Hatter v. Illinois Cent. R. Co.*, 69 Miss. 642, 13 So. 827, it was held that a brakeman employed on a freight train cannot recover for injuries sustained in coupling to his train a locomotive equipped with a coupler not defective as one of its mate, but more dangerous in the use for freight trains than those generally employed, if the use of such coupler, on certain freight engines of the company, designed for passenger service on occasion, was not unusual when he entered the employment, and he recognized that he would be required to make couplings with the same.

(2) Foreign Cars.

An employee coupling cars assumes the risk arising from the fact that foreign cars have different style of coupling from that on his company's cars. *Louisville & N. R. Co. v. Boland*, 96 Ala. 626, 11 So. 667; *Northern Pac. R. Co. v. Blake*, 63 Fed. 45; *Indianapolis, etc., R. Co. v. Flanigan*, 77 Ill. 365; *Thomas v. Missouri Pac. R. Co.*, 109 Mo. 189; *Simms v. South Carolina R. Co.*, 26 S. Car. 490, 2 S. E. 486, 31 Am. & Eng. R. Cas. 199; *Nashville, etc., R. Co. v. Wheelless (Tenn.)*, 10 Lea 741, 15 Am. & Eng. R. Cas. 315; *Norfolk & Western R. R. Co. v. McDonald's Adm'r*, 88 Ga. 352, 13 S. E. 706, 8 Am. & Eng. R. Cas., N. S., 552; *Kelly v. Abbott*, 63 Wis. 307, 23 N. W. 890, 21 Am. & Eng. R. Cas. 633.

In *Thomas v. Missouri Pac. Ry. Co.*, 109 Mo. 187, 18 S. W. 980, it is held that a switchman whose duty it is to attend to the switches and couple cars at a railway station assumes the risk of coupling all cars which come to him in good order and sound condition, including those of other companies, no matter how peculiar or hazardous their couplings are.

(3) Dangerous Construction of Coupling Appliances of Foreign Cars.

In *Chicago, B. & Q. R. R. Co. v. Montgomery*, 15 Ill. App. 205, it is held that where foreign cars coming into the yard day after day are peculiarly dangerous, in the manner in which the coupling apparatus and bumpers are constructed, and that fact is as well known to the employee as the employer, if the servant continues in the employment with such knowledge, he assumes the risk of coupling such cars.

(4) Miller Couplings.

An employee, by virtue of his employment, assumes all the ordinary and usual risks incident to his employment; and this rule is applicable where a switchman attempts to couple a car equipped with "Miller coupling," an invention by which cars are coupled to each other automatically, without the use of links or pins, but which are also equipped with links or pins, to an engine equipped with an oval faced drawhead, with slots into which a link might be placed for coupling. So held in *Atchison V. T. & S. F. R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204, 21 Am. & Eng. R. Cas. 637.

(5) New Device Adopted.

In *Railroad Co. v. Henly*, 48 O. St. 608, 29 N. E. 575, it is held that it is not, per se, negligence for a railroad company to adopt a device for coupling cars, not before in use on its road, without discarding those already in use by it, although the use of the two together may be more hazardous than would be the use of either alone;

Note

and the exercise by the company of this right is a risk incident to the service of one engaged in coupling cars; and if the sole cause of an injury to one so engaged, was the concurrent use of the two devices, it imposes no obligation on the railroad company to compensate him therefor.

(6) Makeshift Coupler.

But in *Taylor v. Missouri Pac. Ry. Co. (Mo.)*, 16 S. W. 206, it is held that the danger arising from the use, by a yardmaster, of a coupling consisting of a piece of brake-beam rod, partly bent, but not sufficiently to stay in place when the cars bumped together, cannot be declared, as matter of law, one of the ordinary risks of the employment of a switchman injured in consequence thereof, and having no knowledge or notice of such facts.

(7) Couplings in General Use.

And a brakeman does not necessarily assume the risk arising from the character of couplings merely on the ground that such couplings are in general use among railroads, such general use being merely evidence tending to show ordinary care in the selection of the couplings, but not conclusive. So held in *Martin v. California Cent. Ry. Co.*, 94 Cal. 326, 29 Pac. 645.

d. Unsafe Kind of Drawbar.

But in *Second v. Chicago & M. L. S. R. Co.*, 107 Mich. 540, 65 N. W. 550, it is held that a brakeman assumes the risk of injury from an imperfect kind of drawbar in use on the road on which he is employed, where he has daily used such drawbars, and is therefore familiar with the dangers attending their use.

e. Double Deadwoods.

If an employee when he enters the service knows that his company is using cars having double buffers, which require a higher degree of care in coupling them than cars of ordinary construction, and continues in the same, he assumes the risk of coupling cars with double buffers. So held in *Indianapolis B. & W. R. R. Co. v. Flanigan*, 77 Ill. 365.

The increased hazard in coupling cars with double buffers being an obvious danger open to the ordinary observation of any one using ordinary care, a person assumes the risk of coupling them, although he has had no experience with them, and has not been instructed as to their peculiar dangers. So held in *East Tennessee, V. & G. Ry. Co. v. Turvaille*, 97 Ala. 122, 12 So. 63.

Where a brakeman knows that cars with double buffers are used on his company's road, he assumes the risk of coupling cars of such construction. So held in *Illinois Cent. R. Co. v. Harris*, 53 Ill. App. 592.

In *Hathaway v. Michigan C. R. Co.*, 51 Mich. 253, 16 N. W. 634, it is held that the omission of a railroad company to warn an inexperienced brakeman of the specific danger of coupling cars that are furnished with double deadwoods does not make the company liable for an injury received by him in so doing, if the risk is such as to be manifest to any person, and if, on being employed, he was warned in general terms of the perils of coupling cars of different construction, and was told not to take any chances.

f. Same—Foreign Cars.

The occasional or frequent use of foreign cars with double deadwoods on his employer's road, in the ordinary course of business, is one of the ordinary risks assumed by a brakeman in coupling or uncoupling them. So held in *Baldwin v. C. R. I. & P. R. Co.*, 50 Iowa 680.

That a car belonging to a road other than the one on which a brakeman is employed is equipped with double deadwoods or buffers is a fact which is open, apparent and obvious to any person attempting to couple the car; hence, any risk attendant on such coupling is of the hazards incident to the duty, and assumed by the employee; and this is true notwithstanding the cars in general use

Note

on the road on which the brakeman is employed are equipped differently, or with single deadwoods. So held in *Chicago, etc., R. Co. v. Curtis*, 15 Neb. 442, 71 N. W. 42.

A brakeman assumes the risk of coupling foreign cars with double buffers or deadwoods, as these are in common use on well-managed roads. So held in *Northern Pac. R. Co. v. Blake* (C. C. A.), 63 Fed. 45.

In *Michigan C. R. R. Co. v. Smithson*, 45 Mich. 212, 1 Am. & Eng. R. Cas. 101, 7 N. W. 791, it appeared that a switchman had his hand crushed while coupling a freight car furnished with double deadwoods and received from another road where such a contrivance was generally used. He had not been expressly notified that he would be required to handle such cars, but in course of the commerce and as a matter of business necessity as well as of statutory obligation they were being constantly received and forwarded like all other cars adapted to the gauge of the road, and having occasion to run thereon. It was held that the switchman could not maintain a suit against his company for negligence in receiving the cars or in omitting to notify him thereof; and that he assumed the risks of coupling and uncoupling such cars by virtue of his employment.

In this case it is said in the opinion: "The difference (between double and single deadwoods) is very marked and striking, and it is quite impossible to couple the double deadwoods, or to approach them for the purpose, with any degree of attention, without observing it. This is so whether the coupling is done in the day time or nighttime; for in the night every switchman has his lantern with him, or should have it on all occasions. If therefore a switchman were to declare that he had attempted to couple the double deadwoods without noticing how they differed the conclusion would be that he had gone heedlessly in the performance of a duty requiring great care, and that he had not allowed his eyes to inform him what was before him."

g. Old Style Bumper.

In *Simms v. South Carolina Ry. Co.*, 26 S. Car. 490, 2 S. E. 486, 31 Am. & Eng. R. Cas. 199, it is held that an old style bumper on freight car, which is not as safe as the improved bumpers in use on its road, is not such a peculiar hazard as to require the company to notify a car coupler of the danger incident to its being coupled as other bumpers are, in order to render the risk incident to using it one assumed by the car coupler.

h. Movements of Cars.

It appears that those engaged in coupling cars assume the risk from their being suddenly moved without warning if the movement is only such as is usual and unavoidable, and not the result of negligence.

(1) Trains Entering on Switches.

In an action by a switchman for personal injuries sustained while uncoupling cars, from the sudden movements of the cars, there can be no recovery if the sudden movements were the ordinary result of trains entering on switches. So held in *Rutledge v. Missouri Pac. Ry. Co.*, 110 Mo. 312, 19 S. W. 38.

(2) Stepping between Cars While Slack Was Being Given.

In *Dysinger v. Cincinnati, S. & M. Ry. Co.*, 93 Mich. 646, 53 N. W. 825, it appeared that a brakeman had his arm caught between two deadwoods while attempting to draw a coupling pin, stepping in between the cars, while the slack was being given for the purpose. It was not claimed that any of the appliances were out of order or defective. It was held that he was not exposed to any extra hazard, or required to perform work not within the scope of his employment; and that he assumed the risk as one incident to his employment.

(3) Custom to Back until Signaled.

Plaintiff, a railway brakeman, was injured while coupling cars.

Note

The crew consisted of plaintiff, two other brakemen, and the fireman, the engineer being absent. One of the other brakemen signaled to the engineer to back to make a coupling, and two cars were coupled, one by such brakeman, and the other by plaintiff, who then ran to a third car to adjust the coupling, and the engineer continued backing, and crushed plaintiff's fingers. It was the custom on defendant's road for the engine to continue backing in such case until signaled to stop, and plaintiff had been in defendant's employ for seven or eight years, and was familiar with its manner of operating trains. The fireman testified that he did not know that plaintiff was making a coupling. It was held that plaintiff assumed the risk. *Zahn v. Milwaukee & S. Ry. Co. (Wis.)*, 3 R. R. R. 268, 26 Am. & Eng. R. Cas., N. S., 268, 89 N. W. 889.

(4) Repairing Coupling.

Though a brakeman employed to couple cars is not entitled to a warning that the cars are about to be moved, for the risk of coupling the cars without such warning is assumed, he does not, as a matter of law, assume that the cars will be moved without his being warned, when engaged in repairing a coupling at the order of the conductor in charge of the train. So held in *Bowes v. New York, N. H. & H. R. Co. (Mass.)*, 62 N. E. Rep. 949, 2 R. R. R. 292, 25 Am. & Eng. R. Cas., N. S., 292.

(5) Negligence.

But, as a general rule, unless the proximate cause of the accident is the carelessness of a fellow servant, car couplers do not assume the risk of injury from negligence in suddenly moving cars without warning while they are in the discharge of their duties. See *Kansas City, Ft. S. & M. R. Co. v. Murray*, 55 Kan. 336, 40 Pac. 646; *Strong v. Iowa Cent. Ry. Co.*, 94 Iowa 380, 62 N. W. 799.

1. Projecting Loads.

(1) General Rule.

Where a railroad company is in the habit of receiving and transporting cars loaded with timbers or iron rails which project over the cars upon which they are loaded, the risk arising from such projecting timbers or rails is nothing more than an ordinary risk assumed by employees when undertaking to make or unmake couplings.

Florida.—*Jacksonville, T. & K. W. Ry. Co. v. Galvin*, 29 Fla. 636, 11 So. Rep. 231.

Illinois.—*Railway Co. v. Black*, 88 Ill. 112.

Kansas.—*Atchison, etc., R. Co. v. Brown*, 26 Kan. 443, 6 Am. & Eng. R. Cas. 228; *Atchison, etc., R. Co. v. Plunkett*, 25 Kan. 188, 2 Am. & Eng. R. Cas. 127.

Massachusetts.—*Boyle v. New York & N. E. R. Co.*, 151 Mass. 102, 23 N. E. 827; *Lothrop v. Fitchburg R. Co.*, 150 Mass. 423, 23 N. E. 227.

Michigan.—*Brennan v. Railway Co.*, 93 Mich. 156, 53 N. W. 358; *Day v. Railway Co.*, 42 Mich. 523, 4 N. W. 203.

Missouri.—*Jackson v. Railroad Co.*, 104 Mo. 448, 16 S. W. 413.

Oregon.—*Scott v. Navigation Co.*, 14 Ore. 211, 28 Am. & Eng. R. Cas. 414, 13 Pac. 98; *Tucker v. Northern Pac. Terminal Co. (Ore.)*, 4 R. R. R. 66, 27 Am. & Eng. R. Cas., N. S., 66, 68 Pac. 426.

Pennsylvania.—*Northern Cent. R. Co. v. Haddon*, 101 Pa. St. 1, 12 Am. & Eng. R. Cas. 241.

Tennessee.—*Louisville, etc., Railway Co. v. Gower*, 85 Tenn. 465, 3 S. W. 824.

Texas.—*Ely v. Railway Co.*, 15 Tex. Civ. App. 511, 40 S. W. 174; *Mexican Cent. R. Co. v. Shean (Tex.)*, 18 S. W. 151.

In *Louisville, etc., R. Co. v. Gower*, 85 Tenn. 465, 3 S. W. 824, it is said in the opinion: "Lumber of all kinds, iron, steel and finished structures must often necessarily be transported on cars of shorter length than the material to be transported. It may not be practicable or proper to solidify the train by loading upon connected cars, and it must, of necessity, result that this loading will project, and still the cars require to be coupled. To hold that such a service is not to be

Note

anticipated by a railroad employee as an occasional, incidental, though extremely hazardous duty to be performed, would be to do so in manifest disregard of the demands of the age upon transportation lines, and their common and well-understood service in conformity to such requirements."

In *Jacksonville, T. & K. W. Ry. Co. v. Galvin*, 53 Am. & Eng. R. Cas. 341, 29 Fla. 636, 11 So. Rep. 23, it is held that a brakeman employed to couple cars assumes the hazards of the ordinary perils which are incident to such employment, and in a suit by him against his company to recover for injuries sustained by him in attempting to couple cars on account of alleged negligence in loading a car to be coupled, and in negligently accepting it from another company to be coupled when it was in an unsafe condition, an instruction which excludes the right to consider such a coupling as coming within the ordinary risks of his employment is erroneous.

In *Mexican Cent. R. Co. v. Shean* (Tex.), 18 S. W. 151, it appeared that an experienced switchman, having charge of an engine and its movements, undertook, without objection, to couple a flat car, with its load projecting over the end, to a box car, knowing the dangerous way in which it was loaded, and, having been injured in the performance of this duty, he brought an action to recover the damages sustained. It was held that he had assumed the risk, and could not recover.

(2) Projecting Iron.

In *Wabash, St. L. & P. Ry. Co. v. Deardorff*, 14 Ill. App. 401, an action for injury to brakeman received while coupling cars, the only negligence charged was in permitting iron to project over the end gate of the cars. It appeared from the evidence that it was customary to load cars with railroad iron in this manner; that for two years prior to the accident, iron had thus been loaded on the cars in the yards where the brakeman was employed, and no accident had happened; that no one knew the manner of loading the cars better than he; and those skilled in the business testified that cars so loaded are constantly coupled without accident. It was held that he must of necessity have known when he accepted the position that he was liable at any and all times, when on duty, to be called on to make couplings of cars loaded in this manner, and when he entered the service he assumed this as well as all other hazards of the ordinary perils incident to the service.

In *Northern Cent. Ry. Co. v. Husson*, 101 Pa. St. 1, 12 Am. & Eng. R. Cas. 241, it appeared that a railroad employee, while engaged in his ordinary occupation of coupling cars, was caught by the head between the ends of certain bridge irons projecting from the cars and was killed. It was customary upon such railroad and upon other railroads to load bridge irons in such manner, and that deceased had full knowledge of the fact, and also that cars were so loaded upon the particular occasion; that the rules of the company required its servants in coupling cars to stoop below the body of the car. Deceased had been for some time, in the service of the company and knew of the regulation. He had, in addition, been specially warned on the day in question to observe it. Had he done so, he would, like other servants engaged in coupling other cars on the same train, have done so with safety. It was held that there was no evidence that the risk run by deceased on the occasion in question was of such an extraordinary nature that he did not impliedly assume it by virtue of his contract of employment.

(3) Loaded with Railroad Iron—Opportunity to Examine.

Where an employment is attended with danger, a servant engaging in it assumed the hazards of the ordinary perils which are incident to it, and if he receives injury from an accident, which is an ordinary peril of the service undertaken by him, he cannot recover damages for the injury; and this rule was held applicable, where an employee was injured in attempting to couple cars loaded with railroad iron, so as to leave the rails projecting, he having had several months experience in coupling cars similarly loaded, an ample time to examine how the cars were loaded, and their mode of coupling. So held in *Toledo, W. & W. Ry. Co. v. Black*, 88 Ill. 112.

Note

(4) Shifting of Rails.

A railroad employee was used to coupling flat cars loaded with iron rails, which usually shift in transit. In an action for his death, it appeared that, while thus employed, a flat car was "kicked" towards a loaded car, and, while endeavoring to couple them he was caught between the projecting rails and the moving car. No one saw the accident, but it occurred before sunset, and his view of the cars was unobstructed, though what his position was before the cars came together was not shown. It was apparent that he must have stooped to avoid the danger at the time of the accident. It was held that it was an ordinary risk of his employment, which he had assumed. *Tucker v. Northern Pac. Terminal Co. (Ore.)*, 4 R. R. R. 66, 27 Am. & Eng. R. Cas., N. S., 66, 68 Pac. 426.

(5) Projecting Lumber.

In *Brice v. Louisville & N. R. Co. (Ky.)*, 38 Am. & Eng. R. Cas. 38, it is held that where a brakeman attempts to couple a car which is so loaded that the lumber which it contains projects over its end so as to render dangerous the process of coupling it, and the conductor was chargeable with notice that the car was so negligently loaded, but it is not shown that he ordered the brakeman to attempt to make the coupling, the brakeman must be deemed to have observed the danger of coupling such car and assumed its risk.

In *Day v. Railway Co.*, 2 Am. & Eng. R. Cas. 126, 42 Mich. 523, 4 N. W. 203, it appeared that a brakeman, in stooping to couple cars, had his fingers injured by the coupling link, caused by lumber projecting beyond the end of the car. It was held that the injury resulted from one of the risks incident to his occupation, and no error was committed in taking the case from the jury.

In *Boyle v. New York & N. E. R. Co.*, 151 Mass. 102, 23 N. E. 827, it appears that the conductor of a switching crew, in charge of all the movements of cars within or about a freight yard, and familiar with his duties and the usages of the yard, while acting as such in the day time, and attempting to couple two cars loaded and handled in the usual way, was struck on the head by a piece of timber projecting from the end of one of the cars, and killed. It was held that he assumed the risk.

(6) Coupling at Night.

But in *Haugh v. Chicago, etc., R. Co.*, 73 Iowa 66, 35 N. W. 116, it appeared that a yardman was ordered to couple, at night, a car loaded with lumber, which projected too far forward. His orders were peremptory, and did not admit of delay. He was killed by reason of the projecting timbers. It was held that he did not assume the risk.

j. Fellow Servants' Negligence.

(1) Existence of Relation—Conflict of Authority.

In this class of fellow servant cases, as in others, there is such a conflict of authority in the decisions that it is impossible to extract from them, or from text books, any certain, definite rule upon the subject. For convenience sake the illustrations are classified under affirmative and negative heads.

(2) General Rule.

Of course, the rule that an employee, by entering into his contract of employment, assumes dangers created by the negligence of his fellow servants applies to brakemen and others when they engage in coupling cars.

United States.—*New England R. Co. v. Conroy (U. S.)*, 16 Am. & Eng. R. Cas., N. S., 380; *Cincinnati, N. O. & T. P. Ry. Co. v. Mealer (C. C. A.)*, 50 Fed. 725.

Arkansas.—*St. Louis, etc., Ry. Co. v. Brown (Ark.)*, 16 Am. & Eng. R. Cas., N. S., 440.

California.—*Long v. Coronado R. Co.*, 96 Cal. 269, 31 Pac. 170.

Florida.—*Jacksonville, T. & K. W. Ry. Co. v. Galvin*, 29 Fla. 636, 11 So. 231, 53 Am. & Eng. R. Cas. 341.

Illinois.—*Chicago & A. R. Co. v. Bush*, 84 Ill. 570; *Meyer v. Illinois Cent. R. Co. (Ill.)*, 12 Am. & Eng. R. Cas., N. S., 694.

Note

Kentucky.—Southern Ry. in *Kentucky v. Clifford* (Ky.), 62 S. W. 514, 21 Am. & Eng. R. Cas., N. S., 229.

Louisiana.—Wallis v. Morgan's L. & T. R. & S. Co., 38 La. Ann. 156.

Michigan.—Loranger v. Lake Shore & M. S. Ry. Co., 104 Mich. 80, 62 N. W. 137; Smith v. Potter, 46 Mich. 258; Stanley v. Chicago & W. M. Ry. Co., 101 Mich. 202, 59 N. W. 393.

Missouri.—Schaub v. Hannibal & St. J. Ry. Co., 106 Mo. 74, 16 S. W. 924.

New York.—Arnold v. D. & H. C. Co., 125 N. Y. 15, 25 N. E. 1064; McCosker v. Long Island R. Co., 84 N. Y. 77.

Virginia.—Eckles' Adm'r v. Norfolk, etc., R. Co., 96 Va. 69, 25 S. E. 545; Norfolk & Western R. Co. v. Houchins' Adm'r, 95 Va. 398, 28 S. E. 578, 8 Am. & Eng. R. Cas., N. S., 616.

Wisconsin.—Kelly v. Abbot, 63 Wis. 307, 23 N. W. 890; Whitwam v. Wisconsin & M. R. Co., 58 Wis. 408, 17 N. W. 124.

(3) Who Are Fellow Servants.

(a) Conductor Injured—Negligence in Using Defective Coupling Link.

No recovery can be had of a railway company for the death of a freight conductor in its employ through a defective coupling link, where there is evidence that the company supplied all the links that were needed for use by its trainmen and at points where trains were made up, as the negligence in using such defective link was that of those making up the train, fellow servants of the conductor. So held in *Young v. Boston & M. R. Co.*, 168 Mass. 219, 46 N. E. 624.

(b) Conductor Signaling to Back Train.

A conductor, in signaling to the engineer to back train up to car which a brakeman was attempting to couple, was acting as a fellow servant of the latter. So held in *Jackson v. Norfolk & Western R. Co.* (W. Va.), 6 Am. & Eng. R. Cas., N. S., 455.

(c) Conductor's Violation of Rule.

The conductor of a railway train whose negligence in failing to observe a rule of the company results in the death of a brakeman on such train is a fellow servant of such brakeman, and the company is not liable for his death so caused. So held in *Norfolk & Western R. Co. v. Houchins' Adm'r*, 95 Va. 398, 28 S. E. 578, 8 Am. & Eng. R. Cas., N. S., 616.

(d) Disabled Car—Failure to Prop Drawhead.

In *Arnold v. D. & H. C. Co.*, 125 N. Y. 15, 25 N. E. 1064, it appeared that plaintiff was a brakeman employed in the defendant company's yard; that there were inspectors whose duty it was, on the arrival of every train in the yard, to examine each car, and if any injury or defect was discovered, to remove the car from the train and place it upon a track known as the "cripple track" for repairs, and in this work plaintiff was employed. In attempting to couple two cars, one of which had a broken drawhead, in order that the latter might be placed on such track, plaintiff was injured. The defect might easily have been seen. It was held that the action was not maintainable; that plaintiff took the necessary risks of his employment, one of the purposes of which was to handle and remove disabled cars; that, under the circumstances, he had no right to assume that the couplings were perfect; if he did not know the condition of the one causing the injury, he was bound to assume that it might be disabled and govern his action accordingly, and therefore was chargeable with negligence; and that a neglect to chain or prop up the defective drawhead, as was the rule and custom of the business of the yard, if not chargeable in some degree to plaintiff himself, was at least a neglect of his co-servants and not a failure of duty on the part of the master.

(e) Engineer Ordering Brakeman to Couple.

In *East Tennessee, etc., R. Co. v. Smith*, 89 Tenn. 114, 14 S. W. 1077, 44 Am. & Eng. R. Cas. 596, the injured employee was a brakeman and was hurt while undertaking to couple a moving train. He alleged that he was ordered to make the coupling by the engineer. The train was

Note

in charge of the conductor. It was held that the engineer and brakeman were fellow servants, and that the company was not responsible for the negligence of either, by which the other was injured, there being no proof of the incompetency of either employee.

(f) Engineer or Fireman—Negligence in Backing Train.

Where the proximate cause of the injury was the negligent driving back of the train a second time by the engineer or fireman of the train, who was the fellow servant of the brakeman injured while uncoupling cars, the railroad company was therefore not liable. So held in *Norfolk & Western R. Co. v. Brown*, 91 Va. 668, 22 S. E. 496.

(g) Engineer's Negligence.

In *Wallis v. Morgan's L. & T. R. & S. Co.*, 38 La. Ann. 156, it is held that in the operation of coupling trains the relation between the engineer and brakeman is that of fellow servants, and subject to the rule that the master is not liable for injury occasioned to one servant by the fault of another servant.

(h) Engineer's Negligence in Backing Train—Injury to Conductor Acting for Brakeman.

Under the fellow-servant rule, there can be no recovery against a railroad for the death of its conductor, caused, while he, the brakeman being temporarily absent, was making a coupling, by the negligence of its engineer in backing the train, whatever the degree of such negligence; and no right of recovery, in such case, is given by § 241 of the Constitution of Kentucky, nor by § 6 of Kentucky Statutes. So held in *Linck's Adm'r v. Louisville & N. R. Co.* (Ky.), 16 Am. & Eng. R. Cas., N. S., 831.

In this case it is also held that even though a conductor and an engineer are fellow servants, and the latter stands in the relation of vice principal with respect to a brakeman, the fact that a conductor is temporarily discharging the duties of a brakeman does not change his relation to the engineer.

(i) Engineer's Negligence in Moving Cars.

In *Long v. Coronado R. Co.*, 96 Cal. 269, 31 Pac. 170, it is held that a person employed as conductor and brakeman who is injured while coupling cars, owing to the alleged negligence of the engineer in moving the cars without a signal from the conductor cannot recover for the injury from the railroad company, because the engineer was his fellow servant.

In this case it is also held that the failure of a railroad company to provide suitable cars and a sufficient complement of men does not entitle a conductor who has been injured while coupling cars, through the negligence of the engineer, his fellow servant, in moving the cars without a signal from the conductor, to recover against the company, where it appears that he knowingly assumed the risk of such failure, and that no new danger occurred or was incurred after the employment.

The engineer is not the superior, but the fellow servant of the brakeman, while the latter is engaged in coupling or uncoupling cars, and the engineer is controlling their movements upon signals from the conductor or brakeman. So held in *Nashville, C. & St. L. R. Co. v. Wheelass* (Tenn.), 10 Lea 741, 15 Am. & Eng. R. Cas. 315.

In *Stanley v. Chicago & W. M. Ry. Co.*, 101 Mich. 202, 59 N. W. 393, it appeared that the conductor of a freight train desired to leave two box cars on a siding, and directed a brakeman to get upon an empty flat car next to the tender, and assist in making a running switch, the brakeman mounted the flat car, and knelt down at the rear end. The conductor climbed upon the first box car, which was attached to the flat car, and took his station at the rear, to apply the brake, in which position he was out of sight of the brakeman. The brakeman pulled the pin at the proper time, and just as he was reaching over the end of the flat car to lay it on the bumper of the detached box car, the engine suddenly went ahead, and he was thrown onto the track, and his leg injured. Neither the conductor nor the brakeman gave the engineer any signal to

Note

go ahead when the pin was drawn. It was held that the engineer should not have started up his engine until notified; that the sudden starting of the engine and flat car was the proximate cause of the accident, for which the engineer alone was responsible; and, being a fellow servant of the brakeman, the railroad company was not liable for the consequent injury to the brakeman.

(j) **Engineer's or Fireman's Negligence—Injury to Conductor of Shifting Crew Acting as Brakeman.**

One who, while acting as conductor of a shifting crew, undertook to act as brakeman in coupling cars, and, while so acting, was injured, cannot recover for such injury if it was caused by or resulted from the negligence of the engineer or fireman of such crew, they being fellow servants of his. So held in *Eckles' Adm'x v. Norfolk, etc., R. Co.*, 96 Va. 69, 25 S. E. 545.

(k) **Fireman's Negligence in Dumping Cinders upon Track.**

In *Loranger v. Lake Shore & M. S. Ry. Co.*, 104 Mich. 80, 62 N. W. 137, it appeared that an experienced brakeman, after turning a switch to allow an engine and tender to pass onto another track for the purpose of running out some cars, ran past the engine and tender, which were backing up about four miles an hour, and when about two car lengths from the cars, and without signaling the engineer, who was bound to obey his orders, to slacken speed, stepped in front of the tender for the purpose of reversing a crooked link, and thereby enable him to make the necessary coupling. While walking sideways upon the track, in his attempt to reverse such link, the brakeman stubbed his toe against a pile of cinders, lately dumped upon the track from a passing engine, fell, and was injured. He had passed over the track on his way from the cars to the switch, but did not notice the cinders. The rules of the company, and his contract with it required brakeman to look before entering upon the track in front of a moving train, to see that the track was clear. It was held that he also assumed the risk as the fireman who dumped the ashes upon the track and the section men who should have removed them were his fellow servants.

(l) **Fireman's Negligence in Repeating Signals.**

A brakeman, when coupling cars and a fireman in the discharge of his ordinary duty of receiving signals from the brakeman and repeating them to the engineer, are coequal fellow servants, and the master is not liable for an injury to the brakeman by either the ordinary or gross negligence of the fireman. So held in *Southern Ry. in Kentucky v. Clifford (Ky.)*, 62 S. W. 514, 21 Am. & Eng. R. Cas., N. S., 229.

(m) **Inspector's Negligence—Defective Foreign Car.**

A brakeman in coupling cars had his arm crushed by a loosened deadwood on a car which had come from another road. It was the business of inspectors employed on both roads to see that cars transferred were in proper condition; and there was no claim or showing that they were not competent. It was held that the inspector was a fellow servant of the brakeman, and that, therefore, that the risk was assumed by the brakeman by virtue of his employment. *Smith v. Potter*, 46 Mich. 258, 9 N. W. 273.

The engineer is not the superior, but the fellow servant of the brakeman, while the latter is engaged in coupling or uncoupling cars, and the engineer is controlling their movements upon signals from the conductor or brakeman. So held in *Nashville, C. & St. L. R. Co. v. Wheelass (Tenn.)*, 10 Lea 741, 15 Am. & Eng. R. Cas. 315.

(n) **Ordered to Detach Car from Engine Having Short Drawbar.**

In *Whitwam v. Wisconsin & M. R. Co.*, 58 Wis. 408, 17 N. W. 124, it appeared that a brakeman was injured while attempting to cut off an engine from a car, by reason of the fact that the drawbar on the engine was too short to be used in connection with the car. The gravamen of the action was the coupling of such car to the engine with the short drawbar. It did not appear when, where, or by whom this was

Note

done, but such coupling and the order for detaching the car were manifestly the acts of the fellow servants of the brakeman. It was held that the company was not liable.

(o) Sectionman's Failure to Remove Obstructions.

A yard switchman in uncoupling cars was walking or running with the train, for the purpose of lifting the pin, when he stumbled over a piece of coke on the track, and his arm was thrown between the deadwood and injured. It was held that as it was the duty of the sectionmen to remove coal or coke from the tracks, there could be no recovery for their negligence in failing to do so, since they and the switchman were co-servants. *Cincinnati, N. O. & T. P. Ry. Co. v. Mealer* (C. C. A.), 50 Fed. 725.

(p) Switchman's Failure to Substitute Sound Coupling Link.

Defendant's fireman was injured through the breaking of a defective coupling link, for which the switchman, it being his duty to inspect such links in making up the train, should have substituted a sound link. It was held that the accident was caused by the negligence of the switchman, and that he and the fireman were fellow servants. *St. Louis, etc., Ry. Co. v. Brown* (Ark.), 16 Am. & Eng. R. Cas., N. S., 440.

In this case it is said in the opinion: "The inspection of cars on the way to their destination is cursory, and made for the purpose of ascertaining whether they be roadworthy, and can be hauled without unnecessarily imperiling the safety of the trainmen. It is temporary, and is for the purpose of ascertaining whether the cars can be hauled to their destination, and is a part of the 'executive details' of the operation of the train; and, like other acts necessary to be performed by the trainmen to haul the train, there is no liability of the railroad company to its employees, for its negligent performance. If care and diligence have been exercised in the selection of competent persons for that duty, a negligence by them in the performance of it is a risk of the employment that the coemployee takes when he enters the service. *Slater v. Jewett*, 85 N. Y. 61; *Holden v. Railroad Co.*, 129 Mass. 268."

(q) Trainmen—Car Left on Sidetrack.

A brakeman assumes the risk of injury caused by the negligence of the company's trainmen in leaving a freight car on a sidetrack so as to injure the brakeman who was endeavoring to get off a passing train to uncouple cars, such trainmen being his fellow servants. So held in *Schaub v. Hannibal & St. J. Ry. Co.*, 106 Mo. 74, 16 S. W. 924.

(r) Yardmaster—Backing Train without Warning.

Deceased was employed in defendant's yard to assist the yardmaster. He was hired by the latter and was under his control and supervision. While deceased was engaged, by the direction of the yardmaster, in attaching a damaged car standing on a track in the yard to another car, the yardmaster negligently signaled to an engineer, whose train stood upon the track, to back the train, which he did, without signal or warning, and in consequence deceased was crushed to death. It was held that deceased assumed the risk, as the yardmaster was to be deemed his fellow servant as to all acts done in the common employment, except those done in the performance of some duty which defendant owed to its servants. *McCoaker v. Long Island R. Co.*, 84 N. Y. 77.

(4) Who Are Not Fellow Servants.

(a) Brakeman Killed by Giving Away of Handhold Not Fellow Servant of Inspector.

In *Cooper v. Pittsburgh, C. & St. L. R. Co.*, 24 W. Va. 37, it appeared that the injury sued for resulted in death under the following circumstances: Patton, a brakeman, was ordered to uncouple and detach the locomotive from the rest of the train, and then to climb to the top of car 4444 and brake the train so as to stop it at the station. He uncoupled the engine and car, and while using a "handhold" in climbing to the top of the car, it broke loose and separated from the car, and he fell under the wheels and was killed. It was shown that the com-

Note

pany was negligent in failing to inspect the car so as to discover the condition of the handhold, and judgment against the company was accordingly affirmed, the court holding that deceased and the negligent carinspector were not fellow servants. See also, *Eaton v. New York, etc., R. Co.* (N. Y.), 18 Am. & Eng. R. Cas., N. S., 391, and foot-note.

(b) *Car Improperly Loaded—Negligence in Accepting for Transportation.*

In *Jacksonville, T. & K. W. Ry. Co. v. Galvin*, 29 Fla. 636, 11 So. 231, it is held that a declaration against a railroad company, alleging that it loaded a certain car upon its railroad with railroad iron, so that the bars projected a considerable distance over the end of said car; and that it was negligently accepted by the company for transportation when in an unsafe condition for coupling, which was known by defendant, but of which plaintiff, a brakeman employed on defendant's train to couple cars, was ignorant, and by due care could not have known, and by means whereof plaintiff was injured while attempting to couple such cars, is not subject to demurrer on the ground that the injury was caused by the acts of plaintiff's fellow servants.

(c) *Conductor.*

In *Mason v. Richmond & Danville R. Co.*, 111 N. Car. 482, 16 S. E. 698, it is held that a conductor is not a fellow servant of a person employed in coupling cars.

(d) *Conductor's Failure to Inspect.*

In *Norfolk & W. R. Co. v. Ampey*, 93 Va. 106, 25 S. E. 226, it is held that where the duty of seeing that the couplings and brakes of his train are in good order before starting, and of inspecting them when his train stops for water, or other trains, is delegated to a conductor of a freight train while his train is between terminal points, and the brakemen of such train are placed under the direction of such conductor, the conductor is not, in the matter of inspecting and seeing that the couplings and brakes of the cars of his train are in good order, a fellow servant with the brakeman; and if one of such brakeman, in pursuance of orders of such conductor, between terminal points, attempts to couple cars which have been in a wreck, and thereby had the deadwoods crushed and the drawheads twisted, and in such attempt sustains injury, the railroad company is liable therefor.

(e) *Conductor's Negligence—Sudden Movement of Cars.*

As a general rule, a conductor in charge of a regular passenger or freight train, and having, as such conductor, full control of its movements, is not, while in the performance of his usual and ordinary duties with reference thereto, a fellow servant of an engineer, fireman or brakeman working under his orders. Under such circumstances, the conductor is the vice principal of the railroad company or of receivers operating it under orders of a court. So held in *Spencer v. Brooks* (Ga.), 5 Am. & Eng. R. Cas., N. S., 202.

(f) *Conductor's Order to Couple in Improper Manner.*

A brakeman and a conductor in charge of a construction train are not fellow servants, so as to charge the brakeman with the results of the conductor's negligence in ordering a coupling made in a defective manner. So held in *Grout v. Tacoma Eastern R. Co.* (Wash.), 74 Pac. 665, 10 R. R. 253, 33 Am. & Eng. R. Cas., N. S., 253.

(g) *Conductor Uncoupling Cars without Warning.*

In *Purcell v. Southern Ry. Co.*, 119 N. Car. 728, 26 S. E. 161, where a brakeman sought to recover for injuries received through the conductor of train having, without the plaintiff's knowledge and without having warned him, performed the latter's duty in uncoupling certain cars. Avery, J., delivering the opinion of the court, said: "The conductor, while in charge of an independent train, was a vice principal, and his acts were, in contemplation of law, the acts of the railway company. *Mason v. Railway Co.*, 111 N. Car. 482, 16 S. E. 698; *Turner v. Lumber Co.*, 119 N. Car. 387, 26 S. E. 23. Strangers are warranted in assuming that the servants of a railway company will discharge their respective

Note

duties, and are not negligent in acting on that assumption. *Tillett v. Railroad Co.*, 118 N. Car. 1031, 24 S. E. 111. The servants themselves have the right to expect and demand that reasonable care be exercised by the company in providing for their protection. *Mason v. Railroad Co.*, 111 N. Car. 482, 16 S. E. 698; *Chesson v. Lumber Co.*, 118 N. Car. 65, 23 S. E. 925. The conductor, who was the embodiment of the authority of the company, was negligent in ordering any movement of the train without warning to the plaintiff, if he had reasonable ground to apprehend that, without such caution, the plaintiff, acting within the scope of his ordinary duties, might be subjected to danger from such movement. *Little v. Railroad Co.*, 118 N. Car. 1078, 24 S. E. 514; *Blue v. Railroad Co.*, 116 N. Car. 955, 21 S. E. 299; *Emery v. Railroad Co.*, 102 N. Car. 209, 9 S. E. 139; *Tillett v. Railroad Co.*, 118 N. Car. 1031, 24 S. E. 111; *Turner v. Lumber Co.*, 119 N. Car. 387, 26 S. E. 23.

Though there is conflict in the testimony as to the question whether the conductor was in the habit of taking the place of the brakeman by uncoupling cars, it was not disputed that it was a duty which the brakeman was accustomed to perform, and which he was justified in assuming that it devolved upon him when he was injured. The plaintiff was not negligent in preparing in the usual way to uncouple the cars, and in subjecting himself only to such danger as he knew to be incident to discharging that duty. If the conductor knew that the plaintiff usually descended from the top of the cars for that purpose, and in doing so necessarily placed himself in a perilous position, he was culpable, if he anticipated his subordinate, and, without warning to him, or in any way looking to his safety, ordered the car to be moved suddenly forward; and by such carelessness he subjected the company to liability for any damage that might have reasonably been expected to ensue from his omission to give such warning, and that might have been averted by giving it."

(h) Engineer and Brakeman—Employees of Different Companies.

While a coal train of defendant railroad company, whose tracks ran over the docks of a coal company, was delivering coal to the latter company, a brakeman of the coal company, engaged in coupling cars of the train, was injured by the negligence of defendant's engineer. It was held, that such engineer was not a fellow employee of the injured brakeman, he not being under the power and direction of the coal company, engaged exclusively in doing its work or "lent" to it for the occasion. *Central R. of New Jersey v. Stoermer*, 51 Fed. 518, 53 Am. & Eng. R. Cas. 577.

(i) Fireman's Negligence in Switching.

A brakeman while coupling cars is not the fellow servant of the fireman while the latter is, according to the custom of the company, acting as engineer in switching trains. So held in *Louisville & N. R. Co. v. Moore*, 83 Ky. 675.

(j) Inspector's Negligence.

In Toledo, etc., *R. Co. v. Fredericks*, 71 Ill. 294, it appeared that the plaintiff, a switchman, was injured because of a defective drawbar on a caboose. It was held that he was not the fellow servant of the car inspector responsible for the defect.

(k) Incompetency of Fellow Servant.

(l) Incompetency of Switchman.

In an action for injuries sustained by a switchman through the incompetency of a fellow switchman to properly signal for the movement of a train while the former was uncoupling cars, the jury found that he was incompetent, but that such fact was not known to the employee who was injured thereby. It was held that the latter did not assume the risk of such incompetency, which was known to the master. *Chesapeake, O. S. W. R. Co. v. M'Mannon* (Ky.), 8 S. W. 18, 33 Am. & Eng. R. Cas. 308.

(2) Fireman's Incompetency—Switchman Continuing to Work Relying on Company's Promise.

The rule that a servant in entering a service accepts the ordinary haz-

Note

ards of his occupation, and that if, with knowledge of defects in the machinery and appliances furnished by the employer, or of the unusual dangers of the occupation, he continues in the employment, he will be regarded as assuming the dangers, and cannot recover for injuries arising therefrom, does not apply to a case where a railroad is notified by a switchman of the incompetency of a fireman who had been permitted to operate an engine in switching cars, and who refuses to work if the fireman is allowed to continue so to do, and who, in reliance upon the promise of the company that he shall not, continues his work, and is injured while attempting to uncouple cars, through the negligence of the fireman in operating an engine without his knowledge. So held in *Lyttle v. Chicago & W. M. Ry. Co.*, 84 Mich. 289, 47 N. W. 571.

II. UNUSUAL DANGERS.

1. GENERAL RULE.

A car coupler does not assume the risks from unusual dangers which he may encounter in the performance of his duties, such as arise from unsafe or defective methods, surroundings, appliances or other instrumentalities, unless he has, or is chargeable, from circumstances, with knowledge or notice of them.

England.—*Skipp v. Eastern Counties R. Co.* (Eng.), 9 Exch. 223.

United States.—*Atchison, T. & S. F. R. Co. v. Myers* (C. C. A.), 63 Fed. 793, 76 Fed. 443; *Brooks v. Northern Pac. R. Co.* (C. C.), 47 Fed. 687; *Chesapeake & O. R. Co. v. Hennessey* (C. C. A.), 16 Am. & Eng. R. Cas., N. S., 515; *Chicago, etc., Ry. Co. v. Voelker* (C. C. A.), 11 R. R. 515, 34 Am. & Eng. R. Cas., N. S., 515; *Lindsay v. New York, N. H. & H. R. Co.* (C. C. A.), 112 Fed. 384, 1 R. R. 378, 24 Am. & Eng. R. Cas., N. S., 378; *Peirce v. Bane*, 80 Fed. 988; *Southern Pac. Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. Rep. 530; *Texas & P. Ry. Co. v. Rhodes* (C. C. A.), 71 Fed. 145; *Tuttle v. Detroit, G. H. & M. Ry.*, 122 U. S. 189, 7 Sup. Ct. Rep. 1166.

Alabama.—*Davis v. Western Ry. of Alabama*, 107 Ala. 625, 18 So. 173, *Arkansas.*—*Arkansas Cent. R. Co. v. Jackson* (Ark.), 4 R. R. 790, 27 Am. & Eng. R. Cas., N. S., 790, 67 S. W. 67; *Little Rock, M. R. & T. Ry. Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50; *Little Rock, etc., R. Co. v. Townsend*, 41 Ark. 382, 21 Am. & Eng. R. Cas. 619; *St. Louis, etc., R. Co. v. Davis*, 54 Ark. 389, 15 S. W. 895.

California.—*Long v. Coronado R. Co.*, 96 Cal. 269, 31 Pac. 170.

Georgia.—*Nelson v. Central R., etc., Co.*, 88 Ga. 225, 14 S. E. 210; *Richmond & D. R. Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290; *Western & Atl. R. v. Bishop*, 50 Ga. 465.

Illinois.—*Atchison, etc., R. Co. v. Alsdurf*, 47 Ill. App. 200; *Chicago, B. & Q. R. R. Co. v. Montgomery*, 15 Ill. App. 205; *Chicago, etc., R. Co. v. Ward*, 61 Ill. 130; *Henderson v. Coons*, 31 Ill. App. 75; *Indianapolis B. & W. R. R. Co. v. Flanigan*, 77 Ill. 365; *Pennsylvania Co. v. Hankey*, 93 Ill. 580; *Peoria, D. & E. Ry. Co. v. Puckett*, 42 Ill. App. 642; *Toledo, etc., R. Co. v. Munroe*, 85 Ill. 25.

Indiana.—*Chicago, etc., R. Co. v. Wagner* (Ind. App.), 45 N. E. 76; *Louisville, etc., R. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594; *Sheets v. Chicago, etc., R. Co.*, 139 Ind. 682; *Umbach v. Lake Shore & M. S. Ry. Co.*, 83 Ind. 191, 8 Am. & Eng. R. Cas. 98; *Wabash R. Co. v. Ray* (Ind.), 12 Am. & Eng. R. Cas., N. S., 593.

Iowa.—*Belair v. C. & N. W. R. Co.*, 43 Iowa 662; *Box v. Chicago, R. I. & P. Ry. Co.* (Iowa), 16 Am. & Eng. R. Cas., N. S., 527; *Gorman v. Minneapolis & St. L. Ry. Co.* (Iowa), 3 R. R. 293, 26 Am. & Eng. R. Cas., N. S., 293, 90 N. W. 79; *Henry v. Sioux City & Pac. Ry. Co.*, 21 Am. & Eng. R. Cas. 644, 66 Iowa 52, 23 N. W. 260; *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa 357; *Mayes v. Chicago, R. I. & P. R. Co.*, 63 Iowa 562, 19 N. W. 680; *Muldrow v. Illinois Cent. R. Co.*, 39 Iowa 615; *Rebelasky v. Chicago, etc., R. Co.*, 79 Iowa 55, 44 N. W. 536.

Kansas.—*Atchison, etc., R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204, 21 Am. & Eng. R. Cas. 637; *Brown v. Chicago, etc., Ry. Co.* (Kan.), 11 Am. & Eng. R. Cas., N. S., 408; *Clark v. Missouri Pac. Ry. Co.*, 48 Kan. 654, 29 Pac. 1138.

Note

Kentucky.—*Arnold v. Louisville & N. R. Co.* (Ky.), 19 Am. & Eng. R. Cas. N. S., 272; *Chesapeake, etc., R. Co. v. McMannon* (Ky.), 8 S. W. 18; *Louisville & N. R. Co. v. Bowcock* (Ky.), 17 Am. & Eng. R. Cas., N. S., 421.

Maine.—*Gillin v. Patten & S. R. Co.* (Me.), 16 Am. & Eng. R. Cas., N. S., 508.

Massachusetts.—*Yeaton v. Boston & L. R. Co.*, 135 Mass. 418; *Wood v. Locke*, 147 Mass. 604, 18 N. E. 578.

Michigan.—*Patterson v. Chicago & G. T. Ry. Co.*, 53 Mich. 123; *Crawford v. Detroit, G. R. & W. R. Co.* (Mich.), 86 N. W. 817, 22 Am. & Eng. R. Cas., N. S., 42; *Brewer v. Flint, etc., R. Co.*, 56 Mich. 620, 23 N. W. 440; *Fuller v. Lake Shore, etc., R. Co.* (Mich.), 46 N. W. 593; *Huffman v. Michigan Cent. R. Co.* (Mich.), 5 Am. & Eng. R. Cas., N. S., 542; *Karrer v. Detroit, etc., R. Co.*, 76 Mich. 400, 43 N. W. 370, 41 Am. & Eng. R. Cas. 265; *Phelps v. Chicago & W. M. Ry. Co.* (Mich.), 16 Am. & Eng. R. Cas., N. S., 302; *Ragon v. Toledo, etc., R. Co.*, 97 Mich. 265, 56 N. W. 612; *Secord v. Chicago & M. L. S. R. Co.*, 107 Mich. 540, 65 N. W. 550.

Minnesota.—*Fraker v. St. Paul, etc., R. Co.*, 32 Minn. 54, 15 Am. & Eng. R. Cas. 256; *St. Clair v. First Div., etc., R. Co.*, 20 Minn. 9; *Woods v. St. Paul & D. R. Co.*, 39 Minn. 435, 40 N. W. 510.

Mississippi.—*Illinois Cent. R. Co. v. Bowelea*, 7 Miss. 1003; *Hatter v. Illinois Cent. R. Co.*, 69 Miss. 642, 13 So. 827.

Missouri.—*Porter v. Hannibal, etc., R. Co.*, 71 Mo. 66, 2 Am. & Eng. R. Cas. 44.

Nebraska.—*Missouri Pac. R. Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044. *Thompson v. Missouri Pac. R. Co.*, 51 Neb. 527, 71 N. W. 61.

New York.—*Appel v. Buffalo, etc., R. Co.*, 111 N. Y. 550, 19 N. E. 93; *Arnold v. Delaware & H. Canal Co.*, 125 N. Y. 15, 25 N. E. 1064; *DeFoust v. Jewett*, 88 N. Y. 264; *Finnell v. Delaware, etc., R. Co.*, 129 N. Y. 669; 29 N. E. 825; *Gottlieb v. New York, L. E. & W. R. R. Co.*, 100 N. Y. 462, 3 N. E. 344; *Hass v. Buffalo, etc., R. Co.*, 40 Hun (N. Y.) 145; *Ireland v. Gardner*, 7 N. Y. Supp. 608; *McNeil v. New York, G. E. & W. R. Co.*, 24 N. Y. Supp. 616; *Spencer v. New York Cent., etc., R. Co.*, 67 Hun (N. Y.) 196; *Welch v. New York Cent. & H. R. R. Co.*, 17 N. Y. Supp. 342.

North Carolina.—*Crutchfield v. Richmond, etc., R. Co.*, 78 N. Car. 300.

Pennsylvania.—*Barkdoll v. Pennsylvania R. Co.* (Pa.), 13 Atl. 82; *Philadelphia, etc., R. Co. v. Schertle*, 97 Pa. St. 450.

South Carolina.—*Simms v. South Carolina Ry. Co.*, 26 S. Car. 490, 2 S. E. 486.

Texas.—*Gulf, etc., R. Co. v. Mayo*, 14 Tex. Civ. App. 253, 37 S. W. 659; *Gulf, etc., R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573, 21 S. W. 706; *Houston, etc., R. Co. v. Barrager* (Tex.), 14 S. W. 242; *Missouri, etc., R. Co. v. Thompson*, 11 Tex. Civ. App. 658, 33 S. W. 718; *Missouri, etc., R. Co. v. Wood* (Tex. Civ. App.), 35 S. W. 879; *Rio Grande & E. P. Ry. Co. v. Lynch* (Tex. Civ. App.), 66 S. W. 712, 1 R. R. R. 419, 24 Am. & Eng. R. Cas., N. S., 419; *Watson v. H. & T. C. Ry. Co.*, 58 Tex. 434, 11 Am. & Eng. R. Cas. 213.

Virginia.—*Darracott v. Chesapeake & O. R. Co.*, 31 Am. & Eng. R. Cas. 157, 83 Va. 288, 2 S. E. 511; *Norfolk, etc., R. Co. v. Emmert*, 83 Va. 640, 3 S. E. 145.

West Virginia.—*Oliver v. Ohio River R. Co.*, 42 W. Va. 712, 26 S. E. 444.

Wisconsin.—*Zahn v. Milwaukee & S. Ry. Co.* (Wis.), 3 R. R. R. 268, 26 Am. & Eng. R. Cas., N. S., 268, 89 N. W. 889.

a. Coupling Appliances—Defects.

A railroad company is bound to furnish reasonably safe appliances with which to perform the work of coupling and uncoupling cars, and a brakeman does not assume the risk of using such appliances, when they are defective, unless the defects are so glaring that a reasonably prudent person would not attempt to use them. So held in *Bender v. St. Louis & S. F. Ry. Co.*, 137 Mo. 240, 37 S. W. 132.

Note

b. Inexperienced Employee.

A servant who enters upon a dangerous employment, such as coupling and uncoupling cars, assumed the ordinary risks of the service; but this rule does not embrace risks of which, by reason of immaturity and inexperience, he is ignorant, as the employer knows, or should know beforehand, nor such as the latter knows that the servant, being without experience, cannot appreciate or avoid without instruction or warning. So held in *Louisville, N. A. & C. Ry. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594.

2. DEFECTS AND PECULIAR APPLIANCES AND DANGERS.**a. Defects.****(1) Risks Assumed.****(a) Car upon Repair Track—Broken Coupling Attachment.**

The plaintiff was an experienced switchman in yards of the railway company, where there was a repair shop, and tracks upon which broken and disabled cars were placed for repair. A defective car had been placed on one of these tracks to be repaired, and in an attempt to uncouple it from another car plaintiff was injured by a broken coupling attachment. It was held that the mere fact that car was out of repair with the knowledge of the company is not sufficient to establish actionable negligence on the part of the company; and that when plaintiff found the car upon the repair track he was, in effect, warned that the car was defective, and unsuitable for ordinary use; and must, therefore, be taken to have assumed the risk incident to the handling of broken and disabled cars. *Brown v. Chicago, etc., Ry. Co. (Kan.)*, 11 Am. & Eng. R. Cas., N. S., 408.

(b) Cars in Inspection Yard—Defective Drawhead.

Where the work of a railroad employee consists in handling all kinds of cars, defective and sound, in an inspection yard, many of them being placed therein because of their broken and dangerous condition, the fact that the defects in the damaged cars, may not be always obvious, or that some other servant of the company whose duty it is to designate the particular cars which are damaged may neglect that duty, is a risk of his employment assumed by such employee; and the company is not required to give personal notice as to the particular cars which are defective. Such employee in handling a car in such yard, on a track primarily devoted to damaged cars, although sometimes sound cars were placed upon it, had no right to assume that its drawhead was in good condition. So held in *Chesapeake & O. R. Co. v. Hennessey (C. C. A.)*, 16 Am. & Eng. R. Cas., N. S., 515.

(c) Removing Car to Repair Track—Coupling Car with Broken Drawhead.

Plaintiff was a brakeman employed in defendant's yard at S.; there were inspectors whose duty it was, on the arrival of every train in the yard, to examine each car, and if any injury or defect was discovered, to remove the car from the train and place it upon a track known as the "cripple track" for repairs, and in this work plaintiff was employed. In attempting to couple two cars, one of which had a broken drawhead, in order that the latter might be placed on said track, plaintiff was injured. The defect might easily have been seen. It was held that the action was not maintainable; that plaintiff took the necessary risk of his employment, one of the purposes of which was to handle and remove disabled cars; that under the circumstances he had no right to assume that the couplings were perfect; if he did not know the condition of the one which caused the injury, he was bound to assume that it might be disabled and govern his action accordingly, and so was chargeable with negligence. *Arnold v. Delaware & H. Canal Co.*, 125 N. Y. 15, 25 N. E. Rep. 1064, 34 N. Y. S. R. 372.

(d) Defective Coupling Appliances.

A brakeman who knows, or by the exercise of ordinary care, could know of any defect or imperfections in the coupling appliances of the cars about which he is employed, and continues in the service without objection, is presumed to have assumed all risks from such defects.

Note

and to have waived all right to recover for injuries caused thereby. So held in *Muldowney v. Illinois Central R. Co.*, 39 Iowa 615.

(e) Damaged Cars.

In *Watson v. H. & T. C. Ry. Co.*, 58 Tex. 434, 11 Am. & Eng. R. Cas. 213, it is held that the duty of removing damaged cars to the repairing shops of a railway company may be imposed on any employee who will assume the risk; that if a brakeman accepts service from a company whose usage and custom it is to require of its brakemen to couple defective or broken cars, so that they may be removed for repairs, he will be held to have assumed the risk incident to such employment.

(f) Handling Damaged Cars—Broken Brake.

A man entered the employ of a railroad company as a brakeman, having previously had some experience in that kind of work. He was placed at work in a yard upon a switching engine, which was used to change cars about the yard and to make up trains. He, with others, was in the habit of taking cars which had been damaged and putting them upon a certain track in the yard two or three times a week. After working a few weeks, he was injured by reason of a broken brake upon a car. Whenever there had been damaged cars to be moved, during his employment, his attention had been called to the fact by the yardmaster. But they could usually tell a damaged car by its appearance. The brakeman was sometimes accustomed to examine to see if cars were damaged; and he looked at the car in question, with others, on the day of the accident, but saw nothing out of order about it. It was held that the injury was caused by one of the risks assumed by him by virtue of his employment. *Yeaton v. Boston & L. R. Co.*, 135 Mass. 418, 15 Am. & Eng. R. Cas. 253.

(g) Defective Brake.

A brakeman chargeable with notice of the nature of the drawbars on cars, which he is about to couple assumes the risks incident to imperfections in them by continuing in his employment without objection, and without promise of change. So held in *Box v. Chicago, R. I. & P. Ry. Co.* (Iowa), 16 Am. & Eng. R. Cas., N. S., 527.

(h) Brakeman Replacing Drawhead after Loss of Spring.

Where a drawhead pulled out while the train was moving, and the spring was lost, and a brakeman replaced the drawhead without the spring, and was soon after injured while attempting to couple the car, by reason of the absence of the spring, it was held that he assumed the risk of the defect, because of his knowledge. *Houston, etc., R. Co. v. Barrager* (Tex.), 14 S. W. 242.

(i) Sagging Drawhead.

An employee, while coupling cars, was injured by reason of the disparity in height of the drawheads of the cars, resulting from the sagging of one of the drawheads, caused by defects in the carrier iron. It was held that he assumed the risk of the defect, if he knew of it, or should have known of it by the exercise of reasonable care. *Texas & P. Ry. Co. v. Rhodes* (C. C. A.), 71 Fed. 145.

(j) Insufficient Space between Cars.

In *Simms v. South Carolina Ry. Co.*, 26 S. Car. 490, it is held that when it is apparent to the eye that there is not space enough for two cars to be coupled by a man standing between them, the danger of so coupling is obvious, and therefore the company is not bound to warn the carcoupler.

(k) Knowledge of Only One Defect in Coupling Appliances.

In *Atchison, etc., R. Co. v. Wagner*, 33 Kan. 660, 7 Pac. 204, 21 Am. & Eng. R. Cas. 737, it appeared that a brakeman, who had knowledge of a defect in the drawbar of a car, he attempted to couple to an engine, but not of a defect in the coupling pin. He was injured by reason of both defects. It was held that he assumed the risks from both.

(2) Risks Not Assumed.

(a) Absence of Bunker—Coupling at Night.

A brakeman was killed in attempting, at night, to couple two slowly

Note

moving cars, one of which was without a bumper. It was held that the defect was not a risk assumed by him by virtue of his employment. *Mahoney v. New York Cent. & H. R. R. Co.*, 15 N. Y. Supp. 501.

(b) Double Deadwoods—Unusual Use—Inexperienced Employee.

In *Louisville, N. A. & C. Ry. Co. v. Frawley*, 110 Ind. 18, 9 N. E. 594, it is held that where a minor of immature judgment and without experience is employed as a brakeman on a freight train, and being ignorant of the difference between double and single deadwoods, and of the danger attending the act of coupling cars constructed with the former, of which facts the railroad company knows or might have known, is, without instruction, ordered by the conductor to couple cars furnished with double deadwoods, instead of single deadwoods ordinarily in use by the company, and in attempting to do so is injured, the company is liable.

(c) Drawbars Passing because of Latent Defects.

In *Northern Pac. R. Co. v. Nickels* (C. C. A.), 50 Fed. 718, it appeared that plaintiff was assisting as brakeman in switching and coupling, and finally ran along with the train as it backed up to a coal car, and hurriedly stepped in between this car and the rear car of the train, when they were about three or four feet apart, to couple them. The strip which supported the drawbar of the coal car and held it up had become unbolted at one end, the bolt being missing, and the drawbar was thus allowed to drop far enough below its proper position to miss the drawbar of the forward car and pass under it. There was some evidence tending to show that the "deadwood," which is a block bolted on the end of the car, above the drawbar, to assist in keeping the cars from coming together, was imperfect, it being worn away as much as a few inches. If the coal car had not been out of repair the drawbars would have met instead of passing, and plaintiff would not have been injured. It was held that plaintiff did not assume the risk of such defects, of which he was not chargeable with notice.

(d) Latent Defects in Coupling Appliances.

If a brakeman is injured by reason of latent defects in coupling appliances he is required to use, he and the railroad company are not upon an equality. The duty resting upon them is different, and the acts required of them to constitute diligence with reference to the discovery of the defect are different. It cannot, therefore, be said, in such a case, that the brakeman assumed the risk because his opportunities to observe a defect in a drawbar were equal to those of the master, unless his duties required and permitted him to inspect the appliance. So held in *Pittsburg, C., C. & St. L. Ry. Co. v. Woodward*, 9 Ind. App. 170, 36 N. E. 442.

(e) Duty to Examine Couplings—Employee's Actual Knowledge of Defects the Test.

In *Louisville & N. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866, it is held that an employer cannot escape liability for injury to a subordinate employee or on account of defective machinery or appliances provided for his use, merely because the latter does not show he exercised care and diligence to discover its character and condition. The limit of inquiring in such case is whether as matter of fact the employee did, before exposing himself to danger, know the appliance to be defective. And while this rule does not apply where examination is in the line of the injured employee's duty, yet a brakeman cannot be reasonably expected or required to know whether all the coupling of a train are in proper condition before attempting to make a coupling.

(f) Defect in Coupling Seen by Brakeman.

Where a brakeman saw a defect in the coupling mechanism of a car, but nevertheless attempted to couple it to another, and was injured, the brakeman did not assume the risk of injury from such defect, as a matter of law. So held in *Youngblood v. South Carolina & G. R. Co.* (S. Car.), 20 Am. & Eng. R. Cas., N. S., 622, 38 S. E. 232.

(g) Foreign Cars—Defective Couplers.

A railroad company is responsible for injuries to its employee re-

Note

sulting from defects in foreign cars received by it which would have been disclosed by ordinary inspection; and a brakeman no more assumes the risk of such defects in the couplers of foreign cars than in cars belonging to his employer. So held in *Gottlieb v. New York, L. E. & W. R. R. Co.*, 100 N. Y. 462, 3 N. E. 344, 24 Am. & Eng. R. Cas. 421.

b. Peculiar Appliances and Dangers.

(1) Risks Assumed.

(a) Coupling Pilot Car to Box Car.

In *Kerns v. C. M. & St. P. Ry. Co.*, 94 Iowa 121, 62 N. W. 692, it is held that an employee does not assume the risk of coupling a pilot car to a box car unless he should, as a reasonably prudent and careful man, have known that such coupling was unusually dangerous.

(b) Hook on Rear of Locomotive Tender.

The presence of a hook on the rear of a locomotive tender, for supporting the hose of the air brake when not coupled, being apparent and its danger known, and it having been replaced every time the brakeman knocked it off, he assumes the risk of being caught thereby, where he continues to climb over the end of the tender. So held in *Crawford v. Detroit, G. R. & W. R. Co.* (Mich.), 86 N. W. 817, 22 Am. & Eng. R. Cas., N. S., 42.

(c) Peculiar Kind of Coupler.

In *Western & Atl. R. v. Bishop*, 50 Ga. 465, it is held that an employee of a railroad company, a part of whose business was to couple cars, who was for ten months in the employment of the road in that business, and who, by special contract had taken upon himself the risks incident to his station, cannot, if he be injured, escape the effect of his contract, by showing that a particular kind of link or coupler, regularly in use on the train to which he was attached, and used by for ten months, was a less safe instrument for the purpose than other kinds of links or couplers. To make out a case of liability on the part of the company under such a contract, it should appear that there was such gross neglect to furnish proper tools as showed recklessness of human safety, on the part of the company or its representatives, and a want of knowledge on the part of the employee of the character of the instrument furnished, at the time he was called on to use it.

(d) Short Drawhead.

In *Brooks v. Northern Pac. R. Co.* (C. C.), 47 Fed. 687, it is held that one who accepts employment from a railroad company as a switchman in its yard assumes the risk of injuries resulting to him from a visible defect in the locomotive on which he was to work, consisting of a drawhead so short as to leave too small a space between the locomotive and any car to be coupled to it for the switchman to work between them with safety.

(e) Three Link Couplings.

In *Daracott v. Chesapeake & O. R. R. Co.*, 31 Am. & Eng. R. Cas. 157, 83 Va. 288, 2 S. E. 511, it is held that the making of three link couplings when the cars are still, according to the known rules of the company, does not expose the coupler to perils beyond those incident to his employment and assumed by him.

(f) Unequal Heights of Drawhead—Cinders on Track.

In *Welch v. New York Cent. & H. R. R. Co.*, 17 N. Y. Supp. 342, it appeared that plaintiff was injured while engaged as a brakeman in coupling an engine to a car. He testifies when he attempted to remove the draw pin it became fastened, and he stumbled against a pile of cinders on defendant's track, and hurt his hand, and that, the drawheads of the car and engine being of unequal height, he should have been supplied with an S link to make the coupling, instead of a straight link, which was given him. It was held that when plaintiff saw the unequal height of the drawheads, and the link was straight, he assumed the risk of attempting to use the straight link.

(g) Use of Faulty Coupling Apparatus.

Where a switchman of mature years voluntarily continues in an employment, the hazards of which he knows are increased by reason of

Note

the use of his company of cars having faulty coupling apparatus, he cannot recover for injury resulting from his use of such apparatus. So held in *Umback v. Lake Shore & M. S. Ry. Co.*, 83 Ind. 191, 8 Am. & Eng. R. Cas. 98.

(h) Road Engine as Substitute for Switching Engine.

In *Gulf, etc., R. Co. v. Schwabbe*, 1 Tex. Civ. App. 573, 21 S. W. 706, it appeared that a road engine was in use in a freight yard as a substitute for a regular switching engine; and that an employee injured while attempting to couple it had not complained of its use. It was held that he assumed the risk.

(i) Inferior Oil for Lantern.

An employee of a railroad company was injured while coupling cars, owing to the dimness of the light given by his lantern which was furnished by the company with an inferior quality of oil. It appeared that complaint had been made to the company as to the inferior quality of the oil, and it had been investigated some weeks before, and that the plaintiff was familiar with its inferiority which had caused him trouble for two months, yet continued to use it without complaint. It was held that he accepted the risk incident to the use of such oil. *Huffman v. Michigan Cent. R. Co. (Mich.)*, 5 Am. & Eng. R. Cas., N. S., 542.

(j) Insufficiency of Hands.

A brakeman assumes the ordinary risks of coupling cars, when he undertakes to make a coupling, without objection, knowing that the supply of hands ordinarily required for the occasion was deficient. So held in *Richmond & D. R. Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290.

(2) Risks Not Assumed.

(a) Drawbar Sliding Back under Car—Promise to Repair.

If a brakeman had knowledge that the drawbar of a car, by reason of defects, slid back under the car when the locomotive touched it, and the usual space intervening between cars when coupled was thereby dangerously reduced, and he complained thereof to the company, by whom he was assured that it should be repaired within a reasonable time, he would not be presumed to have waived the defect, and assumed the risk, by continuing for such a length of time in the employ of the company. So held in *Belair v. C. & N. W. R. Co.*, 43 Iowa 662.

(b) Drawbars of Unequal Height.

In *Lawless v. Connecticut R. R. Co.*, 136 Mass. 1, it is held that the fact that a brakeman was chargeable with notice that the drawbars of an engine and of a car, to which it was to be coupled by him while standing upon a plank in front of the engine were of unequal height, so that they would be likely to pass each other instead of coupling together, though furnishing strong evidence of carelessness on his part, will not, as matter of law, preclude him from maintaining an action against the railroad company for injuries occasioned by reason of the drawbars so passing each other, that of the engine being too low for the purpose for which it was used.

(c) Drawbars Passing—Cars of Different Gauge—Brakeman Injured at Night.

A brakeman in defendant's employ was crushed between two cars while coupling them. It appeared that defendant's road was so arranged that both broad and standard gauge cars could be run upon it in the same train, and there were both kinds of cars in the train in question. It broke in two in the nighttime, and the two cars which plaintiff was required to couple were of different gauge; failing to make the coupling the drawheads passed each other, and the bumpers, being but three inches wide, and entirely too narrow to protect him, he was injured. It was held that plaintiff did not assume the risk. *Gottlieb v. N. Y. L. E. & W. R. R. Co.*, 100 N. Y. 462, 13 N. E. 344.

(d) Mismatched Couplers—Inexperience.

A railway company received from another road a train of tourist sleepers having cars with couplers so mismatched that they were liable to slip past each other and let the platforms come together when they

Note

were being coupled. A freight brakeman, where such couplers were not ordinarily used, and who did not appear to have ever made or seen made a coupling with such appliances, was required to brake on such train. The train was temporarily separated, and such brakeman was ordered to make the coupling, but was not warned of the hazard of working with such couplers. The couplers slipped past each other, and he was crushed between the cars. It was held that, as he had the right to presume that the company had furnished appliances which were reasonably safe when used in accordance with its rules, and that he would be warned if there was extra or unusual hazard, he did not assume the risk of the use of such unsafe couplers. *Southern Pac. Co. v. Winton* (Tex. Civ. App.), 66 S. W. 477, 3 R. R. R. 358, 26 Am. & Eng. R. Cas., N. S., 358.

(e) Negligence in Selecting Couplings.

In an action for the death of a brakeman who was injured while attempting to couple cars, on the ground that the railroad company did not use ordinary care in the selection of the couplings, an instruction to the effect that the question of negligence was for the jury to decide under all the evidence in the case, even if it appeared that the deceased knew the character, kind, and dangerous nature of the couplings, and that such knowledge is a circumstance to be considered by the jury, but is not necessarily decisive, is correct. So held in *Martin v. California Cent. Ry. Co.*, 94 Cal. 326, 29 Pac. 645.

(f) Unusual Construction of Drawhead—Dark Night.

In *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588, it appeared that plaintiff, while coupling cars on a dark, misty night, was injured by reason of the dangerous and unusual construction of one of the drawheads, of which defect he testified he had no knowledge. It was held that he did not assume the risk.

(g) Use of "Goose Neck."

The use of an unusual coupling appliance termed a "goose neck" is not one of the ordinary risks assumed by an employee when coupling a freight engine. So held in *Hungerford v. Chicago, etc., R. Co.*, 41 Minn. 444, 43 N. W. 324, 41 Am. & Eng. R. Cas. 269.

c. Unsafe Place to Work.

(l) Risks Assumed.

(a) In General.

Where a switchman undertakes to couple cars he has assumed the risks from the dangerous character of the place where he is required to perform the operation, so far as they are open to observation, or are known to him. So held in *Woods v. St. Paul & D. R. Co.*, 39 Minn. 435, 40 N. W. 510.

(b) Unblocked Rails and Frogs.

In *McNeil v. New York, G. E. & W. R. Co.*, 24 N. Y. Supp. 616, it is held that a brakeman who has been more than a year in the employ of a railroad company assumes the risk incident to the fact that some of the guard rails in the company's switch yards are not blocked, so as to prevent his foot from being caught between the guard rail and the main rail, when he is engaged in coupling cars.

A railroad brakeman, a part of whose duty it was to couple cars upon tracks known by him to be unblocked and dangerous, while so engaged caught his foot in an unblocked guard rail, and was killed. His administratrix sue the railway company for damages, alleging that its failure to block the guard rail was negligence which caused her intestate's death. The petition did not allege that the deceased was inexperienced when he entered the employ of the railway company; that he was ignorant, at the time he entered the service of the company, that the guard rails of its main track were unblocked; that he did not know that the guard rail was unblocked at which he was killed; that he remained in the service of the company relying upon a promise made by it to block its guard rails; nor that guard

Note

rails blocked were less dangerous than those unblocked. It was held that the petition did not contain averments of facts which negated the presumption of law that the injury received by the deceased was one of the risks which he assumed by virtue of his employment, and therefore did not state a cause of action. *Missouri Pac. R. Co. v. Baxter*, 42 Neb. 793, 60 N. W. 1044.

In *Ireland v. Gardner*, 7 N. Y. Supp. 609, it was held that where a car coupler has for some time been employed in a railroad yard, it is error to submit to the jury the question whether the danger of having his foot caught in an unblocked guard rail is so apparent and obvious that he is chargeable with notice of its existence, although he had been at work only three or four days in that part of the yard where the injury occurred.

A brakeman who has worked as section man and brakeman for two years on a railroad where the frogs and guard rails were not filled or blocked, must be presumed to appreciate the danger of getting his foot caught in such frogs and guard rails while stepping about and over them. And if such brakeman, under such circumstances, continues to work at making and unmaking couplings without requiring the frogs and guard rails to be filled or blocked, he must be held to have waived the right, and to have assumed the risk of injury from stepping into them. *Gillin v. Patten & S. R. Co. (Me.)*, 16 Am. & Eng. R. Cas., N. S., 508.

In *Mayes v. Chicago, R. I. & P. R. Co.*, 63 Iowa 562, 9 N. W. 680, it is said in the opinion: "The intestate had been at work for six weeks over this track. He must be presumed to have known that the space between the rails was not blocked, and that the opening between the guard rails, and in frogs are dangerous to brakemen while engaged in coupling and uncoupling cars. This is a fact which is as patent as that a hole in the track between the rails is dangerous."

(c) **Unblocked Frogs—Inability to Extricate Foot the Second Time.**

In *Southern Pac. Co. v. Seley*, 152 U. S. 145, it appeared that S., after serving as a brakeman in the employ of a railroad company, became a conductor on the same railroad, and as such had been engaged at a depot yard at one of its stations at least one a week, and usually oftener, for seven years. While making up his train at that yard, preparatory to running out with it, after the chief brakeman had failed in an attempt to make a coupling, he tried to make it. There was an unblocked frog at the switch where the car was. He put his foot into this frog, and was told by the brakeman that he would be caught if he left it there. He took his foot out, put it in again, and, being unable to extricate it when the cars came together, was thrown down and killed. It was held that S. must be assumed to have entered and continued in the employ of the railroad company with full knowledge of any danger which might arise from the use of unblocked frogs, that he assumed the risk.

(d) **Frogs Unblocked at Numerous Street Crossings.**

Where a brakeman has passed over a portion of defendant's road, on its trains, every day, except on Sundays, for over a month, and all the spaces between switches and guard rails on such portion of the road are blocked, except at street crossings, and there are more than fifty of such open spaces, and this was the condition of the road when he became defendant's brakeman, he assumes the extra risk pertaining to an attempt to couple cars at one of such crossings. So held in *Wabash R. Co. v. Ray (Ind.)*, 12 Am. & Eng. R. Cas., N. S., 593.

(e) **Work of Digging between Ties in Progress—Unblocked Frog—General Warning.**

Notice to a brakeman that digging is being done between the ties at a certain place, with warning that he look out for it to avoid injury, is sufficient, without mentioning the danger from the unblocked frogs, especially where the work has been for two weeks

(Note

within his daily view and observation while passing on his train. So held in *Haus v. Lake Erie & W. R. Co.* (C. C. A.), 105 Fed. 733, 22 Am. & Eng. R. Cas., N. S., 864.

(f) Condition of Side Tracks.

Brakemen, when coupling and uncoupling cars, are presumed to be aware and to take the risk of dangers from such conditions and defects in the construction of a side track as would be open to observation; and they are also expected to use reasonable care in examining their surroundings. So held in *Batterson v. Chicago & G. T. Ry. Co.*, 53 Mich. 125, 18 N. W. 584.

(g) Unsafe Roadbed.

In *Little Rock, M. R. & T. Ry. Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50, it is held that in employing one to act as switchman and to couple and uncouple cars, the railroad company undertakes to exercise reasonable care and prudence, to provide and keep a safe roadbed and tools for the exercise of the employment, and the employee assumes the risk ordinarily incident to the service he undertakes; but the negligence of the company in failing to provide a safe place and tools, is not a risk incident to the service, nor one assumed by the employee, and if injury results to the employee from such negligence of the company, it is liable, unless the employee at and before the time of the injury had full knowledge of the unsafe condition of the roadbed or the place where he was to work. In such case he should refuse to make or unmake couplings at such point, until the roadbed is put in a safe condition for the performance of such duties.

Where a brakeman has equal knowledge with the master of the construction and condition of the roadbed at a point where he is required to couple and uncouple cars, and knows all the dangers incident to his work there, he assumes all the risks of doing such work at that point. So held in *Clark v. Missouri Pac. Ry. Co.*, 48 Kan. 654, 29 Pac. 1138.

(h) Curves in Track in Yard.

In *Tuttle v. Detroit, G. H. & M. Ry.*, 122 U. S. 189, 31 Am. & Eng. R. Cas. 217, it is held that brakemen, when coupling cars, within the freight stations and yards of their company, when they accept the employment assume the risks arising from the nature of the curves existing in the track, and the construction of the cars used by the company.

(i) Ditches across Track.

A servant who has accepted service with knowledge of the character and position of structures from which he may be liable to injury cannot maintain an action against his employer; as he assumes apparent risks, and cannot call upon his employer to make alterations to secure greater safety. This rule was held applicable where one employed as switchman or car coupler, working in a freight yard drained by a system of small ditches, running across the track between the ties, which were in existence when he entered the employment, and remained without any alteration, every one of which was well known to him, and while engaged in coupling cars he stepped into one of them, fell under the car, and was killed. *De Forest v. Jewett*, 88 N. Y. 264, 8 Am. & Eng. R. Cas. 495.

(j) Fall into Drain.

Where a brakeman who had been continuously employed in a railroad yard for over nine months was injured by falling into a drain, which, with 118 similar drains, had plainly existed in the yard during all the time of his employment in substantially the same condition, he should be presumed to know of the existence of such drains, and to have assumed the risk thereof. So held in *Lindsay v. New York, N. H. & H. R. Co.* (C. C. A.), 112 Fed. 384, 1 R. R. R. 378, 24 Am. & Eng. R. Cas., N. S., 378.

(k) Fish Chute.

In an action for injuries to a brakeman caused by his coming in

Note

contact with a fish chute in loading defendant's cars, while he was standing on the side ladder of a car and attempting to uncouple cars in motion, it is not necessary in order to exculpate the railroad on the ground of assumption of risk, that it should appear that the brakeman had actual knowledge of the danger from the proximity of the chute to the track, but only that he was chargeable with notice of its existence. So held in *Phelps v. Chicago & W. M. Ry. Co.* (Mich.), 16 Am. & Eng. R. Cas., N. S., 302.

(l) Cattleguard.

The danger of stepping into a cattleguard, while coupling cars in the day time is one of the ordinary risks of such service, and assumed by the car coupler. So held in *Fuller v. Lake Shore, etc., R. Co.*, 108 Mich. 690, 66 N. W. 593.

(m) Location of Cattleguard.

In an action brought for the death of a brakeman, alleged to have resulted from the improper placing of a cattleguard with reference to the head of a switch, it was held, that as the switch was properly located; that any danger that could arise therefrom to an employee uncoupling cars was a risk assumed by deceased as an incident of the employment. *Henderson v. Coons*, 31 Ill. App. 75.

(n) Slivered Rails.

A brakeman who continues to work without complaint, at a point where he is familiar with the track, with knowledge that the rails there are old and slivered, assumes the additional risk in coupling cars at such point, arising from the condition of such rails. So held in *Arnold v. Louisville & N. R. Co.* (Ky.), 19 Am. & Eng. R. Cas., N. S., 272.

(2) Risks Not Assumed.

(a) Ballasting Temporarily Removed.

A brakeman, in making a coupling at a point not within a yard where trains are made up, assumes the risk of injury from the track not being surfaced up, if the track at such point is in substantially the same condition as similar localities along the road. But where all the filling has been temporarily removed from between the ties at a switch, a brakeman, in making a coupling at such point, does not assume the risk of injury from such condition of the track, unless he is chargeable with notice of it. So held in *Louisville & N. R. Co. v. Bowcock* (Ky.), 17 Am. & Eng. R. Cas., N. S., 421.

(b) Space between Ties Not Properly Filled.

Where it appeared from the evidence that the injuries of the plaintiff, a brakeman in the employ of defendant, resulted from his foot having been caught between two ties, the space between them being not properly filled, while attempting to couple cars in its switch yard, and that he had no knowledge of the defective condition of the track, it was not error to refuse to direct a verdict for defendant. So held in *Illinois Cent. R. Co. v. Sanders* (Ill.), 11 Am. & Eng. R. Cas., N. S., 861.

(c) Unballasted Track of Another Road.

A brakeman, though knowing that the tracks of his employer, on which he was hired to brake, were not ballasted, and therefore assuming the risk as to such tracks, does not assume such risk where directed to make a coupling on a switch track of another road, he not knowing its condition, and having a right to presume that it was in proper condition. So held in *Arkansas Cent. R. Co. v. Jackson* (Ark.), 67 S. W. 757, 4 R. R. R. 790, 27 Am. & Eng. R. Cas., N. S., 790.

(d) Unblocked Frog—Knowledge and Failure to Notify Company.

It was not necessary that a freight conductor, killed by catching his foot in an open frog while making a coupling, should have given the company notice of danger from open frogs, nor did he assume the risk of danger therefrom by continuing in his employment after

Note

knowing that a safety block would have removed its perils. So held in *Seley v. Southern Pac. R. Co.*, 6 Utah 319, 23 Pac. 751.

(e) Choosing Dangerous Mode of Uncoupling—Custom—Unblocked Rail.

In *Curtis v. Chicago & N. W. R. Co.*, 95 Wis. 460, 70 N. W. 665, it appeared that a switchman went between cars while they were slowly moving, for the purpose of uncoupling them, and used a stone while walking along to loosen the coupling pin; that it was a common custom in that switch yard, approved by the yardmaster, to attempt to uncouple cars in such a way. It was held that even though he might have signaled the engineer to stop the car, and then have taken the pin out without danger, he did not by choosing the more dangerous mode, assume the risk of injury resulting, not from that cause, but from the negligence of the defendant in not keeping a guard rail properly blocked, in consequence of which he caught his foot between the guard rail and the track rail, and fell under the cars.

(f) Fish Chute Too Near Main Track.

Defendant's brakeman was injured by a fish chute which abutted upon the main track and not within the yards of the defendant company. It was held that while brakeman and switchmen in making up trains must be on the lookout for such obstructions near a side track, yet where they abut upon the main track and not in yards where trains are usually made up, servants have a right to expect that they will not be placed so close to the track as to make them dangerous. *Phelps v. Chicago & W. M. Ry. Co.* (Mich.), 84 N. W. 66, 20 Am. & Eng. R. Cas., N. S., 137.

(g) Hole under Tie—Latent Defect—General Warning.

In *Porter v. Hannibal & St. Joseph R. Co.*, 71 Mo. 66, it appeared that a brakeman, while engaged in coupling cars at night, stepped into a hole under a tie, by which his foot was caught, and he was thrown under the moving car. The defect in the road was not patent, but required inspection to discover it, and he had never worked on this portion of the track before. His attention had been called to the generally unsafe and dangerous condition of the track, but not to the specific defect causing his injuries. He was ignorant of its existence, and the attention of the servants of the railroad company, whose duty it was to attend to the track, had more than once been called to its dangerous condition, but they had taken no steps to repair it. It was held that it was not incumbent upon the brakeman to search for latent defects in the track.

(h) Knowledge of Custom to Empty Ash Boxes on Track—Brakeman Injured at Night.

Where a brakeman's injury is the result of stepping upon a clinker while coupling cars at night in defendant's yard, it cannot be held as matter of law that he had assumed the risk, although he knew that the ash boxes of the engines were emptied on the tracks in such yards, and sometimes remained there for some hours, he having no reasonable means of knowing the precise danger to which he was exposed, his duties in such yard requiring him to move rapidly. *Louisville & N. R. Co. v. Vestal* (Ky.), 12 Am. & Eng. R. Cas., N. S., 633.

(i) Knowledge That Stones Fell from Gravel Trains.

Assumption of risks does not prevent recovery for the death of a brakeman caused by stumbling on a loose stone in the company's yards, though he knew that gravel trains from which stones fell were in the yards where he went to uncouple cars at midnight, but also knew that the company was accustomed to remove such stones from time to time. So held in *Fish v. Illinois Cent. Ry. Co.*, 96 Iowa 702, 65 N. W. 995.

(j) Wood Scattered Along Track—Question for Jury.

Where a brakeman, whose duty it was to go between the cars for

Note

the purpose of coupling and uncoupling them, had been in the service of the company about two weeks, and knew that there was wood scattered along the track near the woodpiles, but did not know that there was wood scattered at the place where he was injured, it was held that it was for the jury to say whether he had assumed the risk by continuing in the service. *Hulehan v. Green Bay, etc., R. Co.*, 68 Wis. 520, 31 Am. & Eng. R. Cas. 322, 32 N. W. 529.

d. Dangerous Customs and Methods.

(1) General Rule.

Where a car coupler remains in the service, without objection with knowledge of the existence of customs or methods of working which render the performance of his duties more than usually dangerous, he assumes the risk of injury from the observance of such customs and methods. *Chicago, etc., Ry. Co. v. Voelker (C. C. A.)*, 11 R. R. R. 515, 34 Am. & Eng. R. Cas., N. S., 515; *Peoria, D. & E. Ry. Co. v. Puckett*, 42 Ill. App. 642; *Kroy v. Chicago, R. I. & P. R. Co.*, 32 Iowa 357; *Gorman v. Minneapolis & St. L. Ry. Co. (Iowa)*, 3 R. R. R. 293, 26 Am. & Eng. R. Cas., N. S., 293, 90 N. W. 79.

(2) Risks Assumed.

In *Peoria, D. & E. Ry. Co. v. Puckett*, 42 Ill. App. 642, it is held that if brakeman is required by his company to perform the duties of coupling and uncoupling cars in a manner known to be perilous, when a safer mode might be adopted, it becomes the duty of the brakeman to determine whether he will accept service under such rule, or remain in such employment. If he accept and remains he must be deemed to have assumed the extra hazards attendant upon the manner of doing the work as required by the employer.

But in this case it is also held that where a brakeman undertakes to make or unmake couplings in the manner required by his company, which is more hazardous than another mode which is practicable, he only, as matter of law, assumes the extra risks attendant upon the required manner of doing the work.

(a) Custom to Kick Cars without Notice to Car Coupler.

In *Chicago, etc., Ry. Co. v. Voelker (C. C. A.)*, 11 R. R. R. 515, 34 Am. & Eng. R. Cas., N. S., 515, it is held that where it was the general and uniform custom in a railroad yard to kick cars down to car couplers without giving them notice or warning, a car coupler who was aware of such custom and remained in that service assumed the risk of injury from the observance of the custom.

(b) Uncoupling Moving Cars.

In *Kroy v. Chicago, R. I. & P. R. R. Co.*, 32 Iowa 357, it is held that where it was the custom upon the railroad where a brakeman was employed to uncouple the engine from a freight train at a certain station while the train was in motion, and he had, without protest or objection, contributed to the establishment of the custom, and its performance generally devolved upon, and, in the particular instance, was voluntarily assumed by him, the railroad company was not liable on account of his being killed while in the performance of such act.

(c) Coupling Cars Moving Too Fast.

In *Henry v. Sioux City & Pac. Ry. Co.*, 21 Am. & Eng. R. Cas. 644, 66 Iowa 52, 23 N. W. 260, it is held that if plaintiff, a brakeman, undertook to couple the cars in question when he knew that they were moving too fast to enable him to make the coupling in safety, he assumed the risk, and could not recover for injuries sustained in the attempt; but though he knew that they were moving too fast at the time when he descended to make the coupling, yet, if he had good reason to believe, from all the facts and circumstances, that the conductor had brought them to a safe speed at the time when he actually made the coupling, and the conductor was negligent in failing to do so, plaintiff could not be charged with negligence, and was entitled to recover.

Note

(d) Uncoupling Moving Cars—Obedience to Orders.

In *Davis v. Western Ry. of Alabama*, 107 Ala. 626, 18 So. 173, it is held that where an order is given by a foreman to a brakeman to uncouple cars in motion, under such circumstances that, by complying therewith, he would incur risks of obvious danger, such as a reasonably prudent man would regard as extra hazardous if obeyed, the employee in obeying assumes the risk.

Where a brakeman was told to uncouple a train of moving cars from the engine, and given directions as to how the work was to be done, and how best to avoid the danger incident to the transaction, he assumed the risk. So held in *Gorman v. Minneapolis & St. L. Ry. Co. (Iowa)*, 3 R. R. R. 293, 26 Am. & Eng. R. Cas., N. S., 293, 90 N. W. 79.

(3) Risks Not Assumed.

(a) Custom of Operating Engine without Fireman—Engineer's Failure to Observe Signals.

The plaintiff receives the injury complained of while in the employ of defendant and while acting in the capacity of switchman in the defendant's yards. The engine used in moving the cars was operated without a fireman, the engineer performing the duties of a fireman himself. This fact was known to the plaintiff, who continued to work without making any complaint to defendant or to any of its agents. The engine was defective, and required more attention because thereof. Defendant had rules which required switchmen to give signals to the engineer, and to see that the signals were observed and obeyed before going between the cars, and to abstain from going between them while in motion for the purpose of coupling or uncoupling them. But these rules were constantly violated, not only by the plaintiff, but also by the yardmaster, as well as the other switchmen. On the occasion of the accident the plaintiff gave the engineer the signal to stop, which was obeyed, and then went between the cars to pull the pin; but, being unable to do so, he stepped out and gave the "slow back up" signal, and without waiting to see if the signal was obeyed, went between the cars to uncouple them while in motion. The engineer, by a quick movement, bumped the forward cars against the back ones. The plaintiff's foot was caught under the brakebeam. He then gave the signal to stop, which not being observed, he was dragged a distance of two or three car lengths until he fell, when several trucks passed over and crushed his leg below the knee, causing the injury complained of. When the last signal was given, the engineer was in the act of replenishing the fire, and, therefore, failed to observe and obey it. Plaintiff's leg was amputated above the knee, and he was unable to wear an artificial leg. Evidence was introduced tending to show that the accident would not have occurred had there been a fireman on the engine at the time of the accident. It was held that the nonsuit was properly denied; that plaintiff's knowledge of the fact that defendant operated its engine without a fireman was not of itself sufficient to preclude a recovery; that such a result would not follow unless the want of a fireman caused the operation of the engine to be so obviously dangerous that a man of ordinary care and reasonable prudence would refuse to act as switchman. The plaintiff had the right to rely, at least to some extent, upon the judgment of the defendant's agents who deemed it safe for the engineer to perform the work of a fireman. *Wright v. Southern Pac. Co.*, 5 Am. & Eng. R. Cas., N. S., 559, 14 Utah 833, 46 Pac. 374.

e. Acting outside Scope of Employment.

(1) General Rule.

Where a railroad employee voluntarily undertakes to couple or uncouple cars, where such work is not within the scope of his duties, and is injured because of his ignorance of the proper and safe way to perform such service, there can be no recovery for his injury against his master, the railroad company.

Note

United States.—*Richmond & D. R. R. Co. v. Finley* (C. C. A.), 63 Fed. 228; *Hogan v. Northern Pac. R. Co.* (C. C.), 53 Fed. 519.

Alabama.—*Georgia Pac. R. Co. v. Propst*, 83 Ala. 518, 3 So. 764.

Georgia.—*Sears v. Central R., etc., Co.*, 53 Ga. 630; *Whitton v. South Carolina & G. R. Co.* (Ga.), 14 Am. & Eng. R. Cas., N. S., 776.

Maine.—*Osborne v. Knox & L. R. Co.*, 68 Me. 49.

Massachusetts.—*Burns v. Boston, etc., R. Co.*, 101 Mass. 50.

Michigan.—*Gardner v. Michigan Cent. R. Co.*, 58 Mich. 584., 26 N. W. 301, 24 Am. & Eng. R. Cas. 435.

Missouri.—*Schaub v. Hannibal & St. J. Ry. Co.*, 106 Mo. 74, 16 S. W. 924.

Texas.—*Texas, etc., R. Co. v. Skinner*, 4 Tex. Civ. App. 661, 23 S. W. 1001.

Virginia.—*Shugart v. Norfolk, etc., R. Co.*, 2 Va. Dec. 196, 22 S. E. 484.

Wisconsin.—*Cole v. Chicago, etc., R. Co.*, 71 Wis. 114, 33 Am. & Eng. R. Cas. 274, 5 Am. St. Rep. 201.

(2) Brakeman Assuming Duty of Another.

A brakeman cannot recover for injuries received in consequence of his having left his place of duty and improperly engaged in the work of uncoupling cars, which was the duty of another. So held in *Schaub v. Hannibal & St. J. Ry. Co.*, 106 Mo. 74, 16 S. W. 924.

(3) Brakeman Going between Cars to Couple by Hand in Obedience to Orders.

In *Richmond & D. R. R. Co. v. Finley* (C. C. A.), 63 Fed. 228, it is held that where a brakeman goes between cars to couple or uncouple them by hand, in obedience to the order of an engineer or conductor, in violation of a well-known rule absolutely prohibiting coupling or uncoupling except without a coupling stick, he performs an act outside the scope of his employment, and assumes the risks

(4) Conductor.

In *Sears v. Railroad Co.*, 53 Ga. 630, it is said in the opinion: "it is not the duty of the conductor of a freight train to couple and uncouple cars, except in case of a pressing emergency, of which the jury must judge. If he is killed performing such service, in the absence of such emergency, he is not without fault and his widow cannot recover damages from the railroad company."

(5) Conductor Coupling Cars—Insufficient Force—Relying on Promise.

But in an action against a railroad company for personal injuries plaintiff's evidence showed he was a conductor, and was injured while coupling cars, work that properly belonged to brakemen, but which he was obliged to do because a sufficient number of brakemen was not employed on his train; and also that plaintiff knew that the number of brakemen was insufficient, but that he remained in defendant's employ notwithstanding. It was held that a demurrer to the evidence was properly overruled where it further showed that plaintiff had notified the superintendent of the necessity for additional brakemen, and that the superintendent had promised to supply them in a few days, as it was then a question for the jury whether plaintiff remained in defendant's employ for more than a reasonable time thereafter. *Joliet, A. & N. Ry. Co. v. Velie* (Ill.), 26 N. E. 1086.

(6) Conductor Going between Cars to Unchain Defective Couplings.

In *Whitton v. South Carolina & G. R. Co.* (Ga.), 14 Am. & Eng. R. Cas., N. S., 776, it is held that, when, in the trial of an action brought by the widow of a conductor against a railroad company for his homicide, it affirmatively appeared from the evidence that he was in charge of, and directing, the movements of the train by which his death was caused, and that, instead of confining himself to the line of his duties on that occasion, which did not include coupling and uncoupling cars, he voluntarily, and in the absence of

Note

any emergency went between two cars, one of which he knew to be in a defective condition, for the purpose of unchaining or uncoupling the same, the conclusion follows that he was "outside of duty, and at fault," and consequently there was no error in granting a nonsuit.

(7) Fireman Attempting to Couple.

In *Shugart v. Norfolk, etc., R. Co.*, 2 Va. Dec. 196, 22 S. E. 484, it is held that a fireman injured while attempting to couple cars could not recover, unless he affirmatively showed that he undertook the performance of the work by the command of a superior.

(8) Obeying Order without Objection.

In *Hogan v. Northern Pac. R. Co. (C. C.)*, 53 Fed. 519, it is held that an employee of mature years and long experience, who is injured while coupling cars in obedience to the orders of his immediate superior, cannot recover merely because the duty is outside the scope of his employment, when he makes no objection to performing it, and there is no threat of dismissal in case of refusal.

(9) Switchmen Attempting to Couple Cars Contrary to Direction.

In *Gardner v. Michigan Cent. R. Co.*, 24 Am. & Eng. R. Cas. 434, 58 Mich. 584, 26 N. W. 307, it appeared that a switchman was injured, by reason of catching his foot in a hole in the planking between the track, while he was attempting to couple cars. He had been directed not to undertake such work. It was held that he assumed the risk.

(10) Foreman of Bridge Builders Attempting to Couple.

The foreman of a construction gang consented to do some switching, and, being inexperienced, was injured while attempting to couple cars. It was held that he assumed the risk, as he was a mere volunteer. *Sears v. Central R., etc., Co.*, 53 Ga. 630, 61 Ga. 279.

(11) Servant of Lumber Dealer Attempting to Uncouple without Authority.

In *Burns v. Boston, etc., R. Co.*, 101 Mass. 50, it appeared that the employee of a lumber dealer was injured while attempting to uncouple a car from a train on a side track, in order to unload it; and that he had not notified the trainmen of his intention. It was held that there could be no recovery against the railroad company.

(12) Volunteer Assisting Servant of Company—Emergency.

A person who voluntarily assists the servant of another, in an emergency, by attempting to remove a bolt for the purpose of uncoupling cars, cannot recover from the latter's employer for an injury resulting from the misconduct of such servant. So held in *Osborne v. Knox & L. R. Co.*, 68 Me. 49.

(13) Passenger Coupling Cars by Conductor's Direction.

In *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518, 3 So. 764, it is held, that a passenger, under no obligation to obey the conductor, who was injured while attempting to couple cars, under the direction of the conductor, the brakeman being incapacitated, was a mere volunteer and assumed the risk, although the conductor had authority to employ a substitute under such circumstances.

f. Violation of Automatic-Coupler Acts.

The doctrine of assumption of risk is generally rendered inapplicable by these statutes in case of their violation. See foot-note appended to *Philadelphia & R. Ry. Co. v. Winkler (Del.)*, 10 R. R. R. 323, 33 Am. & Eng. R. Cas., N. S., 323, 56 Atl. 112.

(1) Federal Statute.

Under Act Cong. March, 2, 1893, c. 186, § 8, 27 Stat. 532 (3 U. S. Comp. St. 1901, p. 1376), providing that any employee of an interstate carrier who may be injured by any car in use contrary to the provisions requiring the use of automatic couplers shall not be deemed thereby to have assumed the risk, though he continues in the em-

Note

ployment of such carrier after the unlawful use of such car, etc., had been brought to his knowledge, a switchman engaged in handling a freight car having a defective coupler, on a track principally used for handling freight trains, though sometimes used to handle cars in need of repairs, did not assume the risk arising from the defect in the coupler; the car not having been marked or isolated as one in bad repair, and its movement at the time not being with a view to its isolation or repair. So held in *Chicago, etc., Ry. Co. v. Voelker* (C. C. A.), 129 Fed. 522, 11 R. R. R. 515, 34 Am. & Eng. R. Cas., N. S., 515.

Use by carrier, in violation of Act Cong. March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), of a car in moving interstate commerce not provided with a coupler working automatically, the risk of which § 8, 27 Stat. 532 (U. S. Comp. St. 1901, p. 3176), provides an employee shall not assume by continuing in the employment, makes the carrier guilty of negligence per se. So held in *Philadelphia & R. Ry. Co. v. Winkler* (Del.), 10 R. R. R. 324, 33 Am. & Eng. R. Cas., N. S., 324, 56 Atl. 112.

(2) North Carolina Act.

In *Elmore v. Seaboard Air Line Ry. Co.* (N. Car.), 44 S. E. 620, 8 R. R. R. 663, 31 Am. & Eng. R. Cas., N. S., 663, it is said in the opinion: "This court has decided in *Greenlee v. Railroad*, 122 N. Car. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, that the failure to have self-coupling devices on their cars was negligence per se; that it was a continuing negligence, and the question of contributory negligence did not arise when an employee was injured by reason of the failure to have automatic couplers in proper condition; that the fact that plaintiff remained in the service of the railroad company, knowing that its freight cars were not equipped with self couplers, did not excuse the railroad from liability for such employee, if injured while coupling its cars by hand. The doctrine of assumption of risk has no application where the law requires the use of new appliances to secure the safety of employees. This doctrine is approved in *Troxler v. Railroad*, 122 N. Car. 902, 30 S. E. 117. Mr. Justice Montgomery, in the opinion in this case (131 N. Car. 573, 42 S. E. 990), says: 'We are not disposed to modify in the least the decision made in *Greenlee v. Railroad*, 122 N. Car. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, in which we decided that the railroad companies in this state should equip both their passenger and freight cars with self couplers, and we are of the opinion that a neglectful failure to keep the couplers in proper condition and repair would be as culpable as if the cars had never been so equipped. In *Fleming v. Railroad*, 131 N. Car. 476, 42 S. E. 905. Mr. Justice Montgomery says: 'It has been decided by this court that 'the failure of a railroad company to equip its cars with automatic couplers is a continuing negligence, and where the negligence of the defendant is a continuing negligence, as the failure to furnish safe appliances in general use, when the use of such appliances would have prevented the possibility of the injury, there can be no contributory negligence which will discharge the master's liability.' *Troxler v. R. Co.*, 124 N. Car. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580. There can be no contributory negligence of the plaintiff available to the defendant as a defense in this action, because the plaintiff attempted to make the coupling in discharge of his duty, and because the continuing negligence of the defendant up to the moment of the injury was subsequent to the plaintiff's negligence, if there was any, and is the proximate cause of the injury."

(3) South Carolina—Constitutional Provision.

Under Const. art. 9, § 15, providing that knowledge by an employee of the defective or unsafe condition of any machinery shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of unsafe cars or engines volun-

McGraw v. Southern Ry. Co

tarily operated by them, a motion for a nonsuit on the ground that undisputed evidence showed that a brakeman suing a railroad for injuries resulting from defective mechanism saw the defects complained of before using such mechanism, and thereby assumed the risk, was properly denied, since the constitution meant that such prior knowledge of defects would not defeat the action. So held in *Youngblood v. South Carolina & G. R. Co.* (S. Car.), 20 Am. & Eng. R. Cas., N. S., 622, 38 S. E. 232.

A. R. Y.

McGRAW et al. v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, May 3, 1904.)

[47 S. E. Rep. 758.]

Carriers—Passengers—Persons on Platform of Baggage Car.*

A person who, though having a ticket, boards a train by getting on the platform of the blind baggage car, has no right of action, as a passenger, because of the conductor pulling him off the car, he not having told the conductor, when ordered to get off, that he had a ticket, and the conductor not having seen a ticket, or supposed that he has one.

Clark, C. J., dissenting.

Appeal from Superior Court, Mecklenburg County; McNeill, Judge.

Action by Theodore McGraw against the Southern Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

The plaintiff, together with one White, purchased a ticket from the defendant's agent at Charlotte, entitling him to go to Huntersville. He and White, while the train was standing at the station, went across the street for the purpose of buying a melon. The train moving off, they ran to catch it, and got upon the platform of the first car they reached, being the "blind baggage" car. The train moved slowly until it reached the crossing of the Seaboard Air Line track, where it was required by law to stop. The conductor, finding the plaintiff and White on the platform, pulled them off. The plaintiff alleges that he was a passenger on the defendant's train, and that the conductor violently and wantonly assaulted him, whereby he was greatly injured. He sues to recover damages for his injuries. White also brought suit, and the cases were consolidated. The plaintiff, having testified in regard to the purchase of the ticket and boarding the train, said: "After we crossed the crossing, Tom Rowland [the conductor] came through. I was on the side of the platform next to the door, and White on the right side. When he came up, he said, 'Fall off.' I said, 'I have got a ticket,' and he said, 'You have like hell.' I had a ticket in my hand. He caught me by the left arm, and jerked me off.

*As to whether it is to be presumed that a person in a car is a passenger, see note appended to *Isaman v. South Carolina & G. R. Co.* (S. Car.), 11 Am. & Eng. R. Cas., N. S., 219.

McGraw v. Southern Ry. Co

The train was moving." He was corroborated by White. The defendant introduced the conductor, who testified: "There is a state law requiring all trains to stop at the crossing. My porter, as usual, went over to the engine to see if there were any tramps or people on the train who had no business. On this occasion we stopped as usual. The porter did not come back as usual, and I thought there was something wrong. I jumped on the ground and ran around the mail car. I was on the back of the first-class car. When I got to the front end of the mail car, the train had begun to move, and I saw these two men up there. About the time I got there the baggage master stepped up on the other side. I told the men to come down. They did not get down, and, in order to get them on the ground before the train got up too much speed, I reached up and pulled them down, and let them light on the ground. When I put the second one down, I caught on the back end of the same car. * * * I just caught hold of them and pulled them down. They did not resist. I had no conversation with them. Did not see any ticket. Did not suppose for a moment that they had any ticket, or they would not be there, because it was not a place for passengers, and they could not pass from that end of the car to the other. There is no doorway between the mail car and the baggage car. Passengers are not allowed to go through them at all." He was corroborated by the porter. It was also in evidence that the rule of the defendant company forbade passengers from riding on the platform. The evidence in regard to the injury sustained by the plaintiff was contradictory. His honor directed the jury to answer the first issue "Yes." The defendant excepted, and from a judgment for the plaintiff the defendant appealed.

Geo. F. Bason and L. C. Caldwell, for appellant.

Montgomery & Crowell and M. B. Stickley, for appellee.

CONNOR, J. There are a number of exceptions in the record to the instructions given by the court and to the refusal to give special instructions, all of which are duly assigned as error. We are of the opinion that the first exception should be sustained. His honor charged the jury as a conclusion of law that upon all of the evidence the plaintiff was a passenger on the defendant's train; meaning, of course, that he was such for the purpose of maintaining this action. If he was correct in this, the jury must, as a conclusion of law, have answered the second issue "Yes"; thus eliminating the question whether the conductor used excessive force from consideration, except upon the character and amount of damages which should be awarded the plaintiff. For the purpose of disposing of this first exception, we must assume that the conductor's account of the transaction is correct. The instruction is necessarily based upon that assumption. When the relation of passenger is established by entry upon

Georgia Ry. & Electric Co. v. Baker

the defendant's premises for the purpose of purchasing a ticket or taking passage on the defendant's train, or entry into the cars for such purpose, the relative rights and duties of the passenger and carrier are fixed and well settled. There is a presumption that a person who enters a passenger car, nothing appearing in his conduct to the contrary, is or intends to become a passenger. *Railroad v. Books*, 57 Pa. 339, 98 Am. Dec. 229. No such presumption arises when the entry is upon a baggage or mail car, or upon any other portion of the train not assigned to passengers. *Elliott on Railroads*, § 1578, says: "The presumption may, of course, be rebutted, and it will not ordinarily arise when the person occupies a position on the train which passengers have no right to occupy, or goes upon a train on which passengers are not carried." The general rule is that a person can take passage on such trains only, and only in such places, as the rules of the company provide that passengers shall be carried; and one who does not conform to such rules is ordinarily to be regarded as an intruder or trespasser, and an intruder or trespasser cannot impose upon a railroad company the high duty which a carrier owes to its passengers." *Id.* § 1581. It was the duty of the plaintiff, when found upon the platform of the baggage car, to promptly inform the conductor that he had a ticket, so that he could be given an opportunity to go into the car provided for passengers. He says that he did so. The conductor says that he did not do so, that he said nothing about having a ticket, and that he (conductor) saw no ticket. The truth of the matter should have been ascertained by the jury. If the plaintiff's version of the transaction is true, he is entitled to maintain his action. If the conductor's version is correct, he is not entitled, as a passenger, to recover. If the jury should find the conductor's version to be true, the plaintiff could recover damages for his ejection only by showing that the conductor used excessive force. *Railroad v. Haring*, 47 N. J. Law, 137, 54 Am. Rep. 123; *Fetter on Carriers*, 359. His right to recover punitive damages, if he shows himself entitled to compensatory damages, depends upon well-settled principles. *Holmes v. Railroad*, 94 N. C. 319.

There must be a new trial.

GEORGIA RY. & ELECTRIC CO. v. BAKER.

(Supreme Court of Georgia, Aug. 12, 1904.)

[48 S. E. Rep. 355.]

Carriers—Expulsion of Passenger—Damages—Injury to Feelings.*

This case is controlled by *Cole v. Railroad Co.*, 12 Am. & Eng. R.

*Damages for mental suffering of passenger wrongfully ejected, see foot-note appended to *Choctaw, O. & G. R. Co. v. Hill* (Tenn.), 8 R. R. 776, 31 Am. & Eng. R. Cas., N. S., 776, where all the preceding authorities in this series are collected.

Van Camp v. Michigan Cent. Ry. Co

Cas., N. S., 14, 31 S. E. 107, 102 Ga. 474; Savannah, F. & W. Ry. Co. v. Quo, 29 S. E. 607, 103 Ga. 125, 40 L. R. A. 483, 68 Am. St. Rep. 85, and Mabry v. Railway Company, 6 R. R. R. 900, 29 Am. & Eng. R. Cas., N. S., 900, 42 S. E. 1025, 116 Ga. 624, 59 L. R. A. 590, 94 Am. St. Rep. 141. See, also, 4 Elliott, Railroads, § 1638; 6 Cyc. 602; 5 A. & E. Enc. Law (2d Ed.) 550.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by A. L. Baker against the Georgia Railway & Electric Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Rosser & Brandon, W. T. Colquitt, and Ben J. Conyers, for plaintiff in error.

Burton Smith and J. A. Branch, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring.

VAN CAMP v. MICHIGAN CENT. RY. CO.

(Supreme Court of Michigan, Sept. 13, 1904.)

[100 N. W. Rep. 771.]

Carriers—Passengers—Transportation—Train Schedules—Failure to Maintain—Penalties—Recovery.

Comp. Laws, § 6235, provides that every railroad corporation shall furnish sufficient accommodation for the transportation of passengers offering themselves for transportation at stopping places used for receiving passengers on payment of the fare legally authorized, and shall transport such passengers from various stations with all practicable dispatch; that on refusal to transport any passenger without legal excuse, for such default it shall pay all damages to the party aggrieved, or a penalty of \$100, at the party's election: *held*, that where a railroad company had advertised a train on a branch line to leave a connecting point shortly after the arrival of another train, and had sent printed posters to its agents showing the contemplated operation of such train, but before the time arrived when the train was advertised to be put on notice of its withdrawal was sent to some of the company's agents, and was published, but the agent at Y. had received no such notice, by reason whereof he sold a ticket to plaintiff for passage over such branch line, and advised her of the running of the advertised train, and on her arrival at the junction point she was compelled to remain there overnight, the company was liable for the penalty prescribed.

Hooker and Carpenter, JJ., dissenting.

Appeal from Circuit Court, Berrien County; Orville W. Coolidge, Judge.

Action by Alberta E. Van Camp against the Michigan Central Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Humphrey S. Gray and G. M. Valentine, for appellant. John J. Sterling and Cady & Andrews, for appellee.

GRANT, J. This suit was brought to recover the penalty of \$100 provided by section 6235, Comp. Laws, for the failure

of the defendant to transport the plaintiff, in accordance with her contract of carriage, without legal or just excuse. Her home was in Benton Harbor, Mich. She was attending school at Ypsilanti, Mich. She purchased a ticket June 24, 1903, good for a continuous passage from Ypsilanti to Grand Junction. Her route was over the main line of the Michigan Central to Kalamazoo, from which place defendant has a branch line to Grand Junction. Previously to and at the time of purchasing her ticket she inquired of the defendant's agent at Ypsilanti if she could take the train leaving Ypsilanti at 1:25 p. m., and make close connections at Kalamazoo with the train for Grand Junction. She was informed by the agent that she could, and he showed her a schedule stating that a train left Kalamazoo at 4:42 p. m., her train on the main line arriving at 4:25 p. m. She testified that she relied upon the schedule shown her, and the statement of the agent in purchasing a ticket. On arrival at Kalamazoo she was informed that there was no train running to Grand Junction at 4:45, and she was therefore obliged to remain in Kalamazoo overnight. Defendant introduced as a witness its agent at Kalamazoo, who testified that the defendant had issued a time card to take effect June 14, 1903, showing a train scheduled to leave Kalamazoo at 4:45 p. m. each day except Sunday; that that card was canceled by another one, eliminating that train from the schedule, and that a notice was received from the division superintendent's office at Jackson advising that this train would not be put on until further notice; and that a further notice was received June 29th announcing that this train would commence to run July 1st. A time card was introduced in evidence in which this train was advertised to take effect June 14th. The evidence did not show when this card or time-table was posted in the office whence it was taken.

The above is a statement of all the evidence produced upon the trial. The court directed a verdict for the plaintiff for the statutory penalty of \$100.

The statute is a penal one, and will not be enlarged by construction. *Crosby v. Pere Marquette R. Co.* (Mich.) 91 N. W. 124. In several cases we have discussed what constitutes a "legal and just excuse" within the meaning of the statute. *Freeman v. D. M. & M. R. Co.*, 65 Mich. 577, 32 N. W. 833; *Reed v. D. S. S. & A. R. Co.*, 100 Mich. 507, 59 N. W. 144; *Hoyt v. C., C., & St. L. R. Co.*, 112 Mich. 638, 71 N. W. 172. The learned counsel for the defendant contend that the undisputed facts do not bring the case within the statute. They admit that the defendant had determined to put on this extra train for summer service to leave Kalamazoo at 4:45 p. m. for South Haven, passing through Grand Junction; that time-tables showing such train were prepared, and public posters were printed and sent to the agents along the line for public distribution; that they were to take effect June 14th. But they insist that immediately thereafter, and

Van Camp v. Michigan Cent. Ry. Co

before June 14th, notice was sent to the several agents that this extra summer train would not be put on until further notice, and that a new public poster or time-table for distribution, omitting this extra train, was issued and published. If the facts were as stated, the defendant's position would undoubtedly be correct. Railroad companies may change their time-tables, may take off and put on trains, and all that the statute requires is that they give reasonable notice to the public of such change. *Sears v. Eastern R. Co.*, 14 Allen, 433, 92 Am. Dec. 780. If, when such reasonable notice is given, the ticket agent misinforms a passenger, this statute does not apply, and the passenger so misinformed can recover only his actual damages. *Ohio & M. R. Co. v. Hatton*, 60 Ind. 12; *Marshall v. St. L., K. C., etc., R. Co.*, 78 Mo. 610; *St. L., I. M., etc., R. Co. v. Atchison*, 47 Ark. 74, 14 S. W. 468. In such case he must count upon the common-law liability, and not upon that of the statute.

The mistake of counsel is one of fact, and not of law. The undisputed facts are that the plaintiff applied two or more times to the authorized agent of the defendant to ascertain about this train. She was shown a time-table issued by defendant and in the hands of its duly authorized agent. She was under no obligation to look for a schedule posted in the defendant's depot or published in the newspapers. She went to the proper place for the most reliable information. She obtained it by being shown a printed schedule. She relied on it as well as on the representations of the agent. This made her case, and entitled her to a judgment under the statute, unless the defendant showed "a legal and just excuse" for not carrying her in accordance with her contract of carriage and printed schedule. The defendant wholly failed to show that the notice countermanding the advertised schedule was delivered to its agent at Ypsilanti. Its only witness was the agent at Kalamazoo, who had nothing to do with issuing or countermanding schedules. He did not know, and did not testify that he knew, that any such countermand or notice was sent to the agent at Ypsilanti. Neither the agent at Ypsilanti nor the defendant's agent who was authorized to issue the schedule was called upon to testify that any such notice or countermand was sent to or received by the agent at Ypsilanti. It cannot, therefore, be said that the act which caused the plaintiff to purchase her ticket and take the train was solely that of the ticket agent at Ypsilanti. On the contrary, it was the act of the defendant itself in issuing and publishing its schedules and failing to notify its agent of the change. So far as this record shows, the agent relied upon this schedule, and was authorized to rely upon it until notified otherwise.

The plaintiff made a case within the statute, and the judgment is affirmed.

MOORE, C. J., and MONTGOMERY, J., concurred with GRANT, J.

LOUISVILLE & C. PACKET CO. *v.* BOTTORFF et al.

(Court of Appeals of Kentucky, Jan. 6, 1904.)

[77 S. W. Rep. 920.]

Direction of Verdict.

A peremptory instruction is properly refused where the evidence is conflicting.

Depositions—Objections.

Objectionable questions and answers in a deposition must be excepted to specifically, and unless such exceptions appear in the bill of evidence they will not be considered on appeal.

Same—Same.

Where no incompetency of a witness appears, an objection to the reading of his deposition as a whole is without merit.

Carriers of Goods—Delay—Damages.

Evidence considered in action against a carrier for negligent delay in delivery of a machine, and *held* sufficient to sustain verdict for plaintiff for \$250.

Same—Same—Liability—Prepayment of Charges.

A carrier is responsible for damages for negligent delay in delivery of a machine only on the ground of unreasonable delay in delivering it, after perpayment of the freight, when prepayment may be required by the carrier.

Same—Same—Duty of Consignee.

It is the duty of a consignee to use ordinary care to ascertain the cause of the delay in the transportation of a shipment.

Same—Same—Same.

It is the duty of a consignee to use ordinary care to remove the cause of the delay in the transportation of a shipment.

Same—Same—Same—Duty to Memorize Damages.

It is duty of a consignee of a machine to use ordinary care in obtaining another machine, where the one shipped is delayed in transportation.

Same—Same—Machinery—Damages.

In an action against a carrier for damages for negligent delay in delivery of a machine, the measure of damage is such a sum as was the natural and proximate result of the carrier's delay after receiving payment for the shipment, and for such time only as intervened between the date the machine should have been delivered and such time as by the use of ordinary care the consignee could have removed the cause of delay or obtained another machine, including the increased cost of labor to the consignee in the absence of the machine and the loss of time or profits on contracts made by the consignee.

Appeal from Circuit Court, Oldham County.

"Not to be officially reported."

Action by Lee Bottorff and others against the Louisville & Cincinnati Packet Company. From a judgment for plaintiffs, defendant appeals. *Affirmed.*

D. H. French, for appellant.

Morris & Morris, for appellees.

SETTLE, J. This is an appeal from a judgment of \$250 against the appellant, recovered by appellees in the Oldham

*See extensive note appended to *Outland v. Seaboard A. L. Ry. Co.* (N. Car.), 10 R. R. R. 476, 33 Am. & Eng. R. Cas., N. S., 476.

circuit court, for damages sustained by reason of the alleged negligent failure of the former as a common carrier to transport and deliver to the latter within a reasonable time a machine made by the Huber Manufacturing Company, of Marion, Ohio, known as a "self-feeder," and intended for use in operating a wheat thresher owned by the appellees. The facts presented by the record are as follows: The appellees in the latter part of June, 1901, through one Stoll, ordered of the Huber Manufacturing Company a feeder, which was shipped by the company June 26, 1901, over the Erie Railroad, from Marion to Cincinnati, Ohio, to be transported by the appellant on one of its steamboats from that city down the Ohio river to Tarleton's Landing, in Oldham county, Ky., where it was to be received by the appellees. Upon its reaching Cincinnati the feeder was delivered to Robert Little, transfer agent, who, on July 3, 1901, delivered it to the agent of the appellant to be shipped upon one of its steamboats to its final destination. But appellant's agent refused to ship the feeder without the prepayment of the freight charges therefor, which fact was made known to Little, and by him communicated to the Erie Railroad Company, which in turn communicated it to the Huber Manufacturing Company, at Marion, and that company, upon being authorized by appellees, through its Lexington agent, then paid the demanded charges to the agent of the Erie Railroad Company, who directed Little to pay them to the appellant, which he did not later than July 15, 1901, but the feeder was not transported by appellant to Tarleton's Landing or delivered to the appellees until July 31, 1901. It is admitted by the appellant that the feeder was not delivered at Tarleton's Landing until July 31, 1901, and also admitted that it refused to ship it without prepayment of the freight, and there seems to be little doubt from the evidence that the feeder was received by it July 3d. It is, however, claimed by appellant, and such was the testimony of its several witnesses, that the freight was not paid by Little until July 30th—only the day before the delivery of the feeder to appellees. The issue made by the pleading on this point was whether or not the appellant failed to deliver the feeder at Tarleton's Landing within a reasonable time after the prepayment of the freight, and, as Little testified that the freight was, in any event, paid appellant by July 15th, and the feeder was not delivered to appellees until July 31st, if his testimony was accepted by the jury they evidently came to the conclusion that the interval of 16 days constituted unreasonable and inexcusable delay on the part of appellant, for which it ought to account to the appellees. The evidence furnished by the witnesses introduced by the appellees strongly conduces to prove that the feeder was received by appellant's Cincinnati agent July 3d, at which time prepayment of the freight was demanded. On the same day the

amount of the freight was paid by Dumbaugh, of the Huber Company, to the Erie Railroad Company. Correction of the way bill was then commenced, and by direction of the Erie Railroad Company Little paid the freight to the appellant as soon as the correction was completed, which he says was not later than July 15th. It doubtless appeared to the jury unreasonable that the Huber Company, railroad company, Little, and appellees, after receiving on July 3d notice of the appellant's demand for prepayment of the freight, should have allowed practically a whole month to pass without seeing it paid, and equally unreasonable that the appellant would have permitted itself to be put to the trouble of storing and caring for the machine for a month without knowing whether or not the charges would be paid. At any rate, the trial court was unable to say that there was no evidence whatever to support the appellees' cause of action, therefore the peremptory instruction asked for by appellant was properly refused. It cannot be denied that the evidence was conflicting, but in that state of case it was the province of the jury, and not of the court, to determine its weight and effect.

It is insisted for the appellant that the depositions of Dumbaugh, Sand, Agnew, and Little were incompetent, and should have been excluded by the court. It will be found that the only exceptions shown by the record are to each of these depositions as a whole, consequently they only go to the competency of the witnesses. If particular questions or answers in a deposition are objected to, they, and each of them, must be excepted to specifically, and such exceptions must appear in the bill of evidence; otherwise they cannot be considered by this court. The witnesses whose depositions are complained of all appear to have been competent to testify, and the lower court did not err in permitting their depositions to be read to the jury.

On the question of damages there was no conflict of evidence. It is clearly shown that the "self-feeder" was not received by the appellees until about the close of the wheat-threshing season. They had contracted in the beginning of the season to thresh sundry crops of wheat for their neighbors and customers upon the faith of being able to procure the self-feeder in time to do so, and the proof shows that with the help of the feeder, if it had been received in reasonable time after being ordered, they could have threshed every crop engaged to them, but that by reason of the delay in its delivery they lost and were compelled to abandon many of these crops. It also appears that in attempting to operate their wheat thresher without the assistance of the self-feeder appellees were put to additional expense in employing extra hands and in boarding them; that with the self-feeder from 200 to 400 bushels more of wheat per day could be threshed than without it, and that appellees during the season of 1901,

State v. Seaboard Air Line Ry

by reason of not having the use of the self-feeder ordered by them, lost the threshing of not less than 8,000 bushels of wheat from the crops contracted to them, for which they would have received five cents per bushel. In view of this evidence we are unable to say that \$250, the amount allowed appellees by the verdict of the jury, is unreasonable or excessive, although, according to their own evidence, they lost the use of the self-feeder only 16 days. Consequently we are unable to sustain the contention of counsel for appellant that the verdict is flagrantly against the evidence.

We have been unable to find any error in the instructions. They recognize the right of appellant to require of appellees, under the facts of this case, the prepayment of the freight for transporting the self-feeder, and make it responsible for damages only upon the ground of unreasonable delay in delivering it after the prepayment of the freight, if it was prepaid, and there was such delay. They also told the jury that it was the duty of the appellees to use ordinary care to ascertain the cause of the delay in the transportation of the feeder, and to use such care in removing such cause or in obtaining another feeder; and, further, if they found for appellees, that the measure of damages was such a sum as was the natural and proximate result of appellant's failure to transport the feeder to its destination in a reasonable time after receiving payment therefor, if it did so fail, and for such time only as intervened between the date the feeder should have been delivered at Tarleton's landing and such time as by the use of ordinary care the appellees could have removed the cause of delay or have obtained another feeder, and in this connection that they might consider the increased cost of labor, if any, in operating the thresher, the loss of time or profits on the contracts made by appellees, caused by the failure, if any, of appellant to transport the feeder to its destination in a reasonable time after prepayment of freight, if there was any such delay.

Finding no error in the record whereby the substantial rights of the appellant have been prejudiced, the judgment is affirmed.

STATE, ex rel. RAILROAD COM'RS et al. v. SEABOARD AIR LINE RY.

(Supreme Court of Florida, July 21, 1904.)

[37 So. Rep. 314.]

Use of Leased Railroad—Power of Railroad Commission to Regulate Rates.

The contracts set forth in the statement and opinion under which the Seaboard Air Line Railway controls and operates the Florida West Shore Railway give the former the "right, license, or permission to operate" the latter, and the latter is "in use" by the former and "operated by" it under a such a "contract or agreement" as brings it within

State v. Seaboard Air Line Ry

the meaning of the railroad commission law (Acts 1899, p. 76, c. 4700), so that the Railroad Commissioners have power under section 6 (page 80) of that law to make reasonable and just rates of freight and passenger tariffs to be observed by the former in the operation of the latter, although under the terms of the contracts the former is not entitled in its own right to the income or profits of the business.

Freight and Passenger Rates—Reasonableness—How Determined.*

In determining whether rates of freight and passenger tariffs established by the Railroad Commissioners for railroad transportation in this state are reasonable, the cost of construction should not be deducted from the estimated earnings under the proposed rates; but the reasonable cost of construction may and should be considered in determining the fair value of the property engaged in transportation.

Same—Same—Same—Interstate and Foreign Business.*

In determining whether rates of freight and passenger tariffs established by the Railroad Commissioners for railroad transportation in this state are reasonable, no part of the earnings or losses from interstate and foreign commerce can be charged to or against the income account of the transportation company; but its interstate and foreign business may and should be considered in determining the proportion of the value of the property of the company assignable to local business and for other purposes.

Mandamus—Return.

The return to an alternative writ of mandamus seeking to compel a railroad company to put into effect and operation a schedule of tariffs prescribed for it by the Railroad Commissioners, which alleges positively and unequivocally that the passenger and freight tariffs prescribed for it by the Railroad Commissioners are unreasonable, and that they do not give to the company fair and reasonable compensation for the services required to be performed by it, is sufficient to tender an issue as to the reasonableness of the rates, without setting up all the facts bearing upon the question of reasonableness, and under such an issue any and every fact pertinent to the question of reasonableness is properly admissible.

(Syllabus by the Court.)

In Banc. Application by the state, on the relation of the Railroad Commissioners and others, for a writ of mandamus to the Seaboard Air Line Railway. Motion to quash returns. Granted.

On February 2, 1904, an alternative writ of mandamus issued from this court alleging:

"(1) That the Florida West Shore Railway is a railroad company, a corporation of the state of Florida, and has con-

*As to how the reasonableness of rates charged by railroad companies are to be determined, see *Mannheim Ins. Co. v. Erie & W. Transp. Co.* (Minn.), 13 Am. & Eng. R. Cas., N. S., 161; *Osborne v. Wabash R. Co.* (Mich.), 20 Am. & Eng. R. Cas., N. S., 569 (in fixing rates for the carriage of passengers, the railroad commission, under an article, No. 90 of the public acts of Michigan may consider the amount of interstate fares earned by that portion of the road lying within the state); *Smith v. Ames* (U. S.), 10 Am. & Eng. R. Cas., N. S., 1; *Southern Pac. Co. v. Colorado F. & I. Co.* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 559; *Steenerson v. Great Northern Ry. Co.* (Minn.), 8 Am. & Eng. R. Cas., N. S., 560; *Northern Pac. Ry. Co. v. Keyes* (U. S.), 13 Am. & Eng. R. Cas., N. S., 128; *Trammell v. Dinamore* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 468; *Metropolitan Trust Co. v. Houston & T. C. R. Co.* (Tex.), 13 Am. & Eng. R. Cas., N. S., 149 (valuation must include interest on investments, and betterments as operating expenses, in order to render state rates reasonable).

State v. Seaboard Air Line Ry

structed its line of railway from a point about four miles southwest of Turkey Creek, a station on the main line of the Florida Central & Peninsular Railroad, which railroad is now known as the Seaboard Air Line Railway, at which point the said line of railway of the Florida West Shore Railway connects with a branch of the said Florida Central & Peninsular Railroad, known as the 'Turkey Creek Branch,' and runs in a southwesterly direction to the town of Sarasota, in Manatee county, Florida, with branch lines to Terra Ceia, Lemon, and Palmetto, and that all of the said main line and branch lines of said Florida West Shore Railway are within the state of Florida.

"(2) That the Seaboard Air Line Railway is a corporation of the states of Virginia and North Carolina, and now controls and operates, and since the 1st day of June, 1903, has controlled and operated, the said Florida Central & Peninsular Railroad, known as the Seaboard Air Line Railway, and owns, controls, and operates, or controls and operates, divers other lines of railroad in the state of Florida.

"(3) That the said Seaboard Air Line Railway and the Florida West Shore Railway entered into a contract with each other on the 1st day of June, A. D. 1903, in which it was agreed by them as follows, to wit:

"This agreement, made and executed on this the first day of June, A. D. nineteen hundred and three (1903), between the Seaboard Air Line Railway, a corporation of the states of Virginia and North Carolina, hereinafter called the "Seaboard," party of the first part, and the Florida West Shore Railway, a corporation of the state of Florida, hereinafter called the "West Shore," party of the second part:

"Whereas, the West Shore has constructed its line of railway from a point about four (4) miles southwest of Turkey Creek, a station on the main line of the Florida Central & Peninsular Railroad (which latter railroad is controlled and operated by the Seaboard Air Line Railway), at which point the said line of railway of the West Shore connects with the Turkey Creek Branch of the said Florida Central & Peninsular Railroad, and runs in a southwesterly direction to the town of Sarasota, in Manatee county, Florida, with the branch lines to Terra Ceia, Lemon, and Palmetto; and

"Whereas, the West Shore contemplates the extension of its said line of railway from Sarasota southwardly to a point at or near Charlotte Harbor in De Sota county, Florida; and

"Whereas, the West Shore has no equipment, rolling stock, or motive power, and is unable to operate its said line of railway without the acquisition of the same; and

"Whereas, the Seaboard desires to derive the benefit from the opening up and development of the territory through which the railway of the West Shore runs; and

"Whereas, it is deemed to be to the mutual interest and advantage of the stockholders of the Seaboard and of the

State v. Seaboard Air Line Ry

West Shore that the railway of the West Shore should be operated in connection with the Seaboard:

“Now, then, in consideration of the premises, and of the advantages and benefits to be derived by each of the said parties from the contracts of the other, it is hereby mutually covenanted and contracted as follows:

“First. The Seaboard agrees to furnish the West Shore Railway with the necessary equipment for the operation of its line of railway, and agrees to cause the same to be operated by its officers and agents for the benefit of the stockholders of the West Shore.

“Second. The term “equipment” shall embrace engines and coaches, freight and passenger, switch engines, or construction trains, and rolling stock of every kind and description necessary in the operation of the railroad, together with all tools, implements, and other accessories incident thereto.

“Third. The West Shore shall pay for the use of said equipment the same rentals which the Seaboard now charges its ancillary lines for the use of similar equipment, it being understood that, if at any time either party shall become dissatisfied with the rate of rental so charged, such party shall have the right to call for a readjustment of said rates, and, if such readjustment cannot be had by agreement, then the question of rentals shall be submitted to arbitrators to be selected as hereinafter provided, who, after investigation of the matter, shall decide whether or not in equity and justice there ought to be any change in the rate of rental, and, if so, fix a rate which, in their judgment, would be fair and equitable to all concerned, and the decision of the arbitrators in the premises shall be conclusive upon both parties hereto.

“Fourth. The West Shore agrees that it will bear such proportion of the salaries of the officers of the operating and traffic departments of the fifth division of the Seaboard as the mileage of the West Shore bears to the mileage of the said division, which said proportion is hereby fixed at the sum of three hundred and fifty dollars (\$350) per annum.

“Fifth. It is understood and agreed that the compensation for the use of equipment herinbefore provided, and the proportion of salaries to be paid by the West Shore, shall be considered as part of the operating expenses of the railway of the West Shore.

“Sixth. It is understood and agreed that the taxes, assessments, insurance, damages to persons or property incurred by reason of the running of cars or through the operation of the railroad, and all other items of expense of every class and description customarily included in the operating expenses of a railroad, shall be considered as part of the operating expenses of the railway of the West Shore.

“Seventh. It is understood and agreed that the sum of one hundred and twenty-five dollars (\$125) per month shall be allowed and paid to the West Shore out of the earnings of

State v. Seaboard Air Line Ry

the railway, to be used by it in paying the salaries of such of its officers as are not engaged in the direct operation of the company, and in otherwise keeping up the corporate organization of the company, and the said allowance to be considered as a part of the operating expenses of the West Shore.

“Eighth. The Seaboard agrees to guaranty the payment, as the same matures, of both the principal and interest of a series of bonds of the West Shore, known as first mortgage, four per cent. (4 per cent.), thirty-year gold bonds, issued and to be issued at the rate of fourteen thousand dollars (\$14,000) per mile, of which eleven thousand five hundred dollars (\$11,500) per mile shall be used in payment for the construction of the railway of the West Shore, and the remainder of said bonds, to wit, twenty-five hundred dollars (\$2,500) per mile, to remain in the treasury of the company and only to be used for its legitimate corporate purposes, by resolution of the board of directors of the West Shore, sanctioned and approved by resolutions of the board of directors of the Seaboard.

“Ninth. It is understood and agreed that, in the event the gross earnings derived from the operation of the railway of the West Shore are not sufficient to meet the operating expenses and fixed charges of said railway as hereinbefore provided, the Seaboard will make good any such deficiency, and the West Shore, in consideration thereof, hereby covenants and agrees that at the expiration of every six (6) months it will execute to the Seaboard its noninterest-bearing obligations, wherein it will bind itself to pay to the Seaboard any such deficiency for the six (6) months immediately preceding out of the net earnings of the company, over and above the operating expenses and fixed charges, as the same may hereafter accumulate from time to time; and it is distinctly understood and agreed that no dividends can be declared on the capital stock of the West Shore so long as any of its obligations for deficiency in income, as aforesaid, are outstanding and unpaid.

“Tenth. The Seaboard agrees that it will treat the West Shore as a favored connection, and give it a fair and equitable proportion of the revenue derived from the interchange of business between the companies.

“Eleventh. It is understood and agreed that the officers and agents of the Seaboard who may be charged with the operation of the line of railway of the West Shore shall in all matters pertaining to the business of the West Shore be deemed and considered the officers and agents of said company.

“Twelfth. It is understood and agreed that the president and directors of the West Shore shall be entitled to annual passes over all lines operated by the Seaboard in the state of Florida, including the line of the West Shore.

“Thirteenth. The Seaboard agrees that it will keep

State v. Seaboard Air Line Ry

accurate books of account of the revenue of the West Shore, and will render monthly to the president of the West Shore an itemized statement of the earnings and expenses of said railway; and it further agrees that it will pay into the treasury of the West Shore on or before the fifteenth day of each month any surplus of earnings of the preceding month, after having deducted cost of operation.

“‘Fourteenth. In case differences should arise between the parties hereto as to the interpretation and meaning of any clause or phrase of this contract, it is agreed that such differences shall be submitted to a board of arbitrators for adjustment; the Seaboard to select one arbitrator, and the West Shore one arbitrator, and the two arbitrators thus chosen to select an umpire. The award of the board of arbitrators shall be final and conclusive upon the parties.

“‘In witness whereof, the parties hereto have caused these presents to be executed by their respective presidents, and sealed with their respective corporate seals, duly attested by their respective secretaries, the day and year first above written.’

“(4) That the said Seaboard Air Line Railway has since the 1st day of June, A. D. 1903, controlled and operated, and now controls and operates, the said Florida West Shore Railway and its branch lines under the said contract of June 1, A. D. 1903, hereinbefore set out, and the said Florida West Shore Railway is now, and since the 1st day of June, A. D. 1903, has been, under the management and control of the said Seaboard Air Line Railway, and under one and the same management as the Florida Central & Peninsular Railroad, alias the Seaboard Air Line Railway.

“(5) That on the 25th day of June, A. D. 1903, the Railroad Commissioners of the state of Florida, in session at their office in Tallahassee, Florida, having previously given due notice to the said Seaboard Air Line Railway, and after having heard argument in behalf of said company, ordered and adjudged that a certain schedule of freight tariffs should be allowed and adopted for freight shipments from points in Florida to points in Florida over the Seaboard Air Line Railway, to apply to shipments from or destined to points on the Florida West Shore Railway, and from points on the Florida West Shore Railway to points on the Florida West Shore Railway, and that the same should be put into operation and become effective on the 1st day of July, A. D. 1903, notice of which was given to the said Seaboard Air Line Railway, and that the said schedule of freight tariffs adopted in and by the said order of the said Railroad Commissioners is the same as appears in the duly certified copy of said order hereto attached and marked ‘Exhibit A.’

“(6) That the Seaboard Air Line Railway has not yet adopted said schedule of freight rates as fixed in said order, and still refuses so to do, but on the contrary thereof charges

State v. Seaboard Air Line Ry

freight tariffs for freight shipments from points in Florida to points in Florida over the Seaboard Air Line Railway from or destined to points on the Florida West Shore Railway, and from points on the Florida West Shore Railway to points on the Florida West Shore Railway, in excess of the rates fixed in and by said order, and in violation of said order, and of chapter 4700, p. 76, of the Laws of Florida of 1899, and of rule 1 of rules governing the transportation of freight, duly adopted by the Railroad Commissioners of Florida, and operative since November 1, A. D. 1897, which said rule is as follows, to wit:

“III. Rules Governing the Transportation of Freight—
Connecting Railroads under the Same Management.

“(1) All connecting railroads which are under the management or control, by lease, ownership, or otherwise, of one and the same company, and all connecting roads, the majority of whose stock is owned or controlled, either directly or indirectly, by one of the connecting lines, shall, for the purpose of transportation, in applying their schedules of freight rates, be considered as constituting but one and the same road, and the rates shall be computed as upon parts of one and the same road, unless otherwise specified. The fact that each of said roads has a separate board of directors shall not prevent the application of this rule. Whenever any railroad company owns and operates in connection with its road, and for the purpose of transporting its cars, freight, or passengers, any steamer or other water craft, such steamer or water craft shall be deemed a part of its said road.”

The writ commanded defendant immediately to put into operation and effect the schedule of freight tariffs adopted in and by said order of the Railroad Commissioners, or show cause on February 16th why it refuses to do so. The order of the commissioners, made a part of the writ, is as follows, omitting the schedule therein referred to:

“Order No. 25.

“Railroad Commission, State of Florida.

“In the matter of freight rates for the Seaboard Air Line Railway Company, to apply on shipments to and from points on the Florida West Shore Railway.

“This matter coming on to be heard after due notice to the Seaboard Air Line Railway Company, and the Seaboard Air Line Railway Company being represented by G. P. Raney, Esq., and E. D. Kyle, Asst. Gen'l Frt. Agt., and the Commission having heard the arguments of G. P. Raney, Esq., and E. D. Kyle, Asst. Gen'l Frt. Agt., in behalf of the said Seaboard Air Line Railway Company, and the Commissioners being satisfied that the present condition of the freight business of the Florida West Shore Railway would justify the ordering into operation of the proposed freight tariff on that line:

“It is hereby ordered and adjudged by the Railroad Com-

State v. Seaboard Air Line Ry

mission of the state of Florida that the following schedule of freight tariffs shall be allowed and adopted for freight shipment over the Seaboard Air Line Railway, to apply only to shipments from or destined to points on the Florida West Shore Railway, and from points on the Florida West Shore Railway to points on the Florida West Shore Railway; and the same shall be put into operation and be effective on the 1st day of July, A. D. 1903."

The defendant moved to quash the alternative writ, and the motion was denied March 29, 1904, without a written opinion being filed. The return of the defendant, filed April 12, 1904, admits that it entered into the agreement of June 1, 1903, with the Florida West Shore Railway, and that it did control and operate the main and branch lines of the latter road under said contract for some time thereafter, but that afterwards the two companies entered into a new agreement, in place of and as a substitute for said agreement and contract of June 1, 1903, and afterwards the new contract was reduced to writing and executed by the two companies, and that since the new agreement was entered into, which was before the alternative writ issued, the defendant had not controlled or operated the main and branch lines, or any part, of the Florida West Shore Railway, otherwise than under the terms of the new or substituted agreement, which was filed with the Railroad Commissioners on February 4, 1904; that the management and operation by the defendant of the Florida West Shore Railway and its branch lines under said new or substituted contract does not constitute the two railways one and the same road, under rule 1 of the Railroad Commission set out in the alternative writ, which requires that rates upon such roads shall be computed as upon parts of one and the same road. The return further alleges "that the schedule of freight tariffs adopted by the Florida Railroad Commission in and by the order of June 25, 1903, and annexed to the alternative writ in this case, does not afford and give to the defendant a reasonable and just tariff of rates for freight shipments over the Seaboard Air Line Railway from or destined to points on the Florida West Shore Railway, or from points on the Florida West Shore Railway to points on the Florida West Shore Railway, and that such tariff of rates, with the tariff of passenger rates prescribed by the Railroad Commission and now in operation over the said Florida West Shore Railway and the Seaboard Air Line Railway, are not sufficient to afford the Seaboard Air Line Railway and the Florida West Shore Railway a reasonable income from the operation of said roads, or in fact any net income from the operation of such roads in the conduct of business local to the state of Florida, and not including commerce between the states or foreign commerce, over and above the reasonable cost of construct-

State v. Seaboard Air Line Ry

ing and maintaining said railroads and paying the fixed charges thereon."

The new or substituted contract, attached to and made a part of the return, is substantially in the language of the contract of June 1, 1903, except in the following particulars: The ninth paragraph of the first contract is omitted from the second, and the eighth was changed so as to read as follows:

"Eighth. The Seaboard agrees to guaranty the payment, as the same mature, of both the principal and interest of seven hundred and twelve thousand dollars (\$712,000) par value of a series of bonds of the West Shore, known as 'First-Mortgage Five Per Cent. (5 per cent.) Thirty (30) Year Gold Bonds,' issued and to be issued, at the rate of twelve thousand dollars (\$12,000) per mile.

"The West Shore agrees that no dividends shall be declared on any of its stock, without the permission of the Seaboard, until January 1, 1909. The West Shore also agrees that it will at all times elect as members of its board of directors two (2) nominees of the Seaboard."

The new contract provides for annual passes for the president and directors of the West Shore "over all lines operated by the Seaboard, including the line of the West Shore," instead of confining the passes to lines operated by the Seaboard in Florida, as in the first contract.

A new paragraph was added to the substituted agreement as follows:

"Fourteenth. The provisions of this agreement are effective and operative from and after the first day of June, 1903, and shall continue in force during the life of said bonds: Provided, however, that the West Shore shall have the right at any time after January 1, 1909, by a majority vote of its stockholders, to determine this agreement upon giving six (6) months' notice in writing to the president of the Seaboard of its intention so to do, having first (that is to say, prior to the expiration of said six [6] months) either paid off or retired the said issue of bonds, or otherwise relieved the Seaboard from all liability on its guaranty of said bonds, in a manner satisfactory to the counsel of the Seaboard."

On May 17, 1904, the defendant filed by leave of this court a further and additional return, which sets up the new or substituted agreement, and claims that the operation and management of the West Shore under the new agreement does not constitute the two roads one and the same road under rule 1 of the Railroad Commissioners, so as to require that rates upon such roads shall be computed as upon parts of one and the same road, substantially as the same matters were set up in the former return; and in addition the return alleges "that the schedule of freight tariffs adopted by the Florida Railroad Commission in and by the order of June 25, 1903, and annexed to the writ in this cause, does not afford and give to the defendant a reasonable and just tariff of

State v. Seaboard Air Line Ry

rates for freight shipments over the Seaboard Air Line Railway from or destined to points on the Florida West Shore Railway, or from points on the Florida West Shore Railway to points on the Florida West Shore Railway, and that such tariff of rates, with the tariff of passenger rates now in operation over the Florida West Shore Railway and over the Seaboard Air Line Railway, are not sufficient to afford the Seaboard Air Line Railway and said Florida West Shore Railway a reasonable income from the operation of said railroads in the conduct of business local to the state of Florida, and including the earnings of said railroad in Florida from interstate and foreign commerce, over and above the reasonable cost of constructing, maintaining, and operating said railroad."

The plaintiff now moves to quash the returns and for a peremptory writ upon the following grounds:

- (1) Said returns are frivolous and evasive.
- (2) Said returns are argumentative, and state conclusions of law.
- (3) The contract entered into by the respondent and the Florida West Shore Railway on January 15, 1904, does not affect the relation maintained by the respondent to the Florida West Shore Railway under the contract of June 1, 1903, between said railroad companies.
- (4) The respondent has now the same management and control of the lines of railroad of the Florida West Shore as it had under and by virtue of the contract of June 1, 1903.
- (5) Said returns are insufficient to show that under said rule 1 the railroads of the respondent and the Florida West Shore Railway should not, for the purpose of transportation, in applying their schedule of freight rates, be considered as constituting but one and the same road.
- (6) The questions of law raised in said returns were presented to the court in the motion of the respondent to quash said alternative writ, and the motion was denied by the court.
- (7) The last paragraph of said returns, which deny the sufficiency of the rates prescribed by said Railroad Commissioners, does not show that the said rates are unjust or unreasonable, nor are facts therein alleged from which the court could infer that the said rates are unreasonable.
- (8) Said returns do not state facts relied upon as a defense with such precision and certainty as to advise the court of all particulars necessary to enable it to pass judgment upon the sufficiency of the returns.

W. H. Ellis, Atty. Gen., and J. M. Barrs, for plaintiffs.
Geo. P. Raney and John C. Cooper, for defendant.

CARTER, J. (after stating the facts). Sections 3, 4, c. 4700, p. 78, Acts 1899 (the railroad commission law), prohibit any railroad, railroad company, or common carrier from

State v. Seaboard Air Line Ry

charging, collecting, demanding, or receiving more than a fair or reasonable rate of toll or compensation for the transportation of passengers or freight, and from making unjust discrimination in its rates or charges of toll or compensation for transporting passengers or freight "upon its tracks or any of the branches thereof, or upon any railroad within this state which it has the right, license, or permission to use, operate, or control." Section 5 defines the term "railroad," as used in the act, as including, among other things, "all the road in use by any corporation, receiver, trustee, or any other person operating a railroad, whether operated under any contract, agreement, lease, or otherwise." By section 6 the Railroad Commissioners are given power to "make reasonable and just rates of freight and passenger tariffs to be observed by all railroads, railroad companies, and common carriers doing business in this state over their respective lines or connecting lines"; and by section 8 they are required to "make and furnish to each railroad corporation doing business in this state, as soon as practicable, a printed or written schedule of just and reasonable rates and charges for transportation of freights, passengers, and cars upon its railroad or railroads under its control or management."

The returns do not deny, but specifically admit, that the defendant "did control and operate the main and branch lines of" the West Shore under the first contract. It does not deny that it controls and operates the same road under the second agreement, but denies simply that it controls and operates same otherwise than under the terms of the second agreement. A careful reading of that agreement satisfies the court that under its terms the Seaboard has "the right, license, or permission to operate" the West Shore Railway, and that such railway is "in use" by the Seaboard and "operated by" it under "a contract or agreement," within the meaning of the railroad commission law, and that under section 6 of that law the Commissioners are authorized to make reasonable and just rates of freight and passenger tariffs to be observed by the Seaboard in the operation of the West Shore. There is nothing in the language of the statute which justifies the construction contended for, viz., that the operation of the road must be under such a contract as that the operation is for the benefit of the operating company, as by a lease or other contract under which the operating company will be entitled in its own right to the income or profits of the business. We entertained the same view of the first contract in overruling the motion to quash the alternative writ, and see nothing in the substituted contract to cause us to change the opinion then entertained. The companies, having entered into the relationship shown by the contract voluntarily after the passage of the railroad commission law, have no ground to complain that their freight and passenger

State v. Seaboard Air Line Ry

rates are to be fixed and regulated in view of that relation. It is contended, however, that the contract does not constitute the two roads one road, within the meaning of Commission Rule No. 1, set up in the alternative writ. The regulation here sought to be enforced does not attempt merely to apply rule No. 1 to the two companies, but sets forth and adopts a schedule of rates for all classes of freight transported to and from points on the Seaboard in Florida from and to points on the West Shore, and to and from points on the West Shore to and from other points on the same road. If, therefore, the language of the rule is not broad enough to embrace the present case, the special regulation here sought to be enforced is within the power conferred upon the Commissioners, and can, therefore, be enforced notwithstanding the inapplicability of rule No. 1. The court is, therefore, of opinion that the returns, in so far as they rely upon the contract set up, furnish no answer to the writ.

The returns attempt to question the reasonableness of the rates established by the Railroad Commissioners. They contain general allegations that the rates are not just and reasonable, but these general allegations are qualified by other statements that the rates, if enforced, will not afford a reasonable income, or in fact any net income, over and above the reasonable cost of constructing and maintaining said railroads. The original return goes further, and includes with the cost of construction and maintenance the payment of fixed charges, which counsel admitted in argument means taxes and interest on outstanding bonds. The vice in this method of pleading lies in the fact that the question of reasonableness is made to depend upon the capacity of the rates to yield a net income over and above the cost of constructing and maintaining the roads and the payment of fixed charges, whereas circumstances may exist under which rates are reasonable which do not afford a net income above the cost of operation and taxes, or the cost of operation, taxes, and fixed charges. The returns set forth a few elements entering into the question as to what constitutes a reasonable rate, and attempt to make those elements controlling; whereas the conditions surrounding the operation of the road may deprive them of controlling force. The use of the words "reasonable cost of construction" renders the pleading very ambiguous. The reasonable cost of construction is to be considered in determining the fair value of the company's property, which is an element entering into the question of reasonableness of the rate; but the cost of construction is not to be deducted from the earnings under the proposed rates in ascertaining if those rates are reasonable; for under such a rule the public would be compelled to pay for construction the road without being entitled to its ownership.

The amended return seeks to test the reasonableness of the rates by taking into consideration as part of the income

State v. Seaboard Air Line Ry

of the road a portion of the earnings from interstate and foreign commerce, whereas, under the decisions of the Supreme Court of the United States, this cannot be done. No doubt interstate and foreign business can and should be considered in determining the proportion of the value of the property assignable to domestic business and for other purposes; but no part of the earnings or losses from such business can be charged to or against the income account of the company in ascertaining the reasonableness of domestic rates. See *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Chicago, M. & St. P. Ry. Co. v. Thompson*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417; *Minneapolis & St. Louis R. R. Co. v. Minnesota*, 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151. See, also, *San Diego Land & Town Co. v. City of National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154.

It is contended by relators that a return questioning the reasonableness of a rate sought to be enforced by mandamus must set up in detail the facts and figures from which the court can see that the rates are reasonable. There is force in the suggestion that, as the law makes the rates *prima facie* reasonable, an attack upon such rates should be full and specific, showing facts from which the court can say affirmatively that they are not reasonable. No doubt some such degree of particularity would be required in a bill in equity seeking to enjoin such rates. But we do not think this case stands in the attitude of a bill in equity. Here an attempt is made to enforce the rates, and the alternative writ necessarily, by implication, at least, alleges that the rates are reasonable. The relators are not required to set out specially the facts showing that the rates are reasonable, because the law makes the schedule of rates prescribed by the Commissioners *prima facie* reasonable. The allegations of the return attacking the reasonableness of the rates are of the nature of a denial of the implied allegations of reasonableness in the writ. If particulars were required in the return, it would lead to great prolixity in pleading, and so many elements enter into the question, which would be of greater or less force according to circumstances, that it would be almost impossible to frame a return upon such a theory. We think a return which alleges positively and unequivocally that the passenger and freight tariffs prescribed by the Commissioners are unreasonable, and that they do not give to the company fair and reasonable compensation for the services required to be performed by it, may be held to sufficiently set forth the ultimate fact in this class of cases without requiring a more detailed statement of particular facts, which after all are mere evidentiary facts bearing upon the ultimate fact. This rule obtains in negligence cases, where it is only necessary to allege that the act was negligently and carelessly done, without further particulars; and we hold that

Ryland & Rankin v. Chesapeake & O. Ry. Co

from necessity in this class of cases allegations of the nature suggested will be sufficient. See *People ex rel. Pekin, Lincoln & Decatur Railroad Co. v. Board of Supervisors of Logan County*, 63 Ill. 374.

The third plea which was held good on demurrer in the case of *Pensacola & A. R. Co. v. State*, 25 Fla. 310, 5 South. 833, 3 L. R. A. 661, was very general in its language; the court remarking that under it any legitimate evidence upon the question of reasonableness might be given.

From the views expressed it results that the motions to quash the returns must be granted; but, as respondent asks leave to amend, leave is granted to file an amended return denying the reasonableness of the rates prescribed on or before the 26th inst.—the state to plead thereto on or before the 29th inst.

TAYLOR, C. J., and HOCKER, SHACKLEFORD, and COCKRELL, JJ., concur. WHITFIELD, J., being disqualified, took no part in the consideration of this case.

RYLAND & RANKIN v. CHESAPEAKE & O. RY. CO.

(Supreme Court of Appeals of West Virginia, March 1, 1904.)

[46 S. E. Rep. 923.]

Carriage of Freight—Refusal of Consignee to Accept—Conversion.

R. & R. shipped by the Chesapeake & Ohio Railway Company a box of goods on the 14th day of September, 1900, from White Sulphur, W. Va., to Newark, N. J. On the 28th of November, 1900, the carrier tendered the box to La Pierre Company, the consignee, who refused to accept the same. R. & R. brought their action of assumpsit for the value of the goods, alleging their loss. The plaintiffs proved the tender of the goods to the consignee, and consignee's refusal to accept them: *held*, plaintiffs could not recover the value of the goods in said action, not having first made a demand on the carrier therefor.

Same—Delay—Conversion—Damages.*

Delay on the part of a carrier does not constitute a conversion of the goods, no matter how long continued, so as to make him liable for their value; and, so long as the goods remain in specie, the plaintiff can recover from the carrier only the damages which he has sustained by the delay.

Same—Same—Same.

The owner cannot charge the carrier with a conversion, or the value of the goods, for a delay, however long, if they are safely kept, unless they have been demanded of the carrier, and their delivery refused.

(Syllabus by the Court.)

Error from Circuit Court, Greenbrier County; J. M. McWhorter, Judge.

Action by Ryland & Rankin against the Chesapeake & Ohio Railway Company. Judgment for plaintiffs. Defendant brings error. Reversed.

*See monograph appended to *Outland v. Seaboard Air Line Ry. Co.* (N. Car.), 10 R. R. R. 476, 33 Am. & Eng. R. Cas., N. S., 476.

Ryland & Rankin v. Chesapeake & O. Ry. Co

Simms & Enslow, for plaintiff in error.

Gilmer & Gilmer and H. L. Van Sickler, for defendants in error.

McWHORTER, J. Ryland & Rankin filed their declaration in the clerk's office of the circuit court of Greenbrier county against the Chesapeake & Ohio Railway Company, averring that on the 14th day of September, 1900, plaintiffs shipped from White Sulphur Springs, in said county, by the defendant railway company, to the city of Newark, N. J., a box containing certain goods in the declaration described, of the aggregate value of \$418.21, and that said defendant on the said day undertook and faithfully promised to take care of the said goods and chattels, and safely and securely carry and convey the same on and by the railroad cars of said defendant from the said White Sulphur Springs to the said city of Newark, N. J., and there safely and securely deliver the same for the said plaintiffs; that, although the said defendant had received the said goods and chattels for the said purpose, yet, not regarding its duty as such carrier, nor its promise and undertaking, it had not taken care of the goods and chattels, and safely and securely conveyed them and delivered them at the said city of Newark, N. J., but had so carelessly and negligently behaved and conducted itself with respect to the said goods and chattels that, by and through the mere carelessness, negligence, and improper conduct of the defendant and its servants, said goods and chattels, being of the said value, afterwards, on the said day and year, became and were wholly lost to the said plaintiffs. The declaration contains three counts, all substantially the same; each count closing with the allegation that the goods were wholly lost to the plaintiffs. The defendant entered its general plea. A jury was impaneled, and the case tried, and a verdict rendered in favor of the plaintiffs for \$418.21. The defendant filed its bill of exceptions, certifying all the evidence taken in the case, and showing that the defendant had moved to set aside the verdict and grant it a new trial because the verdict was contrary to law, and because of improper instructions given the jury, which motion the court overruled, and refused to set aside the verdict, and entered judgment thereon.

It appears from the evidence introduced by the plaintiffs that the box containing the goods which were shipped was tendered by the defendant on the 28th of November, 1900, to La Pierre Manufacturing Company at its place of business in the city of Newark, N. J., who refused to receive it; La Pierre Manufacturing Company being the consignee named on the box, and to whom the evidence shows the box was shipped, although the declaration fails to disclose the name of the consignee of the goods. The declaration is a declaration for the loss of the goods, and yet the evidence shows

Ryland & Rankin v. Chesapeake & O. Ry. Co

that the goods were not lost; hence they must be yet in the custody and care of the defendant. Instructions Nos. 1, 2, 4, 5, 6, and 7 given for plaintiffs, as well as instruction No. 1 offered by defendant and refused, are all based upon the theory of the declaration, that the box was lost, and there is no evidence in the case upon which to base any such instructions; and therefore plaintiffs' instructions were improperly given, and defendant's instruction No. 1, of the same character, was properly refused. The only instruction offered which was proper to be given was defendant's instruction No. 2, which was refused by the court, and is as follows: "The court instructs the jury that if they find from the evidence that the defendant or any one else offered to deliver to the consignees, La Pierre Manufacturing Company, at their place of business in Newark, New Jersey, the box shipped by Ryland & Rankin on September 14, 1900, from White Sulphur, and the said manufacturing company refused to receive the same, then you should find for the defendant." This instruction was in line with the evidence given in the case. The goods were never demanded of the defendant by the consignors, and the consignee had refused to receive the box when tendered to it. On the 30th of November, 1900, Ryland & Rankin wrote to R. H. Boatright, agent of the defendant, referring to the fact that they had on the 22d of October advised the defendant that La Pierre Manufacturing Company had not received the goods, and that, unless they were delivered to them on or before the 1st of November, the goods would not be accepted, and stating that they had that morning received advice from the La Pierre Manufacturing Company that defendant had endeavored to deliver to them a package on the 28th, which they presumed was the package containing the goods shipped on the 14th of September, and that they had refused to receive the same, and they thought the La Pierre Manufacturing Company was right in so doing, and closed by saying, "You will confer a favor on us by having this matter adjusted immediately and send us check to cover the amount of invoice." They did not demand the goods, but demanded of the defendant that it pay the invoice price of the goods; treating it as a conversion of the goods, which they could not do until after making a demand, and a failure or refusal on the part of the defendant to deliver the goods. Section 775, Hutchinson on Carriers, pp. 927, 928, says: "Delay on the part of the carrier does not constitute a conversion of the goods, no matter how long continued, so as to make him liable for their value; and, so long as the goods remain in specie, however much they may be depreciated in value, the consignee or owner must receive them when tendered, and can recover from the carrier only the damages which he has sustained by the delay. Nor will a voluntary acceptance of the goods, when there has been inexcusable delay on the part of the carrier in their delivery,

Halverson v. Seattle Electric Co

preclude the owner from a recovery of whatever damages he may have sustained thereby." And authorities there cited. And the same writer, in treating of the duties of common carriers in section 328, says, in part: "But as to this implied contract or duty, his responsibility is only that of an ordinary bailee for hire; and, if he fail in the performance of it, he becomes liable for only such damages as the bailor may have suffered by his negligence. Although he may have delayed the carriage for an unreasonable length of time, the bailor is still bound to receive the goods, when tendered where the delivery is required to be made, and cannot refuse them, and hold the carrier liable for their value. And though the carrier may delay ever so long, the owner cannot charge him with a conversion, or for value of the goods, if they are safely kept, unless they have been demanded of the carrier, and their delivery refused. But if by the unreasonable delay they have deteriorated, or their market value has fallen, or they arrived too late for the market, he may hold him liable for the damages. And in an action to recover such damages, he may recover for any reasonable expense to which he has been put by the delay."

The evidence wholly fails to support the allegations of the declaration, and, the court having erred in giving the instructions named for plaintiffs, and refused the second instruction for defendant, hereinbefore set forth, the judgment must be reversed, the verdict of the jury set aside, and the cause remanded, and the plaintiffs granted leave, if they so desire, to amend their declaration, or take such other proceedings as they may be advised it is proper to do.

HALVERSON v. SEATTLE ELECTRIC CO.

(Supreme Court of Washington, Sept. 21, 1904.)

[77 Pac. Rep. 1058.]

Street Railways—Proper Speed at Curve—Evidence.

Where a passenger on a street car was killed by being thrown from the front platform, on which he was standing, as the car was alleged to have rounded a curve at a high rate of speed, a witness, who had been a motorman over the same line for six or seven months, was familiar with the speed of cars, and the road throughout its entire length, and was acquainted with the particular curve, and who stated that, in his judgment, the car was running through the curve at the time of the accident at between seven and eight miles an hour, was competent to state at what rate of speed the car ought to have been run into the curve in order to be operated with safety to passengers thereon, and whether a speed of six or eight miles an hour was safe.

Wrongful Death—Earnings of Deceased—Evidence.

Where, in an action for death of plaintiff's husband, plaintiff had been associated with him in the business and kept the books, she was entitled to testify as to her husband's earnings in his business, independent of the books so kept.

Same—Same—Same.

In an action for death, evidence as to decedent's earnings imme-

Halverson v. Seattle Electric Co

diately prior to his death was admissible as tending to show his earning capacity.

Killing of Passenger—Operation of Street Car at Curve—Evidence—Subsequent Experiments.*

In an action for death of a passenger by being thrown from a street car as it rounded a curve, evidence as to the experiments subsequently made with the same car, running through the same curve, was incompetent, where the conditions were not similar to those existing at the time of the accident, though more favorable to decedent's case.

Remarks of Court:

Where evidence offered as to the results of experiments was excluded, remarks of the court with reference thereto, stating the reason why he thought the same inadmissible, were harmless.

Same.

An objection that remarks of the court on the exclusion of evidence were objectionable cannot be reviewed on appeal in the absence of an exception thereto taken at the trial.

Care Due Passengers Not Provided with Seats.

While it is not negligence per se for a street car company to fail to furnish a seat for each of its passengers, where seats are not furnished, and passengers are permitted or required to stand on cars, greater care is required in the operation thereof than where all of the passengers are provided with seats.

Passengers—Contributory Negligence—Standing on Platform.†

It is not negligence per se for a passenger on a street car to ride or stand on the platform.

Passenger Compelled to Stand on Platform—Evidence—Instruction.

Where, at the time deceased boarded a street car from which he was subsequently thrown, there was but little standing room inside the car, and a seat in the front vestibule, which was seven feet nine inches long, was occupied by four persons, two of whom nearest deceased being ladies, and two or three other passengers were standing on the front platform, it was not error, in the instructions, to assume that there was evidence that deceased was compelled to stand on the car or on the platform.

Passenger Compelled to Ride on Front Platform—Negligence—Absence of Gates.‡

Where, in an action for death of a passenger by being thrown from the front platform of a street car, plaintiff alleged negligence, in that the car was run at a high and dangerous rate of speed through a curve, and that defendant failed to provide railings or gates to prevent passengers from falling or being thrown from the cars, it was not error to refuse to charge that the company was not bound to provide gates,

*As to the admissibility of evidence of subsequent experiments in negligent cases, see note, 11 Am. & Eng. R. Cas., N. S., 424; *Schweinfurth v. Cleveland, C. & St. L. Ry. Co.* (Ohio), 15 Am. & Eng. R. Cas., N. S., 73; *Bias v. Chesapeake & O. Ry. Co.* (W. Va.), 13 Am. & Eng. R. Cas., N. S., 616 (experiments in presence of jury at scene of accident); *Konold v. Rio Grande W. Ry. Co.* (Utah), 17 Am. & Eng. R. Cas., N. S., 450; *Whitcher v. Boston & M. R. Co.* (N. H.), 20 Am. & Eng. R. Cas., N. S., 540.

†See foot-note appended to *Augusta Southern R. Co. v. Snider* (Ga.), 9 R. R. R. 622, 32 Am. & Eng. R. Cas., N. S., 622, where all the preceding authorities are collected or referred to; *Rolette v. Great Northern Ry. Co.* (Minn.), 10 R. R. R. 602, 33 Am. & Eng. R. Cas., N. S., 602 (riding on platform of crowded steam car when standing room inside); *Pennsylvania Co. v. Paul* (C. C. A.), 10 R. R. R. 546, 33 Am. & Eng. R. Cas., N. S., 546 (riding on platform of over-crowded car was not contributory negligence per se).

‡As to the duty of a carrier of passengers to provide platform guards, see monograph, 3 R. R. R. 154, 26 Am. & Eng. R. Cas., N. S., 154.

Halverson v. Seattle Electric Co

and, if deceased entered the car on the front platform, the fact that there was no gate closed behind him would not constitute negligence, and to charge that if deceased was permitted to ride on the platform, and defendant negligently failed to provide any gate, railing, or other protection, and thereby the car was rendered unsafe, and defendant permitted the car to become overcrowded, and permitted deceased to be crowded by other passengers on the platform, and the car ran into a curve at the place of the accident at a high rate of speed, without warning to deceased, causing him to be thrown therefrom, plaintiff was entitled to recover.

Wrongful Death—Excessive Verdict.

In an action for death of plaintiff's husband, it appeared that deceased had been in the photograph business for 10 years, during which time his accumulations consisted of a small building on leased land, used as a photograph gallery, in which plaintiff and deceased lived, together with a photographer's equipment and supplies. Plaintiff and her husband had no children, and plaintiff had been with her husband in the business, which earned a net annual income of \$2,000. Plaintiff continued the business after her husband's death, but her earnings therefrom were not shown: *held*, that a verdict of \$20,000 for the death of her husband was excessive, and should be reduced to \$10,000.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Alexia Halverson against the Seattle Electric Company. From a judgment in favor of plaintiff, defendant appeals. Reversed on condition.

Struve, Hughes & McMicken, for appellant.

Walter S. Fulton, Vince H. Faben, and T. D. Page, for respondent.

MOUNT, J. Plaintiff brought this action against defendant to recover damages for the death of her husband, N. P. Halverson. She avers in her complaint that on the 26th day of December, 1902, the said N. P. Halverson became a passenger on one of defendant's cars running from the city of Seattle to Ballard, that the defendant failed and neglected to provide a gate or railing around the platform of said car, and that defendant negligently permitted the said car to become overcrowded with passengers, so that the said N. P. Halverson was prevented from obtaining a seat, and was compelled to stand on the platform of said car. She makes the following allegation of negligence: "That at Stewart street and Western avenue, in the city of Seattle, on the line of defendant's road leading to Ballard, there is a sharp curve and turn; that when said car reached said point, to wit, at about 5:15 p. m. on said day, the motorman in charge of and propelling the same negligently and carelessly failed and neglected to slacken the speed of said car, and negligently and carelessly turned on a heavy current of electricity, without warning or notice to the said N. P. Halverson, and while the said N. P. Halverson was in all things exercising due care, thus negligently and carelessly causing said car to start forward violently, and to run around said bend and

Halverson v. Seattle Electric Co

curve rapidly and with a lurch and jerk, thereby throwing said N. P. Halverson from said car to the ground, and inflicting upon the said N. P. Halverson mortal wounds, from which said mortal wounds the said N. P. Halverson languished, and languishing died, in the city of Seattle, Washington, on the 27th day of December, 1902." She further avers that the deceased was a photographer, having an established business in the town of Ballard, and was able to earn, and was earning, in the prosecution of his business, the sum of \$2,000 per year. Defendant, by its answer, put in issue the allegations of negligence, and those in relation to the earning capacity of the said deceased and the damages suffered by plaintiff, and pleaded the following affirmative defense, to wit: "That on the 26th day of December, 1902, the said N. P. Halverson boarded one of defendant's cars on Western avenue at or near its intersection with Pike street, which said car was bound to the town of Ballard; that said N. P. Halverson entered said car in the front vestibule thereof, and remained standing near the step of said car; that he failed and refused to occupy a seat vacant in said vestibule, but carelessly and negligently stood near the step of said car, smoking a cigar, and without holding to any of the bars or rods placed there for that purpose, and, while said car was proceeding along one of the curves in the track, rendered necessary by the irregularity of the street, said N. P. Halverson fell from said car to the street, and received injuries from which he subsequently died; and this defendant avers that the injuries and damage, if any, sustained by the plaintiff, were caused and contributed to by the aforesaid negligent acts of the said N. P. Halverson." The foregoing affirmative defense was put in issue by the reply. The undisputed facts developed on the trial of the cause are as follows: The plaintiff's husband, N. P. Halverson, had for about three years been engaged with his wife in conducting a photograph gallery in the town of Ballard. Defendant owned and operated a street railway line between the city of Seattle and Ballard, which line, as it leaves the city, runs along Western avenue; starting at the foot of Columbus street, and extending northerly toward Ballard. After reaching Pike street there is a grade of about 6 per cent. to Stewart street; the hill terminating at Virginia street, about one block further on. About 5:15 o'clock p. m. on the 26th day of December, 1902, the said N. P. Halverson offered himself as a passenger on one of defendant's cars at the intersection of Pike street with Western avenue. At this time the seats within the body of the car were filled, and persons were standing in the car, although there was standing room therein for more. Said Halverson was smoking, and boarded the front platform or vestibule of the car. There is no evidence showing the motive of said Halverson in entering the vestibule, except as above stated. The car was about 42

Halverson v. Seattle Electric Co

feet long, and had a vestibule at each end. These vestibules were exactly alike. They were entirely cut off from the body of the car by a partition running from side to side. Immediately in front of this partition was a seat running crosswise the entire width of the car, and facing the front. This seat was 7 feet 9 inches long, and capable of holding five or six persons. Within the vestibule and in the extreme front of the car were the motor box and brake, between which stood the motorman. The vestibule was entered at the opening on either side thereof. Halverson entered the front vestibule at the entrance or opening on the east side, the car facing north. At the time he entered, four persons were sitting on the seat in the vestibule—two women and two men; the women being on the end where Halverson entered. Two or three men were also standing in the vestibule. Halverson stood at the entrance where he boarded the car, with his back to the street, and facing the vestibule. He remained in that position until he fell from the car. He had a package in one arm, and was smoking a cigar. From Pike street to Stewart street the distance is a little more than a block. At the intersection of Stewart street, Western avenue, along which the car was running, changes its direction northerly, and at this point the tracks of defendant's line curve to conform to the direction of the avenue. This requires a double or compound curve, both being curves of large radius. After leaving Pike street, the car proceeded up the hill to Stewart street, and while passing through the curves the said Halverson, at the further curve, fell from the car to the street, striking his head and receiving injuries from which he died the following day. The photograph business conducted by plaintiff and her husband yielded an income of about \$2,000 a year. Halverson had been in the photograph business for about ten years, in Chicago, Seattle, and Ballard, which covered the period of his married life; and the cumulations of those years consisted of a small building on leased land, used as a photograph gallery (in which they also lived), together with the photographer's equipment and supplies. Plaintiff and her husband had no children. At the close of all the testimony the defendant challenged the sufficiency of the evidence to entitle the plaintiff to recover. This challenge was denied, and exception taken. The case was then submitted to a jury, which returned a verdict in favor of plaintiff for \$20,000. A motion for new trial was denied, and judgment entered upon the verdict. Defendant appeals.

Appellant first insists that the court erred in overruling objection to questions propounded by respondent to the witness J. R. Dickson, as follows: "Q. At what rate of speed, in your opinion and judgment, ought a car to be run into that curve, in order to be operated with safety to passengers on it, basing your answer upon your experience as a motorman upon that road?" "Q. You may state whether, in your

Halverson v. Seattle Electric Co

judgment and opinion, based upon your experience as a motorman upon that road, a car, with safety to passengers, can be run into that curve at a rate of speed at from six to eight miles per hour." These questions were objected to upon the ground that the witness had not shown himself competent to testify. The witness had testified that he was familiar with the road throughout its entire length, and knew the curve; that he had been a motorman over this same line for six or seven months; that he was familiar with the speed of cars; and that, in his judgment, the car was running through the curves at the time of the accident at between seven and eight miles per hour. We think this evidence qualified the witness to answer the questions. There seems to be no well-defined rule by which to measure the qualifications of an expert witness, and it rests largely in the discretion of the trial court to determine them. 12 Am. & Eng. Enc. of Law (2d Ed.) p. 427; Traver v. Spokane Street Railway Co., 25 Wash. 225, 65 Pac. 284. Appellant argues other grounds for the exclusion of these questions, but they were not raised by the objection made at the time, and for that reason we shall not consider them. Gustin v. Jose, 11 Wash. 348, 39 Pac. 687.

Appellant next contends that the court erred in permitting Mrs. Halverson to testify over defendant's objection in respect to the income from their business, without producing the books. After Mrs. Halverson had testified that she was associated with her husband, had helped him in the business, and was familiar with the amount of business he was doing, and knew what he was earning prior to his death, she stated the amount at "about \$2,000 per year." She thereupon testified as follows: "Q. What did you base your estimates upon? A. On the books. Q. And the amount of business that you took in? A. Yes, sir. Q. And the receipts that you derived from it—revenue? A. I kept the books." Upon cross-examination she testified as follows: "Q. Well, do you know what your total income was? I suppose your books would show it, would they not? A. My books will show. They will show it just to a penny. Q. That is what I thought would probably be the case. But you don't know yourself just how much you did take in—how much was the gross receipts of your business? A. No, sir." While the witness stated that she based her estimate upon the books, yet it is clear from her whole testimony that she meant she could not state the exact amount of earnings of the business, but that the books would show exactly. It is further clear that she based her estimate upon her knowledge of the business derived from her association therewith, and from the fact that she kept the books. The books, of course, are the best evidence of their contents, but the contents of the books kept by the witness are not necessarily the best evidence of the income of the business. The witness might be

Halverson v. Seattle Electric Co

heard to say that she had not entered every item of income thereon, or that entries were incorrect in certain particulars. In other words, the books, being private memoranda, are secondary evidence; and for that reason the bookkeeper, or any other person with knowledge of the income of the business, could be heard to state the facts independent of the books. *Cowdery v. McChesney* (Cal.) 57 Pac. 221; *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089. It was therefore not error for the court to refuse to strike the evidence of the witness. Appellant also contends that the evidence in regard to the earnings of the deceased prior to his death was incompetent. But under the rule in *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518, and *Turner v. Great Northern Ry. Co.*, 15 Wash. 213, 46 Pac. 243, 55 Am. St. Rep. 883, this evidence which tended to show his earning capacity and income immediately prior to his death, was competent.

Appellant next contends that the court erred in refusing to permit certain witnesses to testify to the results of experiments made by them in running the same car upon which the accident occurred, through the same curve. The witnesses showed that these experiments were made under different conditions from those existing at the time of the accident. They were made at a different time of day, when the electric current would have less load, and therefore more power. The experiments were also made with no load upon the car, and upon a dry rail, while the car at the time of the accident was heavily loaded with passengers, and the rails were wet. It is argued by appellant that the conditions existing when the experiments were made were more favorable to the respondent than the conditions existing at the time of the accident, and that the court therefore should have permitted the results to be shown, notwithstanding the dissimilar conditions. The general rule as laid down by Mr. Freeman in his note on page 375 to *Chicago, etc., R. Co. v. Champion*, reported in 53 Am. St. Rep., at page 357, is as follows: "There has been, until within recent years, some hesitation in receiving evidence of experiments or demonstrations; but the rule is now established that evidence of the results of tests or experiments is admissible, if based upon conditions similar to those existing in the case on trial. In all cases of this sort, very much must necessarily be left to the discretion of the trial court, but the exercise of its discretion will not be interfered with where it has not been abused. From the liability to misconception and error, there can be no doubt that it is essential that the experiments or demonstrations should be made under similar conditions and like circumstances. When this is shown as a foundation for the introduction of experiments as evidence, they ought to be admitted, and the court's exercise of discretion in admitting them ought not to be interfered with." We have no doubt that this is the correct rule. The fact that

Halverson v. Seattle Electric Co

the conditions are more favorable to the test, or less favorable, ought not to change the rule that the experiments must be made under similar conditions and like circumstances. The similarity of the circumstances and conditions must be left to the sound discretion of the trial court, and determined by him subject to review only for abuse. Where the conditions and circumstances are so different or dissimilar as to probably bring about different results, as they evidently were in this case, it is not an abuse of discretion to exclude the results of the experiments.

In passing upon the question of the admissibility of the evidence above referred to, the court said to counsel: "I think that it already appears from the evidence that the amount of power upon these cars during the time of climbing the hill depends upon the number of cars that are climbing other hills, and the number on the road. It seems to me that any tests that might be made would on that account be dissimilar from the conditions that prevailed at the time, and I do not think it is within the knowledge of any person to know where they were located—whether upon grades or off grades—so that any test at any other time would be of very little value, if any, in determining the operation of cars at one time or another." Appellant now insists that this was a comment upon the evidence. The evidence of tests was excluded, and the statement of the court was made as his reason for excluding it. If the evidence had been admitted, and the court had then made the statement, it would, no doubt, have been a comment upon the weight of the evidence; but, where the evidence was excluded, the remarks of the court were harmless. Furthermore, no exception was taken upon the ground that the remarks of the court were a comment upon the evidence, and for that reason the point cannot be now made here for the first time. 8 Enc. Pl. & Pr. p. 272.

Appellant also insists that the court erred in giving instructions Nos. 6 and 8. No. 6 is as follows: "You are instructed that it is the duty and obligation of common carriers for hire to furnish passengers with seats for their accommodation, and, if you believe from the evidence in this case that the defendant received the said N. P. Halverson as a passenger, the said N. P. Halverson thereby became entitled to a seat; and, if he was prevented from obtaining a seat by reason of the car being overcrowded, you are instructed that it was not negligence for said N. P. Halverson to stand or be upon the platform of said car, providing you believe that in standing upon said platform the said N. P. Halverson was exercising ordinary care and prudence, and would have been safe from injury if said car had been run in a careful manner." The substance of the above instruction is repeated in instruction No. 8. It is first argued that there is no obligation to furnish passengers with seats upon ordinary street cars,

Halverson v. Seattle Electric Co

and that the same rule does not apply to street cars as applies to steam railways; and, second, that the instruction assumes that there is evidence from which the jury might find that, owing to the crowded condition of the car, the deceased was compelled to stand upon the platform. We cannot agree with either of these contentions of appellant. The obligation of street car companies to furnish seats for their passengers rests upon the same principle as that of steam railways, viz., the accommodation and safety of their passengers. No doubt, swiftly moving steam railway trains are more dangerous to standing passengers than electric or other motor cars, running less swiftly, and for that reason greater care is necessary upon steam railway trains. But the principle is the same in both cases. Both must care for the safety of their passengers. It would not be negligence per se for a street car company to fail to furnish a seat to each of its passengers; but, where seats are not furnished, and passengers are permitted or required to stand upon cars, greater care is required in the operation of its cars than where all are provided with seats. Nor is it negligence per se for a passenger to ride or stand upon the platform of a car. *Graham v. McNeill*, 20 Wash. 466, 55 Pac. 631, 43 L. R. A. 300, 72 Am. St. Rep. 121; *Railway Co. v. Boudrou* (Pa.) 37 Am. Rep. 707; *Cattano v. Metropolitan St. Ry. Co.* (N. Y.) 66 N. E. 563. We do not think the instructions are subject to the criticism that they assume that there was evidence from which the jury might find that the deceased was compelled to stand upon the car or the platform. But if they may be said to assume such fact, the assumption was correct, because it appears that there was but little standing room inside the car, and that the seat in front, which was seven feet nine inches long, was occupied by four persons, and two or three other passengers were standing on the platform; and, when deceased boarded the car, two women were on the end of the seat next to where the deceased was, and he made a remark, in substance, that he "did not want to climb over ladies."

Appellant next contends that the court erred in giving the following instruction: "You are instructed that if you believe from a preponderance of the evidence that the deceased, N. P. Halverson, was permitted to ride by the defendant upon the platform of defendant's car; that the defendant carelessly and negligently failed and neglected to provide and have on said car a gate, railing, or other protection around the platform thereof, and that thereby said car was rendered an unsafe and dangerous conveyance, in that passengers on said platform were unprotected and liable to be thrown therefrom; and you further believe that defendant permitted said car to become overcrowded with passengers, and failed to provide said Halverson with a seat on said car, but permitted him to be crowded and jostled by other passengers likewise upon said platform; and if you further be-

Halverson v. Seattle Electric Co

lieve that said car ran into said curve at a high rate of speed, without warning or notice to said Halverson; that thereby said car was caused to lurch and jerk as it went around said curve, causing said Halverson to be thrown therefrom, and to receive injuries of which he died—then your verdict will be for plaintiff," etc. And in refusing to give the following instruction requested by appellant: "You are further instructed that there being no statute or law of this state requiring street car companies to provide gates, and have them closed, on the front platform of its cars, the fact, if you should so find, that at the place where the said N. P. Halverson entered said car upon the front platform there was no gate closed behind him, would not constitute negligence upon the part of the defendant company." This latter instruction is, no doubt, correct, when applied to a case where such is the only or principal negligence complained of. But in this case there were other elements of negligence, the principal one of which was running the car at a high rate of speed into a curve where passengers were permitted to stand and were standing, and had no means of knowing the danger, and were not warned to protect themselves against the danger of being thrown from the car. It may not be negligence of railway companies to fail to provide railings or gates to prevent passengers from falling or being thrown from the cars, where they are run at the usual rate of speed upon straight or even tracks, where no such protections are usually required; but when an unusual or high rate of speed is maintained around curves, or over rough and uneven roads, then ordinary diligence requires such safeguards, even if they are not required by positive statute. For this reason, we think the instruction requested would have been misleading, as applied to the facts in this case, and we also think the instruction given fairly stated the law applicable to the facts. Instruction No. 10 requested by appellant, in reference to contributory negligence, was given in substance, and it was therefore not error to refuse the one requested.

The next error complained of is that the court erred in overruling defendant's challenge to the sufficiency of the evidence. We have gone carefully over the whole of the evidence, and, without extending this opinion by a discussion thereof, it is sufficient to say that there was enough in the case to warrant the jury in finding a verdict for the plaintiff.

Appellant contends further that the verdict of the jury is excessive. In this we agree. In cases of this kind the plaintiff is entitled only to actual damages, as nearly as the same can be measured in money. It is difficult, of course, to measure in money the damages which the respondent sustained by the loss of her husband. She lost his society and comfort, and the means of support which he provided. Society and comfort are largely sentimental and incapable of accurate valuation. There were not children left for the

Cheetham v. Union R. Co

respondent to provide for. The means of support which the deceased provided were not large. The evidence shows that the only source of revenue was from their photograph business, conducted by both of them, the net income of which was \$2,000 per year. Respondent continues the business, earning sufficient for her needs, but with what actual returns does not appear. For all the damages which respondent has suffered, we are satisfied that \$10,000 is ample to reward her, and that \$20,000 is so out of proportion to the actual damages as to show, upon its face, prejudice of the jury. For this reason the judgment is reversed and remanded, unless within 30 days from the date of the filing of this opinion the respondent remits the excess of \$10,000, in which event the judgment will stand affirmed. Appellant to recover costs of this appeal.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ., concur.

CHEETHAM v. UNION R. CO.

(Supreme Court of Rhode Island, July 22, 1904.)

[58 Atl. Rep. 881.]

Injury to Passenger—Presumption of Negligence.*

An injury to a passenger by the derailment of a street car is of itself prima facie evidence of negligence on the part of the railroad company, which the latter is bound to rebut by proof that the accident was not due to the carelessness of its employees, in order to escape liability.

Same—Derailment of Street Car—Speed at Curve—Evidence—Experiments.

Where a passenger was injured by the derailment of a street car at a curve, alleged to have been caused by the excessive speed of the car when entering the curve, evidence of experiments conducted under similar conditions for the purpose of determining whether the car would leave the track at the same curve when running at its maximum speed was admissible.

Same—Same—Presumption of Negligence—Rebuttal.

A passenger on a street car was injured by derailment on a dark evening. There was evidence that at the time of the occurrence a strike was in progress among the carrier's employees, and that obstructions had been placed on the track at various points, and several witnesses testified that the derailment was accompanied by a jolt as if an obstruction had been run over. A spike was picked up from the track near the place of the accident, which had the appearance of having been run over, and it was also proved that the car running at its maximum speed could not have been derailed at that point by its speed: *held*, that the evidence sufficiently rebutted the presumption of negligence arising from the happening of the accident.

Action by Mary A. Cheetham against the Union Railroad Company. On defendant's petition for a new trial. Granted.

*See foot-note appended to *Peck v. St. Louis Transit Co.* (N. J.), 11 R. R. R. 16, 34 Am. & Eng. R. Cas., N. S., 16.

Cheetham v. Union R. Co

Argued before STINESS, C. J., and TILLINGHAST and DOUGLAS, JJ.

Comstock & Gardner, for plaintiff.

Henry W. Hayes, Frank T. Easton, and Lefferts S. Hoffman, for defendant.

DOUGLAS, J. The injuries of which the plaintiff complains were caused by the derailment of one of the defendant's electric cars, on which she was a passenger. On the evening of June 13, 1902, the car was proceeding easterly on Warren avenue, in East Providence, when it suddenly left the track, and, after going a short distance, stopped on the macadamized roadway. The plaintiff was prevented from being thrown out by a passenger who sat behind her, but was, thrown violently against the framework of the car, and sustained serious injuries. The defendant denies its liability, and contests the extent of the injuries.

The case is one where the occurrence itself throws upon the defendant the burden of accounting for the accident. It is the duty of a railroad company so to lay out, construct, equip, and operate its road that its cars shall keep upon the track. If a car leaves the track, it is *prima facie* through the negligence of the railroad company; but the company may show in reply that the cause of the accident was not the carelessness of its employees, but some extraneous act which the company could neither prevent nor guard against. *Harris v. Union Pacific R. R. Co.* (C. C.) 13 Fed. 591. This is the defense which is set up in this case, and we think it is made out by a very strong preponderance of evidence. The place where the car left the track was at the beginning of a slight bend in the track, the radius of the curve being 420 feet. The only theory consistent with the presumption of negligence is that the car was run with such speed that it was thrown from the rails on striking this curve. The evidence as to the speed of the car at the time of the accident is contradictory, as is usual in such cases; but the extreme speed capacity of the car is a known quantity, and experiments were made under substantially similar conditions, which seem conclusively to show that such a car running at its highest possible speed upon the curve would keep upon the track. If such a car, lightly loaded, and running at its highest speed, would pass safely around the curve 20 times, we must look for some other cause than excessive speed to account for the derailment which occurred.

The evidence with regard to these experiments was objected to by the plaintiff, but, we think, was properly admitted. The motorman and conductors in charge of the running of the experimental car were experts in that business, and such experiments by experts are always admissible to sustain their opinions, if fairly conducted. *Steph. Ev.* 112; *Eidt v. Cutter*, 127 Mass. 522; *Sullivan v. Com.*, 93

Cheatham v. Union R. Co

Pa. 284, 296. In *People v. Morrigan*, 29 Mich. 4, the complainant testified that his coat had been cut open and his pocketbook taken away. In considering one of the exceptions to the rejection of testimony the court say: "But we think the testimony of the tailor to whom the prosecutor carried his coat to be mended, as to experiments made to see whether such a pocketbook as he described could have been taken out of the pocket in that condition, ought to have been received." And upon this error a new trial was granted. The question in the case at bar was whether the car left the track by reason of being run at an excessive rate of speed. If the witnesses in this case had run their similar cars around the same curve at maximum speed in the course of their experience, and the cars had kept to the track, the fact would have been pertinent evidence. We see no objection to the testimony because the car was run purposely to solve the question. 1 Gr. Ev. (16th Ed.) § 162, p. 3. One very persuasive circumstance corroborates the evidence of the experiments. Several of the passengers, immediately after the car stopped, ran back, and searched the line over which they had come for some obstacle which might have derailed the car. Evidently, in their minds, the speed and the curve did not explain the accident. Some of the passengers also testify that before the car left the track a jolt was felt, as if one of the wheels ran over some obstacle. Another car came up closely behind the one which ran off the track, and the conductor of the second car testifies that going very slowly he felt a similar jolt as he approached the place of the accident. A young man living near by was attracted to the scene, and within a few minutes of the accident picked up from the track a spike, which was handed to one of the conductors, and preserved for some time at the car barn. All the witnesses who saw this spike describe it as partly flattened, and showing marks as if it had been run over. It is in evidence that at the time of this occurrence a strike of some of the employees of this company was in progress, and obstructions had been placed on its tracks in East Providence at different points. In view of all this evidence, it seems that the defendant has abundantly sustained the burden of showing that the accident was not occasioned by its carelessness. The evening was dark, a storm was approaching, and the motor-man could not have seen an object like a spike upon the rail in time to have avoided it. If this was the cause of the accident, the company are in no wise responsible for it. That such was the case we think is supported by evidence, both negative and positive, sufficient to convince any unprejudiced person.

In this view of the case, the exceptions taken to the admission of evidence, which were for the most part trivial and immaterial, need no discussion.

A new trial is granted.

LAUTERER v. MANHATTAN RY. CO.

(Circuit Court of Appeals, Second Circuit, February 1, 1904.)

[128 Fed. Rep. 540.]

Wrongful Death—Action for Damages—Relevancy of Evidence.

Where plaintiff's intestate attempted to board a car on an elevated road at a station after the gate had been closed and the car was moving, and after being carried beyond the station platform fell and was killed, the absence of a railing or guard across the end of the platform cannot be considered a proximate cause of the accident, and evidence as to the construction of the platform was properly excluded, in an action to recover for the death.

Railroads—Construction of Stations—Negligence.*

A railroad company is bound to exercise only such degree or care in the construction of its stations and platforms as is sufficient to protect passengers using ordinary care from injury.

Same—Injury of Passenger—Liability for Failure to Guard against Passenger's Negligence.†

One who voluntarily and unnecessarily exposes himself to a known danger, by attempting to climb on board a moving car, assumes all risks of injury therefrom; and the railroad company is not chargeable with negligence, causing his injury, which results from his falling from the car because of the manner in which its station or platform is constructed.

Same—State Regulation—Construction of Statute.

The New York statute (Laws 1890, p. 1126, c. 565, § 138), which provides that no train on an elevated railroad shall be permitted to start from a station until every passenger upon the platform desiring to enter the cars shall have done so, unless due notice has been given that the

*As to the duties of a carrier of passengers with respect to the safety of stations, platforms and other stopping places, see foot-note appended to *Leveret v. Shreveport Belt Ry. Co. (La.)*, 9 R. R. R. 611, 32 Am. & Eng. R. Cas., N. S., 611, where all the preceding authorities in this series are collected.

As to the care required of a passenger for his own protection, see foot-note appended to *Carroll v. Charleston & S. R. Co. (S. Car.)*, 8 R. R. R. 221, 31 Am. & Eng. R. Cas., N. S., 221; *Dotson v. Erie R. Co. (N. J.)*, 8 R. R. R. 279, 31 Am. & Eng. R. Cas., N. S., 279 (care required in using station platform); *Barker v. Ohio River R. Co. (W. Va.)*, 4 R. R. R. 132, 27 Am. & Eng. R. Cas., N. S., 132; *Clerc v. Morgan's Louisiana & T. R. Co. (La.)*, 4 R. R. R. 690, 27 Am. & Eng. R. Cas., N. S., 690; *Davis v. Paducah Ry. & Light Co. (Ky.)*, 4 R. R. R. 684, 27 Am. & Eng. R. Cas., N. S., 684 (street railway passengers); note, 9 Am. & Eng. R. Cas., N. S., 652; note, 9 Am. & Eng. R. Cas., N. S., 259; *Chesapeake & O. Ry. Co. v. King (C. C. A.)*, 17 Am. & Eng. R. Cas., N. S., 167 (care required of passenger crossing intervening tracks to platform); *Graven v. MacLeod (C. C. A.)*, 14 Am. & Eng. R. Cas., N. S., 305 (care to be exercised by passenger crossing tracks in leaving train at station); *Macon, D. & S. R. Co. v. Moore (Ga.)*, 15 Am. & Eng. R. Cas., N. S., 842 (care to be exercised by passenger on mixed train); *West Chicago St. Ry. Co. v. Manning (Ill.)*, 9 Am. & Eng. R. Cas., N. S., 364 (street railway passengers); *West Chicago St. R. Co. v. McNulty (Ill.)*, 9 Am. & Eng. R. Cas., N. S., 255.

†As to whether it is contributory negligence to board a moving car, see foot-note appended to *Hunterson v. Union Traction Co. (Pa.)*, 8 R. R. R. 927, 31 Am. & Eng. R. Cas., N. S., 927 (street cars); foot-note appended to *Illinois Cent. R. Co. v. Glover (Ky.)*, 8 R. R. R. 911, 31 Am. & Eng. R. Cas., N. S., 911, where all the preceding authorities in this series on the question of contributory negligence in boarding moving team railroad cars are referred to.

Lauterer v. Manhattan Ry. Co

cars are filled, must be given a reasonable construction, and cannot be held to require gates of cars to be opened after they have been closed and a signal to start given, or after they have actually started, because people may thereafter come onto the platform and desire to take the train, which in many cases of daily occurrence would wholly prevent the operation of trains.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the United States Circuit Court for the Southern District of New York, entered in favor of defendant on a verdict of a jury.

F. E. M. Bullawa, for plaintiff in error.
Henry W. Taft, for defendant in error.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. Plaintiff, as administrator, brought this action to recover damages suffered by reason of the death of his son, who was fatally injured by being crushed between the station of defendant's railway at 169th street and Third avenue and a southbound train of cars. Beyond the southerly end of the main platform at this station is a ledge 16½ inches wide, sloping from the side of the station house toward the track. It was not separated from the end of the platform by any rail or guard. Above this ledge the distance between the body of the station house and the body of a car on the southbound track is about 21 inches. The accident happened on the morning of December 22, 1899, at about 20 minutes past 7, when a southbound train had stopped at the station with the rear gate of its forward car about on a line with the end of the station building, facing the platform, from which point said ledge extends.

In view of the extraordinary claims asserted in support of the assignments of error, it becomes necessary to summarize the testimony as to the circumstances attending the accident.

Miss Wurtz testified that on the morning in question, as she opened the door of the station, her attention was attracted to decedent by seeing him hurrying out, and she stepped aside to let him pass; that he brushed past her, and "when he started to run to catch the car the forward gate of the second car was already closed." She further testified as follows:

"There was not any one on the platform besides myself.
* * * The last gate of the first car was open, the first gate of the second car was closed. The car was not in motion. The young man placed his foot on the last platform of the first car. He placed his foot on the car. The car was not in motion."

Joseph G. Frost testified that he was acting as conductor

Lanterer v. Manhattan Ry. Co

on the morning in question, but that he was no longer in the employ of the Manhattan Railway Company; that he duly stopped at said station, took on all the passengers there, closed both gates, gave the signal, and started the train; that, just as the train started, deceased came rushing out, slammed the door and stood there; that a porter held up his hand, and said, "Too late"; that deceased stood there about a minute to get back his breath, and looked at him; that he (Frost) also said, "Too late," and then, all of a sudden, deceased made a dash around the porter, got hold of the stanchion of the car, and got about one-half of his foot on the step over the edge of the platform of the car; that, as soon as he (Frost) saw this, he quickly opened the gate and tried to pull him in, but, before he could do so, deceased turned around and lost his hold, and went down between the car and the station house. He further testified that the gate was closed and the train in motion before deceased attempted to get on, and that he (Frost) did not try to open the gate until after he saw that deceased had got his foot on the platform and that his life was in danger.

William Becker, an employee of Adams Express Company, testified that deceased came behind him, rushing up the stairs, ran by him, pushed him aside, got a ticket, dropped it in the box, ran right ahead past the first door, and swung open the second door; that he (Becker) stood still; that both gates were closed; that, when the cars had gone about two feet, deceased made a leap for the back end of the first car, and the car went a couple of feet, and he slipped and went down between the two cars; that he saw the conductor grab for the deceased to try to pull him on the platform; and that he thought the conductor opened one of the doors.

There was no other testimony as to the manner in which the accident happened, except that of one witness to the effect that she stepped aside to let deceased buy a ticket, because he seemed to be in a hurry.

We think it doubtful whether it would have been error for the court to take the case from the jury on the ground that the practically undisputed evidence conclusively showed that the accident was the direct result of the negligence of the deceased. *Elliott v. Chicago, Milwaukee & St. Paul Ry. Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068, and cases cited.

The testimony of Miss Wurtz, as to the last gate of the first car being open is somewhat indefinite as to time, especially in view of the fact that her attention was diverted part of the time by reason of her turning to let the young man pass and to call to a friend who was with her. But the court gave plaintiff the benefit of the doubt, and submitted the case to the jury, charging them on this branch of the case as follows:

Lauterer v. Manhattan Ry. Co

"If the gate of either platform was open at the time the young man attempted to board the car, it was to a certain extent an invitation to him to enter, and, if the car started before the gate was closed, the defendant was guilty of negligence."

Despite this instruction, counsel for plaintiff has assigned as error the refusal of the court to charge that "the defendant was bound to exercise all the care and skill which human prudence and foresight could suggest." So far as concerns plaintiff's claim that the car was negligently started, the court assumed this perfectly well-settled obligation of law as binding upon the defendant, and in effect charged that, no matter how much care and skill might have been exercised by defendant, if it started the car before the gate was closed, it was negligent.

Error is further assigned to the refusal of the court to receive any evidence concerning the construction of the platform. The theory of counsel for plaintiff on this point seems to be that the court should have admitted evidence as to the absence of a guard or railing shutting off the space beyond the platform, and should have charged the jury that the absence of such railing was negligence. This position is manifestly untenable. It is not the province of a court or jury to reconstruct the defendant's stations upon such theoretical suggestions. If such railing had been provided, and a person had been killed or injured by striking against it, we think it might have been quite as plausibly argued by counsel that the presence of said railing was the cause of the accident, and that, if the space had been left open, such person might have escaped serious injury, by being permitted to fall on the platform ledge, instead of being thrown against the obstruction.

But the vital objection to the evidence offered is that it appears beyond question that the construction of the platform was not the proximate cause of the injury. In support of his contention that the absence of said railing was the proximate cause of the accident, counsel for plaintiff has cited various cases decided in the courts of this state, and especially relies on *Ellis v. New York, Lake Erie & Western Railroad Co.*, 95 N. Y. 546, and *Lilly v. New York Central & Hudson River Railroad Co.*, 107 N. Y. 566, 14 N. E. 503. But in the *Ellis* Case it was held that the immediate effect of the negligent failure of the railroad company to provide buffers on its car "was to put the car in such condition that, in case of collision at the rear, its body must be impelled against the preceding car with a force to which it could offer no resistance, and therefore its absence was the 'causa causans,' * * * the proximate cause of injury." In *Lilly v. New York Central & Hudson River Railroad Co.*, *supra*, a divided court, "after considerable reflection" and "with some hesitation," in a "border" case, held that, where

Lauterer v. Manhattan Ry. Co

plaintiff was knocked off a car through the negligence of servants, the question whether "the failure to have the brakes in good condition does bear such a relation to the happening of the accident as to make it a question of fact for the jury to determine, upon all the evidence in the case, whether the injury would have occurred if the brakes had been in good order and properly set." In each of these cases the defendant sought to escape liability for negligent failure to provide proper appliances or a safe place, by invoking the protection of the fellow servant rule, and the court refused to allow exemption on that ground.

But we are not here concerned with the decisions of the courts of this state on the question of proximate cause, but with the rule in the federal courts. As was said by the New York Court of Appeals in discussing this doctrine in *Condict v. Grand Trunk Railway Co.*, 54 N. Y. 500:

"The rule adopted in Massachusetts and Pennsylvania was also applied in *Railroad Company v. Reeves*, 10 Wall. 176 [19 L. Ed. 909]. Those decisions are in direct conflict with the law as settled in this state, and cannot control the decision of this case."

If counsel for plaintiff had wished to avail himself of a rule such as he claims is established in the New York courts, he was at liberty to bring this action there, instead of resorting to the federal courts.

Counsel for plaintiff pressed upon our attention in the argument of this exception the case of *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485. There the court says:

"Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification, which has grown up in recent years (having been first enunciated in *Davies v. Mann*, 10 M. & W. 546), that the contributory negligence of the party injured will not defeat the action, if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence."

And, subject to said qualification as to reasonable care and prudence, the court approved the following charge:

"Turning, now, to the conduct of Smith, and subjecting that to the same test of reasonable prudence and cautious conduct of a person in his situation, you will understand that, no matter how negligently the company ran this train, or how unreasonably they neglected to provide sufficient safeguards at the crossing, if he brought his death upon himself by his own negligence, his administrator is not entitled to a verdict in this suit."

In the case at bar it cannot be claimed that any negligence

Lauterer v. Manhattan Ry. Co

of defendant was the primary cause of the injury, because the jury have found as a fact that deceased attempted to board a moving train after the gate had been closed. He is thus brought within the universal rule that a person who seeks to recover for a personal injury sustained by another's negligence must not himself be guilty of negligence that substantially contributed to the result. "Where the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary care and caution, that but for such negligence or want of care and caution on his part the misfortune would not have happened, he cannot recover." *Railroad Company v. Jones*, 95 U. S. 439, 24 L. Ed. 506.

But, even if it be assumed that the result of plaintiff's negligence might have been different, if the defendant had provided a railing, yet the failure to provide such railing does not show the failure to exercise reasonable care and prudence. The defendant is not required to provide against accidents resulting either from the reckless disregard by passengers of its reasonable rules, or through their negligent heedlessness of their personal safety. It is only bound to exercise such a degree of care and prudence as is sufficient to protect the ordinary passenger using ordinary care on his part. Here deceased, having voluntarily and unnecessarily exposed himself to a known danger, must be held to have assumed all risks of injury which a careful and prudent person would apprehend is likely to flow therefrom. *Motey v. Pickle Marble & Granite Co.*, 74 Fed. 155, 20 C. C. A. 366; *Scheffer v. Railroad Co.*, 105 U. S. 249, 26 L. Ed. 1070; *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Chicago, St. Paul, M. & O. Ry. Co. v. Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582.

When the negligence of the injured plaintiff is the efficient cause of the accident, defendant is not liable in negligence for any act or omission, where no injurious consequence could reasonably have been contemplated as a result of such omission or act. *Scheffer v. Railroad Co.*, *supra*; *Railroad Co. v. Reeves*, *supra*; *Gould v. Slater Woolen Co.*, 147 Mass. 315, 17 N. E. 531; *Lilly v. New York Central & Hudson River Railroad Co.*, 107 N. Y. 575, 14 N. E. 503. Furthermore, a defendant is not liable, even where it is negligent, provided such negligence is not the proximate cause, but merely a remote cause or condition of the accident. *Railroad Company v. Reeves*, *supra*. "But where, upon all the evidence, the court is able to see that the resulting injury was not probable, but remote, the plaintiff fails to make out his case, and the court should so rule, the same as in cases where there is no sufficient proof of negligence. *McDonald v. Snelling*, 14 Allen, 290, 299 [92 Am. Dec. 768]. In *Hobbs v. London & Southwestern Railway*, L. R. 10 Q. B. 111, 122, *Blackburn, J.*, said: 'I do not think that the question of remoteness

Lauterer v. Manhattan Ry. Co

ought ever to be left to a jury. That would be in effect to say that there shall be no such rule as to damages being too remote.' It is common practice to withdraw cases from the jury, on the ground that the damages are too remote." *Stone v. Boston & Albany Railroad*, 171 Mass. 543, 51 N. E. 4, 41 L. R. A. 794, and cases cited.

Where the question of proximate cause is in doubt, it should be submitted, under appropriate instructions, to the jury; but, where it is not a matter of doubt, it is a question of law for the court. *Elliott v. Chicago, Milwaukee & St. Paul Ry. Co.*, supra; *Southern Pacific Company v. Pool*, 160 U. S. 438, 16 Sup. Ct. 338, 40 L. Ed. 485. In the case at bar there was no question of fact for the jury because, in view of the law already stated, the accident was merely a condition of the proximate cause, and is not one which might reasonably have been foreseen. As Mr. Pollock on Torts says, in discussing proximate cause:

"It follows that if, in a particular case, the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability."

See *Scheffer v. Railroad Company*, supra; *Milwaukee & St. Paul Ry. Co. v. Kellogg*, supra.

In the latter case the Supreme Court says as follows:

"In order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

It follows that, if the court had submitted to the jury the question as to whether defendant was negligent in failing to provide a railing at the end of the platform and they had found thereon in favor of plaintiff, it would have been the duty of the court to set it aside.

Error is further assigned to the refusal of the court to charge as follows:

"If deceased had deposited his ticket and was on the platform before the train had started, it was the duty of the conductor to have held the train until plaintiff's intestate had opportunity to board the train."

This assignment of error is founded upon the provision of section 138 of the railroad law of the state of New York (chapter 565, p. 1126, Laws 1890), and section 419 of the New York Penal Code.

Section 138 provides as follows:

"All trains upon elevated railroads shall come to a full stop before any passenger shall be permitted to leave such trains; and no train on such railroad shall be permitted to start * * * until every passenger upon the platform or station at which such train has stopped, and desiring to board or

Lauterer v. Manhattan Ry. Co

enter such cars, shall have actually boarded or entered the same, but no person shall be permitted to enter or board any train after due notice from an authorized employee of such corporation that such train is full and that no more passengers can be then received."

Section 419 imposes a penalty upon—

"Any conductor, brakeman or other agent or employee of an elevated railroad, who:

"(1) Starts any train or car of such railroad, or gives any signal or order to any engineer or other person to start such train or car, * * * before every passenger on the platform or station at which the train has stopped, who manifests a desire to enter the train has actually boarded or entered the same, unless due notice is given by an authorized employee of such railroad that the train is full, and that no more passengers can then be received."

And section 139 of said railroad law provides as follows:

"Every car used for passengers upon elevated railroads shall have gates at the outer edges of its platforms, * * * and every such gate shall be kept closed while the car is in motion; and when the car has stopped and a gate has been opened, the car shall not start until such gate is again firmly closed."

Counsel for plaintiff asserts in his brief that:

"The deceased was entitled to act upon the belief that the defendant's conductor would open the gate of the car and give him an opportunity to board before permitting the car to start, since he was upon the platform manifesting a desire to enter before the car had actually started."

The court was not bound to charge said request. There was testimony tending to show that, after the gate was closed, deceased rushed out on the platform, and that, when the porter and conductor said, "Too late," he stood still until after the train had started. If the jury believed this evidence, deceased did not "manifest a desire to enter the train" until after it had started.

Furthermore, this court must take judicial notice, from daily experience, of the practical operation of the trains of the elevated railway. If the foregoing provisions are to be interpreted to mean that no train can start until every passenger on the platform, desiring to enter such cars, shall have entered the same, the elevated railway could not run. We all know that in the rush hours of the day there is a continual line of prospective passengers on the platform, signifying, with various degrees of energetic insistence, their desire to enter such cars. If such passengers are "entitled to act on the belief that the conductor will open the gate" after it has been closed, and the conductor should thus act, the railroad would be involved in a dilemma between stopping the car until such gate could be again firmly closed, or inviting intending passengers to assume a dangerous position at the

Cau v. Texas & Pac. Ry. Co

moment when the car was starting. We do not understand that any such impracticable construction has ever been put upon the railway law of this state, and we certainly should not feel disposed thus to interpret it or apply it to the facts found herein.

There is no merit in any of the assignments of error. The judgment is affirmed.

JOVITE CAU, Plff. in Err., v. TEXAS & PACIFIC RAILWAY COMPANY.

(Argued April 8, 1904. Decided May 16, 1904.)

[24 Sup. Ct. Rep. 663.]

Carriage of Goods—Limiting Liability—Loss by Fire.*

An exemption of a carrier from liability for damages caused by fire, expressed in the bill of lading, is valid, although the option or opportunity to ship the goods under the common-law liability was not actually presented to the shipper by the carrier.

Same—Same—Same—Consideration.†

The lack of an independent consideration for an exemption of a carrier from liability for damages caused by fire, expressed in the bill of lading, cannot successfully be urged to void such provisions, although the carrier may have had but one rate, where the consideration expressed was sufficient to support the entire contract made.

Same—Same—Loss by Fire—Negligence—Burden of Proof.‡

The burden of showing that a fire causing the loss of a shipment of cotton was due to the negligence of the carrier or its servants rests on the shipper, where the bill of lading contains a provision exempting the carrier from liability from damages caused by fire.

*See generally, note, 13 Am. & Eng. R. Cas., N. S., 169 et seq.

†As to necessity of a consideration for stipulation limiting carrier's liability, see foot-note appended to *Lake Erie & W. R. Co. v. Holland* (Ind.), 9 R. R. R. 735, 32 Am. & Eng. R. Cas., N. S., 735, where all the preceding authorities in this series are collected.

‡As to the burden of proving the carrier's liability where the contract of shipment limits liability, see *Morse v. Canadian Pac. Ry. Co.* (Me.), 9 R. R. R. 296, 32 Am. & Eng. R. Cas., N. S., 296 (held that where the evidence prima facie indicates that the loss or damage of goods during carriage resulted from any of the excepted causes, the burden of proof is on the shipper to show that the loss or damages actually resulted from the carriers' negligence); *Louisville & N. R. Co. v. Harned* (Ky.), 1 R. R. R. 115, 24 Am. & Eng. R. Cas., N. S., 115 (burden of proving negligence on shipper undertaking care of stock); *Anderson v. Atchison, T. & S. F. Ry. Co.* (Mo.), 3 R. R. R. 42, 26 Am. & Eng. R. Cas., N. S., 42 (burden of proving that delay was caused by carrier's negligence where carrier had contracted against liability for delay not caused by negligence); *Mears v. New York, etc., R. Co.* (Conn.), 3 R. R. R. 668, 26 Am. & Eng. R. Cas., N. S., 668 (burden of proof on carrier where goods are injured by water to show that injury was not due to its negligence); note, 10 Am. & Eng. R. Cas., N. S., 335 (burden on carrier to show that loss did not occur through negligence); note, 18 Am. & Eng. R. Cas., N. S., 424 (burden of proof where shipper goes in charge of live stock); *Hinton v. Eastern Ry. Co. of Minnesota* (Minn.), 11 Am. & Eng. R. Cas., N. S., 125; *Gardner v. Southern Ry. Co.* (N. Car.), 20 Am. & Eng. R. Cas., N. S., 83 (burden of showing reasonableness of agreement fixing value of goods); *Louisville & N. R. Co. v. Gidley* (Ala.), 13 Am. & Eng. R. Cas.,

Cau v. Texas & Pac. Ry. Co

In Error to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Louisiana, entered upon a directed verdict for defendant in an action against a common carrier to recover the value of a shipment destroyed by fire. Affirmed.

See same case below, 51 C. C. A. 76, 113 Fed. 91.

Statement by MR. JUSTICE McKENNA:

This is an action to recover the value of cotton delivered by plaintiff to defendant, to be transported over its railroad from Texarkana, Texas, to New Orleans. The cotton was destroyed by fire while in the custody of defendant.

The action was originally brought in the civil district court of the parish of Orleans, and removed, on the petition of defendant, to the circuit court of the United States for the eastern district of Louisiana. The case was tried to a jury, which, under the instructions of the court, rendered a verdict for defendant, upon which judgment was entered dismissing the suit, with costs. 51 C. C. A. 76, 113 Fed. 91.

The main question presented by the record is the effect of a provision in the bills of lading delivered by defendant to plaintiff, exempting it from liability for damages caused by fire. Incidentally a question arises as to the burden of proof. At the time of the delivery of the cotton there were four bills of lading issued by defendant,—three exactly alike, and the fourth substantially like the other three in all that is material to this case. They all contain the following provision: "That neither the Texas & Pacific Railway Company nor any connecting carrier handling said cotton shall be liable for damages to, or destruction of, said cotton by fire. . . ."

For the purpose of showing the delivery of the cotton to the defendant the plaintiff introduced in evidence the bills of lading, but without prejudice to his claim that the provision quoted was not binding, in the absence of a consideration therefor. The court admitted the bills of lading, with that limitation.

The other evidence in the case was that the bills of lading in blank were obtained from the defendant's agent by plaintiff's agent, and three of them made out by the latter at his office. The record leaves doubtful whether the other bill of lading was prepared by him or by the agent of defendant.

N. S., 214 (burden on carrier to show due care); *Newberger Cotton Co. v. Illinois Cent. R. Co.* (Miss.), 10 Am. & Eng. R. Cas., N. S., 334 (burden on carrier to show that fire was not due to its negligence); *Ward v. Missouri Pac. Ry. Co.* (Mo.), 19 Am. & Eng. R. Cas., N. S., 30 (burden of proof where carrier relies on failure to give notice of claim); *Crawford v. Southern Ry. Co.* (S. Car.), 19 Am. & Eng. R. Cas., N. S., 17; *Mitchell v. Carolina Cent. R. Co.* (N. Car.), 13 Am. & Eng. R. Cas., N. S., 201 (burden of proving negligence); *Paddock v. Missouri Pac. Ry. Co.* (Mo.), 17 Am. & Eng. R. Cas., N. S., 310 (stipulation providing that injury to stock in transit shall be presumed to have been caused by shipper's negligence is valid where there was a consideration).

Cau v. Texas & Pac. Ry. Co

The former, however, testified that he did not know the fire clause was in the bills of lading, and further testified as follows:

A. When I applied to the agent of the Texas & Pacific railroad for a rate to New Orleans on the cotton I was going to ship, he told me I could get but one rate, 60 cents per 100 pounds; that that was the rate of the other roads. And I gave them the cotton because it was the most direct line to New Orleans. I simply went there to get the rate, and I simply gave them the cotton at that rate which they gave me, 60 cents per 100 pounds.

He also testified that he did not want to know the lowest rate; that he asked for the correct rate; he knew there was but one rate, all of the roads having the same, and that it was against the law to give other rates.

The following was the testimony as to the fire clause:

Q. What I mean to say is this: Did you tell the agent of whom you asked for the rate that you did not want any fire clause in any bill of lading which he might issue to you?—

A. No, sir.

Q. Did you tell him that you wanted to ship your cotton without any fire clause in the bill of lading?—A. No, sir; because I did not know it was in the bill of lading.

Q. Therefore you made no application to him, then, for a rate based on a bill of lading not containing the fire clause?—

A. I made no application that way; I made no inquiries; I just asked for the rate.

Q. Allowing that his reply to you was only one rate, was anything said by him as to the different kinds of contracts you could get?—A. No, sir; he never said anything to me at all.

Q. Were you, or not, informed that you could get a contract under which the company would be liable as insurer, practically, and another kind of contract, under which they would not be liable for loss in case of fire?—A. No, sir.

Q. Did you have any information, or did you know that if you wanted to make a choice between these two, that you could do it?—A. No, sir.

The cotton was in the possession of the Union Compress Company when destroyed, to which company it had been delivered by defendant to be compressed, and that company had obtained insurance on it for the defendant, it being the custom of that company to effect insurance for the benefit, and in the name of, each particular railroad compressing cotton at their press. The testimony of the destruction of the cotton is that the Union Compress Company's building and platforms in Texarkana, Texas, were destroyed by fire September 19, 1900, in which the cotton was destroyed with other cotton.

Plaintiff requested instructions of the court which embodied the following propositions:

1. A carrier cannot limit his common-law liability without consent of the shipper, for consideration given.

2. The mere contract of shipment is not such a consideration.

3. The condition usually, though not necessarily, is a reduced rate; but in such case both rates must be offered shipper, and be reasonable, and the shipper given a genuine freedom of choice in making his selection; and if the evidence satisfied the jury "there was no fair alternative or choice offered to plaintiff by defendant as between two rates, under one of which defendant would be liable for the loss of said cotton by fire, and under the other of which he would not be so liable," the fire clause was not binding upon plaintiff, and the jury might "deal with such bill of lading as though it did not contain such clause or stipulation."

4. The burden of proving the reasonableness of the fire clause, and that plaintiff had a fair opportunity to refuse or accept it, rested upon the defendant.

Messrs. W. S. Parkerson and B. K. Miller for plaintiff in error.

Messrs. Charles P. Cocke, William Wirt Howe, Walker B. Spencer, and John F. Dillon for defendant in error.

MR. JUSTICE McKENNA, after stating the case, delivered the opinion of the court:

It is well settled that the carrier may limit his common-law liability. *York Mfg. Co. v. Illinois C. R. Co.*, 3 Wall. 107, 18 L. Ed. 170. But it is urged that the contract must be upon a consideration other than the mere transportation of the property, and an "option and opportunity must be given to the shipper to select under which, the common-law or limited liability, he will ship his goods."

If this means that a carrier must take no advantage of the shipper, or practice no deceit upon him, we agree. If it means that the alternative must be actually presented to the shipper by the carrier, we cannot agree. From the standpoint of the law the relation between carrier and shipper is simple. Primarily the carrier's responsibility is that expressed in the common law, and the shipper may insist upon the responsibility. But he may consent to a limitation of it, and this is the "option and opportunity" which is offered to him. What other can be necessary? There can be no limitation of liability without the assent of the shipper (*New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465), and there can be no stipulation for any exemption by a carrier which is not just and reasonable in the eye of the law. *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; *Bank of Kentucky v. Adams*, 93 U. S. 174, 23 L. Ed. 872.

Cau v. Texas & Pac. Ry. Co

Inside of that limitation, the carrier may modify his responsibility by special contract with a shipper. A bill of lading limiting liability constitutes such a contract, and knowledge of the contents by the shipper will be presumed.

(2) It is again urged that there was no independent consideration for the exemption expressed in the bill of lading. This point was made in *York Mfg. Co. v. Illinois C. R. Co.* 3 Wall. 107, 18 L. Ed. 170. In response it was said: "The second position is answered by the fact that there is no evidence that a consideration was not given for the stipulation. The company, probably, had rates of charges proportioned to the risks they assumed from the nature of the goods carried, and the exception of losses by fire must necessarily have affected the compensation demanded. Be this as it may, the consideration expressed was sufficient to support the entire contract made."

In other word, the consideration expressed in the bill of lading was sufficient to support its stipulations. This effect is not averted by showing that the defendant had only one rate. It was the rate also of all other roads, and presumably it was adopted and offered to shippers in view of the limitation of the common-law liability of the roads.

(3) The carrier cannot contract against the effect of his negligence, and hence it is contended that in the case at bar the burden of proof is upon the defendant to show that the fire was not caused by its negligence or that of its servants. The contention is answered by *Clark v. Barnwell*, 12 How. 272, 13 L. Ed. 985. In that case the bill of lading bound the carrier to deliver the goods in like good order in which they were received, dangers and accident of the seas and navigation excepted. It was held that after the damage to the goods had been established, the burden lay upon the carrier to show that it was caused by one of the perils from which the bill of lading exempted the carrier. But it was also held that even if the damage so occurred, yet, if it might have been avoided by skill and diligence at the time, the carrier was liable. "But," it was observed, "in this stage and posture of the case the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him." The doctrine was affirmed in *Western Transp. Co. v. Downer*, 11 Wall. 129, 20 L. Ed. 160. See also § 218, 2 Greenleaf on Evidence.

Judgment affirmed.

HOLLY v. SOUTHERN RY. CO.

(Supreme Court of Georgia, March 29, 1904.)

[47 S. E. Rep. 188.]

Carriers—Loss of Baggage—Pass.*

One who receives of a railroad company a gratuitous pass over its line, which by its terms is "issued only on condition that the person accepting it assumes all risks of accidents, and expressly agrees that the company shall not be liable, under any circumstances, for any injury to the person, or loss or damage to the property of the person using it," cannot recover of the company the value of baggage lost while traveling on such pass.

(Syllabus by the Court.)

Error from City Court of Atlanta; H. M. Reid, Judge.

Action by A. I. Holly, as next friend of Lillian Leslie Holly, against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Anderson, Anderson & Thomas, for plaintiff in error.

Dorsey, Brewster & Howell, Sanders McDaniel, and J. D. Bradwell, for defendant in error.

CANDLER, J. The plaintiff, as next friend of her minor daughter, Lillian Leslie Holly, sue the Southern Railway Company for damages on account of the loss of a trunk and its contents. The original petition set out merely the delivery of the trunk to the defendant in Washington, D. C., and the receipt of a check therefor, a demand for it in Atlanta, and the failure then and subsequently to comply with that demand, and charged that the trunk was lost by reason of the negligence of the defendant company. By an amendment the allegation of negligence was stricken, and in lieu thereof it was alleged that the plaintiff demanded the trunk of the defendant, and its delivery was refused. From another amendment it appeared that, at the time the trunk was alleged to have been lost, the plaintiff and her daughter were riding over the defendant's line of railroad on a free pass. The defendant, in its answer, denied liability, and averred, "by way of plea in bar" to the action, "that plaintiff was not its passenger in the sense alleged in said declaration, so as to make it legally liable for any loss of her baggage, for that plaintiff at the time was gratuitously on its train, and without the payment of fare; she being allowed to ride upon said train by virtue of a complimentary pass gratuitously furnished her, without any consideration whatever to defendant. Such pass from Atlanta to Washington was allowed her upon the following conditions, which it contained: 'This ticket is issued only on condition that the person accepting it assumes all risk of accidents, and expressly

*See foot-note appended to Northern Pac. R. Co. v. Adams (U. S.), 10 R. R. 575, 33 Am. & Eng. R. Cas., N. S., 575, where all the preceding authorities in this series are collected.

Holly v. Southern Ry. Co

agrees that the company shall not be liable, under any circumstances, for any injury to the person, or loss or damage to the property of the person using it.' * * * These conditions are binding upon the plaintiff, and bar her right to recover for the alleged loss of her baggage." The plaintiff demurred to the portion of the answer which we have quoted, but the demurrer was overruled. At the trial the plaintiff proved the delivery of the trunk to the defendant in Washington; that, upon presentation of the check for it at the baggage depot in Atlanta, it could not be found; that diligent search was made for it then and afterwards by the employees of the defendant company, without result; and that the trunk had never been returned to its owner. It was not shown how the trunk was lost, or that the agents of the railroad company had been in any manner negligent in handling it. The only evidence introduced by the defendant was in support of that portion of its plea which we have already set out. The court, on motion, directed a verdict for the defendant. To this ruling, and to the overruling of her demurrer to the answer, the plaintiff excepted.

From the foregoing it will be seen that the only question presented for our determination is whether, in an action against a railroad company, by one who has ridden over its line on a free pass, to recover the value of baggage alleged to have been lost by it, it is a complete defense to show that, as a condition of the gratuity extended him, the plaintiff agreed that the defendant should not be liable for any loss of property or damage to person which he might sustain while using the pass. In the present case the plaintiff seems to have recognized that the ordinary relation of carrier and passenger did not exist between her and the defendant, for by an amendment she struck the allegation of negligence in her original petition, and stood squarely on the bailment of her property, which, by her own showing, was entirely gratuitous. Regardless of any agreement or condition involved in the issuance of the pass, the defendant, as a gratuitous bailee, could only be held liable for gross negligence, which, under ordinary circumstances, it would be bound to disprove upon the introduction by the plaintiff of evidence of the bailment, and the loss of the property bailed. Civ. Code 1895, § 2896. Stated a little differently, then, the question now before us is, may a gratuitous bailee, as a consideration of the gratuity, stipulate against his own gross or wanton negligence? The precise point involved seems never to have been squarely decided in this state, and, while there are numerous authorities on the subject to be found in the Reports from other states, the conclusions reached by the various courts present, unfortunately, a hopeless conflict of opinion.

It is well settled in Georgia that a railroad company may, by a special contract, change the nature of its liability, provided

Holly v. Southern Ry. Co

the contract be founded upon a sufficient consideration, be reasonable, and be not void as against public policy. It has been held that it may stipulate that it shall be liable only as a private carrier, and not as a common carrier; the consideration of the stipulation being the grant of a reduced rate of freight. *Central of Georgia R. Co. v. Glascock*, 117 Ga. 938, 43 S. E. 931. Upon a like consideration a contract has been held valid which provided that the company should be liable only for gross negligence. *Cooper v. Raleigh R. Co.*, 110 Ga. 659, 36 S. E. 240. These cases are in entire harmony with the principle ruled in *Georgia R. Co. v. Keener*, 93 Ga. 808, 21 S. E. 287, 44 Am. St. Rep. 197, where a contract was held invalid which did not seek to change the nature of the company's liability, but named an arbitrary amount which might be recovered in the event of loss or damage by the defendant's negligence. In the present case the railroad company, in the absence of any agreement, condition, or stipulation, could, as a gratuitous bailee, only be held liable for gross negligence. The plaintiff paid it no fare, and offered to pay it none, but solicited of it the favor of free transportation for herself and her baggage over its line of railroad. This favor it was under no obligation whatever to grant. Why, then, could it not legally impose as a condition to the extension of this favor that she should assume all the risks of the journey, and that it should not be held liable for any loss to her property or injury to her person? Why may not the railroad company say: "I will give you a free ride, and carry your baggage for you, but I will not assume responsibility for the security of your property or the safety of your person. The duties imposed upon me by law to safeguard the persons and property of those whom I am obliged to carry give me all that I can do, and, while I do not object to your riding on my train without the payment of fare, I cannot undertake to assume a responsibility as a result of my courtesy."

The only reason that can be urged against the validity of such conditions to the grant of a free pass is that it is opposed to public policy, and we confess our inability to see the force of this argument. If gratuitous transportation by railroads were of such common occurrence as to involve the public, or any considerable proportion thereof, it might well be said that considerations of public welfare would forbid that the company should in any way restrict its liability in a matter of this sort. But for every gratuitous passenger carried by a railroad company, many are carried who have paid full fare, and to whom the company is due the full measure of extraordinary diligence; and it is a self-evident proposition that negligence as to gratuitous passengers would involve the greater consequences of negligence to passengers who have paid fare. The person riding on a free pass is, in a sense, protected by the fact that on the same train and in the same car with him

Holly v. Southern Ry. Co

are others to whom the railroad company owes the highest degree of care known to the law, and the further fact that any negligence to him necessarily involves the safety of those around whom the law throws a more ample protection than he would otherwise enjoy. In this view of the case, we fail to see how the question of public policy can affect the imposition of conditions to the grant of a free pass, by the terms of which the company is exempted from liability. What we now hold is in no way in conflict with the ruling of this court in the case of *Central of Georgia R. Co. v. Lippman*, 110 Ga. 665, 36 S. E. 202, 50 L. R. A. 673. In that case it was held that section 2276 of the Civil Code of 1895, which provides that a common carrier cannot limit his legal liability by any notice given, either by publication or by entry on receipts given or tickets sold, but that he may make an express contract, by which he will be governed, has no application to a carrier of passengers; and it was further decided that a carrier of passengers for hire cannot by contract exempt himself from liability for his negligence. A broad distinction is to be noted between the *Lippman Case* and the case now under consideration. There the relation of carrier and passenger existed between the defendant and the plaintiff in its full sense, while here there was no consideration whatever for the carriage, and the plaintiff herself, by her petition as amended, treated the transaction out of which the suit arose as a mere bailment, entirely gratuitous in its nature.

As before stated, the various courts of this country hold widely divergent views on the subject now under consideration. We will call attention to a few of the cases which support the ruling now made, and which, in our opinion, afford excellent reasons for our position. In the case of *Quimby v. Boston R. Co. (Mass.)* 23 N. E. 205, 5 L. R. A. 846, it was held that "an agreement by one who accepts a railroad pass purely as a gratuity, that he will assume all risks of accident, of every name and nature, is not against public policy, and will prevent a recovery by him for injuries occasioned by the negligence of the railroad company's servants." It appeared in that case that the pass was issued with a proviso that the plaintiff sign the agreement referred to, but, as a matter of fact, he did not sign it, not having been required to do so by the conductor; and the court held that his failure to sign the agreement was unimportant, for, it was said, "having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not." It was further said in the opinion that the reasoning that the agreement or condition involved was void as against public policy "can have no application to a strictly free passenger, who receives a passage out of charity or as a gratuity. Certainly the carrier is not likely to urge upon others the acceptance of free passes, as the success of his business must

Holly v. Southern Ry. Co

depend on his receipts. * * * The instances cannot be so numerous that any temptation will be offered to carelessness in the management of their trains, or to an increase in their fares, in both of which subjects the public is interested." In *Kinney v. Central R. Co.*, 32 N. J. Law, 407, 90 Am. Dec. 675, it was held that a contract that, in consideration of a free passage, a passenger will assume the risk of injuries to his person from the negligence of the servants of the railroad company, is valid in law, and that a passenger who receives knowingly a free ticket, with an indorsement of such a contract upon it, will be bound by its terms, and cannot recover for injuries sustained from the cause specified. A well-reasoned case on this subject is that of *Muldoon v. Seattle R. Co.*, 7 Wash. 528, 35 Pac. 422, 22 L. R. A. 794, 38 Am. St. Rep. 901, wherein it was held: "A passenger riding upon a free pass which contains conditions limiting the liability of the carrier on account of negligence cannot recover for injuries received through the negligence of the carrier's servant." On the question of public policy, Stiles, J., delivering the opinion, said: "When the intending passenger proposes to the carrier that it do something for him which it is not, under any conceivable circumstances, required by law or duty to do, viz., to carry him without any compensation whatever, and when the whole matter is at the option of either party to agree or not, it is difficult to see why public policy should step in and deny the right of the carrier to limit its chances of loss in the operation, even though a careless servant cause unintentional injury to the passenger. The theory that the granting of passes upon condition like this will tend to demoralize the servants of railway and other carriers, and thereby imperil the limbs and lives of paying passengers, seems to us mere fancy; and yet this is about the only consideration urged by those courts which hold that there is a public policy in the way of such agreements. Absolutely gratuitous passes represent but an infinitesimal portion of the mileage actually traveled, and, of all the passengers carried, but an infinitesimal number are injured by the carrier's negligence. The precautions adopted by managers and employees of land and water transportation companies are not gauged by the fact that there may be free passengers aboard, and never will be, while the doctrine of *respondeat superior* has its present healthy existence." See, also, *Griswold v. New York R. Co.* (Conn.) 4 Atl. 261, 55 Am. Rep. 115; *Wells v. R. Co.*, 24 N. Y. 181; *Perkins v. R. Co.*, 24 N. Y. 196, 82 Am. Dec. 281; *Bissell v. R. Co.*, 25 N. Y. 442, 82 Am. Dec. 369; *Northern Pac. R. Co. v. Adams* (decided February 24, 1904) 24 Sup. Ct. 408, 48 L. Ed. —.

In conclusion we will say that, reasoning by analogy, it seems to us clear that if, as has been held by the Georgia cases to which we have already referred, a railroad company, acting in its public capacity as a common carrier, may by

Boerings v. Chesapeake Beach Ry. Co

special contract relieve itself from liability for any but gross negligence, it may, as a consideration for doing something which it is under no obligation to do, and in the performance of which it would under no circumstances be liable for any thing less than gross negligence, require that it shall, in the event of loss or damage, be held liable under no circumstances whatever. It follows that in the present case the railroad company made out a complete defense, and that the court properly directed a verdict in its favor.

Judgment affirmed. All the Justices concur.

LAMAR, J. (with whom concur FISH, P. J., and TURNER, J.). It appears that the trunk was lost, and there is neither allegation nor evidence of any negligence by the gratuitous bailee. The case at bar does not, therefore, involve a decision on the effect of gross, willful, or criminal negligence, nor do the cases cited deal with injuries or losses occasioned by such negligence. I concur in the judgment of affirmance, but not in all the reasoning of the foregoing opinion.

JOHN D. BOERING and MEARLIN G. BOERING, HIS WIFE, *Plffs.*
in *Err.*, *v.* CHESAPEAKE BEACH RAILWAY COMPANY.

(Argued March 4, 1904. Decided March 21, 1904.)

[24 Sup. Ct. Rep. 515.]

Carriers—Assumption of Risk by Free Passenger—Knowledge of Condition in Railway Pass.*

A stipulation in a free railway pass, requiring the user to assume the risk of injury due to the carrier's negligence, is binding on a person accepting the privilege, although notice of such stipulation may not have been brought home to her.

In Error to the Court of Appeals of the District of Columbia to review a judgment affirming a judgment of the Supreme Court of the District in favor of defendant in an action to recover damages for personal injuries sustained by a passenger on a railway, riding upon a free pass. Affirmed.

See same case below, 20 App. D. C. 500.

The facts are stated in the opinion.

Messrs. Charles F. Carusi, Charles H. Merillat, and Eugene Carusi & Sons for plaintiff in error.

Messrs. Frederic D. McKenney and John Spalding Flannery for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court:

This was an action brought in the supreme court of the District of Columbia to recover damages for personal injuries sustained by Mrs. Boering while riding in one of the coaches

*See generally, preceding case and foot-note.

Boerings v. Chesapeake Beach Ry. Co.

of the defendant, and caused, as alleged, by the negligence of the company. Her husband was joined with her as plaintiff, but no personal injury to him was alleged. The defense was that she was riding upon a free pass, which contained the following stipulation: "The person accepting and using this pass thereby assumes all risk of accident and damage to person and property, whether caused by negligence of the company's agents or otherwise." A trial before the court and a jury resulted in a verdict and judgment for the defendant, which was affirmed by the court of appeals of the district (20 App. D. C. 500), and thereupon the case was brought here on error.

The contention of the plaintiffs is that the company was liable in any event for injuries caused by its negligence to one riding on its trains; and further, that if it were not liable for such negligence to one accepting a free pass containing the stipulation quoted, it was liable to Mrs. Boering, because it did not appear that she knew or assented to the stipulation. The trial court submitted to the jury the question whether she was, in fact, a free passenger, and as the verdict was in favor of the defendant, that question of fact was settled in favor of the company. Under those circumstances the recent decision of this court in *Northern P. R. Co. v. Adams*, 192 U. S. 440, ante, p. 408, 24 Sup. Ct. Rep. 408, disposes of the first contention.

With reference to the second contention, the testimony of the two plaintiffs showed that the husband had attended to securing transportation; that he obtained passes for himself and wife, and that they had traveled on these passes before; that she knew the difference between passes (she called them "cards") and tickets, for on that day her husband had purchased a ticket for a friend who was traveling with them, and she had seen him use both ticket and passes. They further testified that she had not had either pass in her possession, and that her attention had not been called to the stipulation. Now, it is insisted that the exemption from liability for negligence results only from a contract therefor; that there can be no contract without knowledge of the terms thereof and assent thereto, and that she had neither knowledge of the stipulation nor assented to its terms; that therefore there was no contract between her and the company exempting it from liability for negligence. Counsel refer to several cases in which it has been held that stipulations in contracts for carriage of persons or things are not binding unless notice of those stipulations is brought home to such passenger or shipper. We do not propose in any manner to qualify or limit the decisions of this court in respect to those matters. They are not pertinent to this case. They apply when a contract for carriage and shipment is shown. When that appears it is fitting that any claim of limitation of the ordinary liabilities arising from such a contract should not be

Boeringa v. Chesapeake Beach Ry. Co

recognized unless both parties to the contract assent, and that assent is not to be presumed, but must be proved. Here there was no contract of carriage, and that fact was known to Mrs. Boering. She was simply given permission to ride in the coaches of the defendant. Accepting this privilege, she was bound to know the conditions thereof. She may not, through the intermediary of an agent, obtain a privilege—a mere license—and then plead that she did not know upon what conditions it was granted. A carrier is not bound, any more than any other owner of property, who grants a privilege, to hunt the party to whom the privilege is given, and see that all the conditions attached to it are made known. The duty rests rather upon the one receiving the privilege to ascertain those conditions. In *Quimby v. Boston & M. R. Co.*, 150 Mass. 365, 5 L. R. A. 846, 23 N. E. 205, a case of one traveling on a free pass, and in which the question of the assent of the holder of the pass was presented, the court said (p. 367, L. R. A. p. 847, N. E. p. 205):

"Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. *Squire v. New York C. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162; *Hill v. Boston, H. T. & W. R. Co.*, 144 Mass. 284, 10 N. E. 836; *Boston & M. R. Co. v. Chipman*, 146 Mass. 107, 14 N. E. 940."

So in *Muldoon v. Seattle City R. Co.*, 10 Wash. 311, 313, 38 Pac. 995, 996:

"We think it may be fairly held that a person receiving a ticket for free transportation is bound to see and know all of the conditions printed thereon which the carrier sees fit to lawfully impose. This is an entirely different case from that where a carrier attempts to impose conditions upon a passenger for hire, which must, if unusual, be brought to his notice. In these cases of free passage, the carrier has a right to impose any conditions it sees fit as to time, trains, baggage, connections, and, as we have held, damages for negligence; and the recipient of such favors ought, at least, to take the trouble to look on both sides of the paper before he attempts to use them."

See also *Griswold v. New York & N. E. R. Co.*, 53 Conn. 371, 55 Am. Rep. 115, 4 Atl. 261; *Illinois C. R. Co. v. Read*, 37 Ill. 484, 510, 87 Am. Dec. 260. As was well observed by Circuit Judge Putnam in *Duncan v. Maine C. R. Co.*, 113 Fed. 508, 514, in words quoted with approval by the court of appeals in this case:

"The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted."

We see no error in the record, and the judgment of the Court of Appeals is affirmed.

COINE *v.* CHICAGO & N. W. RY. CO.

(Supreme Court of Iowa, April 7, 1904.)

[99 N. W. Rep. 134.]

Ejection of Passenger—Evidence.

In an action by a passenger for wrongful ejection, where the answer denied all the allegations of the petition, as it was incumbent on plaintiff to show that he had a right to be transported on defendant's train, it was proper for him to introduce in evidence a receipt given by defendant's agent to plaintiff when he purchased his ticket.

Contracts—Passenger Tickets—Parole Evidence.*

An ordinary passenger ticket is not necessarily a contract, within the rule excluding oral evidence of the contents of a written instrument.

Ejection of Passenger—Evidence—Harmless Error.

In an action for the ejection of a passenger, admission of testimony that plaintiff stayed in the depot at the place where he was ejected all night, because he could not get a place to stay elsewhere, was, if error, cured by a charge excluding all evidence relative to the matter, and instructing the jury that they should not allow plaintiff damages for staying in the depot, where it was shown that plaintiff stayed at the depot because he could not secure accommodations at the hotel, and there was nothing to indicate that he suffered any physical injury or mental distress on account thereof.

Same—Same—Same.

In an action for ejection of a passenger, testimony that plaintiff was without money when he was ejected, and that he had to wait at the town where he was ejected until banking hours before he could secure money to continue his journey, was not prejudicial, where plaintiff did in fact reach his destination with less than a day's delay, and defendant did not contend that plaintiff should not have been allowed compensation for one day's loss of time.

Same—Same—Same.

In an action for the ejection of a passenger, testimony that plaintiff's expulsion was talked about at his home was not prejudicial, where the court did not include injury to reputation as an element of damage, and excluded from the jury's consideration some of the evidence relating to the rumors, and the verdict was for merely \$100, and some substantial damage in the way of loss of time and injury to feelings was shown.

Same—Same—Same.

In an action for the ejection of a passenger, testimony as to whether the receipt for a ticket introduced in evidence was issued by defendant's agent was not prejudicial, where no question was raised as to the genuineness of the receipt.

Same—Damages—Mental Anguish.

A passenger may recover damages for indignity, humiliation, wounded pride, and mental suffering involved in and resulting from his wrongful expulsion from the train, even though the conductor was not actuated by malice or willfulness.

Appeal from District Court, Boone County; J. R. Whitaker, Judge.

Action to recover damages for being ejected from a passenger train on defendant's railroad. Verdict for \$100. Defendant appeals. Affirmed.

*See foot-note appended to *Choctaw, O. & G. R. Co. v. Hill* (Tenn.), 8 R. R. R. 776, 31 Am. & Eng. R. Cas., N. S., 776, where all the preceding authorities in this series are collected.

James C. Davis and A. A. McLaughlin, for appellant.
D. G. Baker, for appellee.

McCLAIN, J. The facts which the evidence tended to show, so far as they are material to a discussion of the questions argued, were substantially as follows: That plaintiff purchased from defendant's agent in Chicago a ticket for transportation from Chicago to Colo, Iowa, and was carried on that ticket, on defendant's passenger train, to the town of Norway, a station on defendant's road east of Colo, where he was required by the conductor to leave the train on the ground that he had no ticket and was not entitled to transportation, although, as a matter of fact, his ticket, entitling him to transportation to Colo, had been regularly taken up by the conductor soon after the train left Clinton. No question is made in argument as to plaintiff's right to be transported to Colo, nor as to the fact that the conductor acted wrongfully in requiring plaintiff to leave the train at Norway, so that the contention is not as to plaintiff's right to recover, but as to the introduction of evidence and the giving of instructions which may have improperly influenced the jury in determining the amount of damages which should be allowed.

1. Several errors are assigned with reference to the admission of improper testimony. It is urged that plaintiff was improperly allowed, over defendant's objection, to relate a conversation with the agent of defendant from whom plaintiff purchased his ticket. It is difficult to see how this evidence could be in any way material under the issues on which the case was tried, for it was practically admitted on the trial that plaintiff was a passenger on defendant's train, entitled to transportation to Colo. However, as all the allegations of the petition were denied by defendant's answer, and it was incumbent on plaintiff to show that he had a right to be transported on the train, it was proper to introduce in evidence on his behalf, as was done, a receipt given by the Chicago agent to plaintiff when he purchased his ticket; and, as explanatory of the fact of issuing this receipt, it was, perhaps, not improper to state the circumstances under which it was issued, and the reason which led the plaintiff to insist upon such receipt. Without holding, however, that the evidence was admissible, it is sufficient to say that it could not have been prejudicial. We cannot believe that, under the instructions which the court gave to the issues presented to the jury, any weight could have been given by the jury to this evidence. Nor do we think any prejudice resulted to the defendant in allowing plaintiff to testify that he purchased a ticket to Colo. An ordinary passenger ticket is not necessarily a contract, within the scope of the rule excluding oral evidence of the contents of a written instrument; and, even if it were, the witness did not attempt

Coine v. Chicago & N. W. Ry. Co

to state its contents. Plaintiff was allowed to testify, over defendant's objection, that he stayed in the depot at Norway all night because he could not get a place to stay elsewhere; but, if the admission of this evidence was erroneous, the error was cured by an instruction to the effect that all evidence in relation to plaintiff's not being able to obtain lodging at Norway was withdrawn from the consideration of the jury, and that they should not allow plaintiff any damages for staying in the depot building at Norway during the night. Counsel urge that the admission of this evidence was so serious an error that it could not be cured by an instruction to the jury to disregard it, but we do not take this view. All the circumstances had been related to the jury, and it plainly appeared that plaintiff stayed in the depot because he was unable to secure accommodations at the hotel. There was nothing to indicate that he suffered any physical injury or mental distress on this account, and we are not willing to assume that the jury so far ignored the explanation and the instructions given by the judge as to take the fact into account, as increasing the damages allowed to the plaintiff. Plaintiff was allowed to testify, over defendant's objection, that he was without money when he left the train at Norway, and that he was compelled to wait there until banking hours before he could secure money for the purpose of continuing his journey to Colo. As he did in fact continue his journey, and reach Colo with a delay of less than a day, we can hardly see how this evidence could have been in any way prejudicial. Defendant does not urge that plaintiff should not be allowed compensation for one day's loss of time, and certainly the jury was not in any way misled by the evidence objected to. Plaintiff was allowed to testify, over objection, that the fact of his expulsion from the train at Norway was talked about at his home, in Boone; and it is urged that this evidence was prejudicial, in that the jury may have taken it into account, and allowed plaintiff something for injury to his reputation. But the court, in stating the issues, did not include injury to reputation as an element for which damages might be allowed, and by an instruction excluded from the consideration of the jury some of the evidence relating to the rumors at Boone as to plaintiff's ejection from the train. Possibly the particular evidence of plaintiff in reference to this matter was not expressly withdrawn, but we reach the conclusion that no prejudice could have resulted from the admission of plaintiff's testimony in this respect. If the verdict were excessive, as based upon the evidence properly admitted, or if there were other indication of passion or prejudice on the part of the jury, we might conclude that the jury had given some consideration to this immaterial matter; but, in view of the verdict, for \$100 only—some substantial damage in the way of loss of time and injury to the feelings having been shown—we feel satisfied that

Coine v. Chicago & N. W. Ry. Co

the minds of the jurors were not affected by it. A witness was allowed to testify for plaintiff, over defendant's objection, as to the substance of a conversation between him and plaintiff at Norway after plaintiff had left defendant's train; but the court expressly instructed the jury not to consider this evidence, and there was nothing in the conversation which could possibly have prejudicially influenced the jury. And the same conclusion must be reached with reference to objections made to the testimony of another witness with regard to whether the receipt for a ticket, introduced in evidence, was issued by defendant's agent at Chicago. There was no question made as to the genuineness of the receipt, and what the witness said about it could not have affected the result. It is urged that witnesses were permitted, over objection, to testify that the expression of plaintiff's face, and his tone of voice and conduct, after leaving the train at Norway, indicated mental distress and anguish, without stating the facts on which such opinion was based; but, on reading the entire evidence of these witnesses, as set out in the abstract, we reach the conclusion that they showed themselves to be in as good a situation as any nonexpert witness could be, under such circumstances, to testify as to the fact of mental distress of another, and that their testimony was properly admitted.

2. As to the instructions, it is objected that the jury were told that the burden was on the plaintiff to establish all the material allegations of his claim by a preponderance of evidence, without being instructed which allegations were material. But the jurors were told what plaintiff must prove to be entitled to recover, and we cannot imagine that any prejudice resulted from the particular language complained of. It is further urged, however, that, after telling the jury what the plaintiff must prove, the court proceeded to tell them conversely that if they found from the evidence that the plaintiff did not purchase a ticket, or did not present or deliver the same to the conductor, or if they did not find from the evidence that plaintiff was expelled from the train, then their verdict should be for the defendant, and, further, that if the evidence showed that the conductor did not use any force, etc., plaintiff could not recover; thus, as it is claimed, throwing upon defendant the burden of negating plaintiff's right to recover. This form of instruction is certainly not to be approved, but, taking the instructions together, we cannot believe the jury misunderstood the court as to the fundamental proposition of law relating to the burden of proof. Finally it is contended that the court erred in instructing the jury that damages might be allowed for indignity, humiliation, wounded pride, and mental suffering involved in and resulting from expulsion from the train, even though it should appear that the conductor was not actuated by malice or willfulness. Conceding, as we must,

Cotant v. Boone Suburban Ry. Co

under the evidence, that the jury was justified in finding that plaintiff was wrongfully compelled to leave the train, we reach the conclusion that they might properly take into account these elements of damage, if shown to exist, although the act of the conductor was not malicious or willful, but was the result of a mistake on his part. This is an action of tort, and there is no longer any room for argument in this state as to the proposition that, for the tortious expulsion of a passenger from a train, compensation may be allowed, covering these elements of damage. *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa, 314, 24 Am. Rep. 748; *Shepard v. Chicago, R. I. & P. R. Co.*, 77 Iowa, 54, 41 N. W. 564; *Curtis v. Sioux City & H. P. R. Co.*, 87 Iowa, 622, 54 N. W. 339. As is said in *Lucas v. Michigan Central R. Co.* (Mich.) 56 N. W. 1039, 39 Am. St. Rep. 517, "If plaintiff's legal rights were violated by the expulsion from the train, it was for the jury to consider the injury to his feelings that such conduct would be likely to produce, in view of his consciousness that he was without fault, and had a right to remain upon the train to his destination." In *Paine v. Chicago, R. I. & P. R. Co.*, 45 Iowa, 569, the question was not as to expulsion from the train, but as to the use of threatening language, and the instruction held erroneous was with reference to exemplary damages. In *Fitzgerald v. Chicago, R. I. & P. R. Co.*, 50 Iowa, 79, the sole question was as to exemplary damages. In the case before us the court expressly excluded any consideration of exemplary damages, and we see no error in the instruction.

No error appears which could have prejudicially affected the result of the trial, so far as defendant is concerned, and the judgment of the trial court is affirmed.

COTANT v. BOONE SUBURBAN RY. CO.

(Supreme Court of Iowa, April 6, 1904.)

[99 N. W. Rep. 115.]

Injury to Passengers—Defective Exit from Terminal—Stile—Construction on Adjoining Property by Third Person—Liability of Carrier.

A railroad company is liable for injury to a passenger from a defective stile erected by a third person to provide a passage over a fence separating the company's right of way from adjoining property, and used by the company's passengers to its knowledge, though the portion of the stile on which the injury occurred was on the adjoining property, on which the company had no right to enter.

Damages—Future Disability—Sufficiency of Evidence.

In a personal injury case, the evidence showed that plaintiff was suffering from his injuries at the time of the trial, and experts testified that his injury would probably be permanent. He himself testified that he was earning \$50 a month before the injury, and had not been able to earn more than \$10 since: *held* sufficient to warrant an instruction as to allowing damages for future disability.

Cotant v. Boone Suburban Ry. Co**Injury to Passenger—Existence of Another Exit—Question for Jury.**

In an action by a passenger for injuries from a defective stile leading from the railroad company's terminal grounds, evidence that there was an opening in the barb-wire fence inclosing the grounds, some forty rods away, but not at a place which afforded a reasonable means of egress, and another opening four or five hundred feet away, which was not in sight, renders the question whether there was another reasonably safe and accessible place of exit, which the passenger was negligent in not taking, one for the jury.

Same—Defective Exit from Terminal—Stile Constructed on Adjoining Property by Third Person—Liability of Carrier.

Where the owner of pleasure grounds, separated from the railroad company's right of way by intervening ground, erects a defective stile across the fence dividing the right of way from such intervening tract, and the company's passengers use the stile to its knowledge, and in obedience to its implied invitation, the company is liable for an injury to a passenger therefrom.

Appeal from District Court, Boone County; W. S. Kenyon, Judge.

Action at law to recover damages for personal injuries received by plaintiff, due, as is alleged, to defendant's negligence in maintaining an exit from one of its terminals. Trial to a jury, verdict and judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Goodykoontz and Dowell & Parrish, for appellant.
C. T. Cotant and Ganoe & Hollingsworth, for appellee.

DEEMER, C. J. Defendant owns and operates an electric railway from the city of Boone to the Des Moines river, near what is known as the "High Bridge" of the Chicago & Northwestern Railway, and on the 4th day of July, 1901, was carrying passengers over the said line for hire. The west or river end of this railway ran for some distance parallel to, and immediately north of, the right of way of the Chicago & Northwestern Railroad Company, and the rights of way of the two companies were separated by a wire fence. Just prior to the 4th day of July, 1901, one Spraker, who owned some land south of the steam railway right of way, which he used as pleasure ground, constructed a stile over this wire fence, which was made by placing two ladders, each 8 or 10 feet in length, and 14 or 16 inches in width, in such a position as that two ends met over and above the fence, while the other ends were set in the earth on either side thereof. Boards running parallel with the sides of the ladders were nailed thereon, and strips or cleats at short intervals were fastened to these boards. There were no railings or hand-rails, and no lateral supports. Plaintiff took one of defendant's trains in the city of Boone, rode out to the western terminal at or near the Des Moines river, alighted from the car, and, seeing this stile, which was near where the train stopped, attempted to pass over it, and, as he started to descend from the top, caught his foot in such a way as that he was thrown to the ground, and received the injuries of which

Cotant v. Boone Suburban Ry. Co

he complains. He said on the witness stand that as he took the second step down, and placed the weight on his foot, something broke or turned with him, causing him to lose his balance and to fall to the ground; that his foot was caught and held, so that his head and shoulders struck the ground. The alleged grounds of negligence are that "the said stile was without railing or means of lateral support, and that the defendant, its agents or servants, so carelessly and negligently constructed, appropriated, maintained, and used said unsafe and dangerous ladder and stile, and so negligently and carelessly failed, refused, and neglected to assist plaintiff at any time or in any manner in getting over said ladders or stile or barb-wire fence, in departing from the defendant's said grounds, and so failed, refused, and neglected to provide safe means of egress and ingress from or to said grounds, as to cause each and all of the damages set out in the petition; that said stile or ladder was so defectively constructed of light and defective timber as to break and give way, and thus throw plaintiff to the ground and break his leg, causing the injury complained of." Defendant denied any negligence on its part, and pleaded contributory negligence on the part of the plaintiff. Many points are relied upon for a reversal, the more important of which we shall consider in the order presented by appellant's counsel in their brief.

The first proposition made by them is that as defendant did not erect the stile, had not assumed control thereof, and had no right to enter upon the land of the steam railway, either to inspect or to repair it, it owed plaintiff no duty with respect thereto, and cannot be charged with negligence either in the construction or maintenance of this device. The trial court gave the following, among other instructions: "You are instructed that, after completing its road, defendant was under no obligations to build or erect a stile or stairs over the fence from the right of way leading over and into the right of way of the Chicago & Northwestern Railway; but if you find from the evidence that said stile in question was constructed partly on defendant's grounds and partly on the grounds of the Chicago & Northwestern Railway Company, and that the same was used by the passengers from defendant's cars as the usual means of egress from said grounds, and such fact was known to defendant, and defendant permitted the same, and there was no other reasonable or safe way of egress from said grounds, then the fact that said stile was partially upon the grounds of the Chicago & Northwestern Railway Company would not relieve defendant of the obligation to exercise ordinary care in keeping said stile in a reasonably safe condition, if it allowed the same to remain and be used as the only reasonable means of egress from its grounds." From the statement already made, it will be observed that the accident occurred on that part of the stile which was over and upon the right of way of the Chicago &

Northwestern Railroad, and it is contended that defendant's responsibility ceased when the passenger passed upon the ground of another carrier; that, at most, it was under no other duty to the plaintiff than to warn him of danger of which it had notice or knowledge, and that its liability is not greater than if the stile had been erected jointly by the steam railway company and the defendant. The defendant did not erect the stile, and there is no evidence that the Chicago & Northwestern Railroad Company had anything to do with it. Little need be said in support of the proposition that this stile was a dangerous contrivance. The jury so found, and we have no doubt of the correctness of its finding. But defendant strenuously insists that, as it had no right to enter upon the grounds of the other company to repair the device, it cannot be held liable for any injury that may have resulted from the use thereof. Ordinarily this proposition is true, but it must be remembered that this contrivance, while partly on or over the land of the Chicago & Northwestern Railroad Company, was a single, complete device, and formed a continuous passageway over the fence; and if defendant invited its passengers to use it, either expressly or by implication, it was bound to at least ordinary care in seeing that it was fit for the purpose intended. That it had no right to go upon the grounds of the Chicago & Northwestern Railroad Company to make inspection or repairs is not controlling. Its passengers were not bound to ascertain at their peril what part of this stile was on the premises owned by another company, and what right defendant had to use it. Defendant undoubtedly had the right to make arrangements with this other company for the construction of a stile, and for permission to its passengers to cross its right of way; and, having invited the traveling public to use the device, it will not be permitted to say that it had no right to erect part of the contrivance upon grounds of another company. It will not do to say that the traveling public must inquire in such cases as to the right the carrier had to pass upon the grounds of another company to make repairs. This contrivance was used by defendant's passengers alone. It was not built to accommodate the steam railway or its passengers. The use made of the railway right of way was permissive only. That company had no interest in the device, did not profit therefrom in any way; and was not using it for the benefit of its patrons. It did not owe the plaintiff or the defendant company any duty whatever with reference to this stile, and the plaintiff was not going upon its grounds for the purpose of taking its trains, or for any other purpose than simply to cross them. In so doing, he was nothing more than a licensee, and the steam railway company was under no obligation to look after his safety in coming upon its premises. The use made of the stile was for the joint benefit of the defendant company and the owner of the pleasure grounds.

Cotant v. Boone Suburban Ry. Co

The jury was justified in finding that the defendant company knew that it was being used by its passengers, and that it was in a dangerous condition. It was also justified in finding, on account of its position and the manner in which defendant stopped its trains and operated its road, that there was an implied invitation to its passengers to use the device in going to the High Bridge and to the picnic grounds of Spraker, the man who constructed the stile. Had the contrivance been constructed by the defendant and the Chicago & Northwestern Railroad Company jointly for the use of the passengers of either line, both would undoubtedly have been liable for an injury received by a passenger. The rule seems to be "that the depot and connected grounds, visited by coming and going passengers, should be fitted up with a careful regard for their comfort and safety. The approaches, the tracks around the platform for entering and leaving the cars, the passages of the cars, every spot likely to be visited by passengers seeking the depot, waiting at it for its trains or departing, should be made safe, and kept so." Bishop, *Noncontract Law*, § 1086. See, also, *Lucas v. Pennsylvania Co.* (Ind. Sup.) 21 N. E. 972, 16 Am. St. Rep. 323, and cases cited. Here there was no liability on the part of the steam railway company, but the situation was such as to make it natural for a person alighting from defendant's train as plaintiff did, intending to go to the bridge or to the pleasure grounds, to use the stile in passing over the fence. Defendant was bound to know that persons alighting from its trains would likely use this device in passing to their destination, and it was its duty to use at least ordinary care in seeing that it was properly constructed and in good repair. The following cases lend support to our conclusions on this point: *Cross v. Lake Shore Co.* (Mich.) 37 N. W. 361, 13 Am. St. Rep. 399; *Collins v. Toledo Co.* (Mich.) 45 N. W. 178; *East Tenn. Co. v. Watson* (Ala.) 10 South. 228; *Delaware Co. v. Trautwein* (N. J.) 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442.

2. The defendant asked an instruction to the effect that, if the jury found the injury was due to a defective step or board in the stile, it would not be liable, unless it knew, or in the exercise of ordinary care should have known, of this defective condition. This thought was embodied in one of the instructions given by the trial court, and defendant has no cause of complaint.

3. Instruction 10, which reads as follows, is complained of: "If you find from the evidence that the stile in question was constructed partly upon the ground of defendant company, and that the same was ordinarily and generally used by those who were passengers on defendant company's cars as a means of egress from said grounds, where the railway of defendant terminated, and that there was no other reasonable means of egress from said grounds, and that said defendant

Cotant v. Boone Suburban Ry. Co

company knew that said stile was so used by passengers upon its cars in leaving said grounds, and that it permitted them to do so; and you further find that said stile, by reason of its narrowness, or by reason of the fact that there was no railing thereon, or by reason of the fact that said stile was constructed of light and defective lumber, if such you find the fact to be, was not such means of egress from said grounds as an ordinary person would provide under similar circumstances—you will be justified in finding the defendant guilty of negligence, as charged. If, however, you find that the said stile was such as an ordinary person would employ under similar circumstances as a means of egress from said grounds, then there would be no negligence upon the part of defendant." The criticism is that there was no evidence upon which to base it. Suffice it to say that we find in the record ample testimony to justify the instruction.

4. Instruction 19, relating to the measure of damages, is also challenged. It reads as follows: "If you find him entitled to recover, he should be allowed a fair and reasonable compensation for his injuries. In estimating his damage, no precise rule can be given for the amount to be allowed, as they are not in their nature susceptible of exact money valuation. You are to use your own sense and judgment, and be guided by the evidence, in allowing him such sum as will reasonably compensate him. In making up this amount, you should award, as may appear from the evidence, the reasonable value of the time lost because of the injury, the amount he has paid for medical attendance and nursing, and fair compensation for the bodily pain and suffering caused by the said injury; and if you further find that plaintiff's injuries are permanent, and will, to some extent, disable him in the future, and cause him pain and suffering hereafter, you should also allow him such further sum as, paid now in advance, will reasonably compensate him for such future disability, pain, and suffering as the evidence shows it is reasonably probable will result to him in the future from such injuries." The first point made with reference to this is that there is no testimony on which to base an allowance for future disability. The evidence clearly shows that plaintiff was suffering from his injuries at the time of trial, and the experts testified that his injury would probably be permanent. Plaintiff testified that he was earning \$50 per month before the injury, and had not been able to earn more than \$10 since. This was sufficient to take the case to the jury. *Smith v. Sioux City (Iowa)* 93 N. W. 81; *Winter v. R. R. (Iowa)* 45 N. W. 737; *Ashley v. Sioux City (Iowa)* 93 N. W. 303. Next it is argued that the instruction runs counter to the rules announced in *Fry v. R. R.*, 45 Iowa, 416, and *Laird v. R. R.*, 100 Iowa, 336, 69 N. W. 414. A reading of these cases will sufficiently demonstrate the incorrectness of this proposition. Abstractly considered, the instruction has support in *Baily v.*

Cotant v. Boone Suburban Ry. Co

City, 108 Iowa, 20, 78 N. W. 831; Miller v. Boone Co., 95 Iowa, 5, 63 N. W. 352; Smith v. Sioux City, supra.

5. Lastly it is argued that the verdict is contrary to the instructions. The principal contention here is that there was another means of egress from the defendant's grounds, whereby plaintiff could have reached his destination with safety. There was testimony to the effect that there was an opening in a barbed-wire fence 40 rods away, but it was not a place which afforded a reasonable means of egress from the defendant's terminal. Another opening in the fence, 400 or 500 feet away, was spoken of by one witness, but it was not in sight, and the witness said that it may have been closed on the day of the accident. It was clearly a question for the jury to say whether or not there was another reasonably safe and accessible place of exit from the grounds where the railway terminated, and as to whether or not plaintiff was negligent in not taking it.

In conclusion, we may say that the case was submitted to the jury on two theories: One, that the stile, by reason of its narrowness, or for want of railings, or because it was constructed of light or defective materials, was not such means of egress as an ordinarily prudent person would provide, in which event defendant might be found guilty of negligence; and the other, that the injury was due to a defective board in said stile, in which event defendant would not be guilty of negligence, unless it knew, or in the exercise of reasonable care should have known, of its defective condition. The latter theory was bottomed on the thought that the stile itself was not dangerous, save as it had a defective board. What we have said in the second division of this opinion has reference to this last contention. On the other proposition, defendant was liable for the defective condition of the stile, although it was erected by a stranger. Defendant had full knowledge of the construction of the stile, and impliedly invited its passengers to use it. Under such circumstances, its liability is the same as if it had itself set up and maintained the device. See cases hitherto cited, and McDonald v. R. R., 26 Iowa, 124, 95 Am. Dec. 114; Beard v. R. R., 48 Vt. 101; Gilmore v. R. R. Co. (Pa.) 25 Atl. 774; Watson v. Land Co. (Ala.) 8 South. 770. This rule is bottomed on the proposition that the duty of a carrier of passengers does not end when the passenger has alighted from its cars. It must also provide reasonably safe means of access to and from its stations or terminals for the use of its passengers and the passengers have a right to assume that the means of egress provided are reasonably safe. This duty it cannot delegate to another so as to relieve itself from responsibility. See cases hitherto cited. Defendant's contention that it is not liable because the stile was erected by a stranger is unsound in principle, and not sustained by authority. When it invited its passengers to use this stile,

Dougherty v. Yazoo & M. V. R. Co

it, in effect, represented that it was reasonably safe for the purposes intended; and, when injury occurred by reason of its unsafe or faulty construction, it should not be allowed to shield itself behind another, and to say that it did not know of its defective construction. *Gulf F. R. Co. v. Glenk* (Tex. Civ. App.) 30 S. W. 278, and cases cited.

The instructions were even more favorable to the defendant than it was entitled to. We are not to be understood as approving all of them. Suffice it to say that defendant was in no manner prejudiced either by those given, or by the refusal of the court to give those asked by it. Our observations in the second paragraph of this opinion must be construed with reference to these suggestions.

There is no prejudicial error in the record, and the judgment must be, and it is, affirmed.

BISHOP, J., taking no part.

DOUGHERTY v. YAZOO & M. V. R. CO.

(Supreme Court of Mississippi, May 23, 1904.)

[36 So. Rep. 699.]

Injury to Passenger—Contributory Negligence—Attempting to Pass from One Car to Another.*

Where a passenger voluntarily attempted to pass from one car to another while the train was running at a high rate of speed around a curve, and fell from the train, he was guilty of negligence.

Same—Same—Same—Coercion of Trainmen.

Where a passenger, under coercion or by the direction of the carrier's employees, attempted to go from one car to another while the train was rounding a curve at a high rate of speed, and fell from the train, the question as to whether the passenger was guilty of negligence was for the jury.

Appeal from Circuit Court, Jefferson County; Jeff Truly, Judge.

Action by John C. Dougherty against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The facts as disclosed by plaintiff's evidence are as follows: Plaintiff was in New Orleans, La., and desired to go to Vicksburg, Miss. On February 5, 1898, he bought a railroad ticket, and took passage on defendant's train in the afternoon of that day; and, in order to avoid paying the full fare of \$2 for sleeping-car accommodations to Vicksburg, he and a companion purchased such accommodations to Harris-

*See *Northern Pac. Ry. Co. v. Adams* (C. C. A.), 3 R. R. R. 734, 26 Am. & Eng. R. Cas., N. S., 734 (passenger not deprived of right of visiting dining car by his knowledge of existence of an unvestibled sleeper in train; but the question of his negligence in so doing was for the jury).

ton, a station between New Orleans and Vicksburg, and paid therefor \$1, and proposed to then go into the day coach for the remainder of the trip. Soon after the train started, the sleeping-car porter brought pillows to plaintiff and his companion, saying, "Perhaps you gentlemen would like to have a little nap." Plaintiff himself testified that some time during the night (probably about 10 o'clock) he was aroused by the porter, who said something about transferring, and at the same time informed him that they had passed Harriston; that he picked up his satchels, and they started forward (he in front, the porter next, and his companion behind); that they passed out of the sleeping car, and through another sleeping car; that the train was going fast, and swaying or lurching from side to side; that this was caused by the high rate of speed of the train, and running over a track which had a short curve and was rough; that when he reached the platform of the passenger car he was thrown off by a sudden movement of the train, and received the injuries complained of. The opinion of the court contains a further statement of the evidence.

The principal assignment of error urged is the giving of some instructions for defendant, and the refusal of instructions asked by plaintiff, which are as follows:

"If from the evidence the jury believe that after passing Harriston the porter of the Pullman Palace Car Company, while the train was in motion, requested or directed plaintiff to go forward to a day coach, and that by reason of the curve in the track of the road at that place, and the rate of speed at which the train was then running, the swaying and lurching of the train caused thereby made the attempt on part of plaintiff dangerous, and that such danger was known or ought to have been known to said porter, and that plaintiff was thrown from said car by the violent motion, swaying, or jerking of said train, caused by said rate of speed over said curve; that the plaintiff acted with reasonable care and prudence, and as an ordinarily prudent man would have done under the circumstances—then the jury should find for the plaintiff."

"The defendant is responsible for the acts of the porter and conductor of the Pullman Palace Car, done in the scope of their duty, in directing the movement of passengers in finding seats or in going from one car to another."

Plaintiff objected to the giving of the following instructions for the defendant:

"That a passenger on a railroad train, when he passes from car to car, under ordinary circumstances, when the train is in motion, takes the ordinary risk that may attend the act; and if, in so doing, he is hurt, he must show, in order to recover, that his injury resulted from some act of negligence on the part of the defendant."

"That although the jury may believe from the evidence

Dougherty v. Yazoo & M. V. R. Co

that the plaintiff was thrown from the platform of defendant's train by the swaying or lurching of the train, yet, if you further believe from the evidence that this swaying or lurching was not due to the defective condition of the tracks, nor to the dangerous rate of speed, if such has been proven, you should find for the defendant."

"That, before plaintiff can recover a verdict in this case, he must show by a preponderance of the evidence that the cause of his being thrown from the train was due to the defective or unsafe condition of the defendant's track, or from the train being run at a dangerous rate of speed."

Plaintiff's motion for a new trial was overruled, and he appeals.

CALHOON, J. We find nothing in this record to sustain a verdict on any contention that, at the time of the sad accident to Mr. Dougherty, the railroad tracks were defective or out of repair, or that the train was running at a dangerous rate of speed. If there was, these matters were submitted to the jury, and their verdict is controlling in this case.

Mr. Dougherty was thrown from the train in trying to pass from one car to another, in the nighttime, while the train was running on a three-degree curve at a rate of speed of 45 or 50 miles an hour. The misfortune arose from the swaying or lurching of the cars produced by the rapid movement on this curve. If the act of appellant in going from one car to another, under all the circumstances, was voluntary, we think it clear that the accident was the result of his own negligence, and that the law gives him no right to recover damages. If, however, his act was on the coercion of the company's employees, or by their actual direction, the question of his negligence should have been left to the jury on all the evidence. Clearly, there was no coercion, and the only inquiry left is to see if there is such evidence of direction as would warrant the court in sustaining a verdict if returned for plaintiff below on that. We do not find any such evidence. On the contrary, from the very frank and manly testimony of Mr. Dougherty himself, the conclusion is irresistible that his action was entirely voluntary. There was no order, no command, no coercion, no discourtesy. He himself, without demur, protest, or suggestion of delay until the train should stop, led the way; the Pullman car negro porter being behind him with the satchels, and his friend and companion bringing up the rear.

Affirmed.

STEWART et al. v. ARKANSAS SOUTHERN R. CO.

(Supreme Court of Louisiana, April 25, 1904.)

[36 So. Rep. 676.]

Actionable Negligence—Fright.*

Negligence which occasions fright and causes serious personal injury is actionable.

Cause of Accident.

The injury was traced to the accident as found by the jury and judge of the district court after having heard the witnesses.

Appeal—Review—Damages.

It does not appear on appeal that they have erred in this respect. A review of the facts bearing more particularly on the quantum of damages has not resulted in convincing the court that a large amount of damages should be allowed.

(Syllabus by the Court.)

Appeal from Fourth Judicial District Court, Parish of Lincoln; R. B. Dawkins, Judge.

Action by Mrs. W. C. Stewart and another against the Arkansas Southern Railroad Company. From a judgment for plaintiffs, defendant appeals. Modified.

Price & Roberts and Rose, Hemingway & Rose, for appellant.

Barksdale & Barksdale, for appellees.

BREAUX, C. J. The allegation has been made by plaintiff, and it appears to be borne out by the facts, that in an accident she became frightened—was jolted and shocked by the sudden movement of the cars—and she further avers that the result was her miscarriage and consequent illness.

She was married on the 7th day of September, 1902, and in December of that year she was a passenger on the cars of the defendant company. She had been, when the accident happened, in an interesting condition for about two months. It appears that she had gone by private conveyance from her own home to the home of her father, accompanied by her husband and by her father, a day or two prior to the accident in question. The father was the driver of the spring wagon in which they drove. The distance was about 10 miles.

The road was fairly good, the team gentle, the gait was slow, and no jar was felt on the way. We are thus particular in referring to this 10-mile ride because it was a ride taken a few days prior to the short trip on the cars, and defendant in

*Fright as an element of damages, see *Kansas City, Ft. S. & M. R. Co. v. Dalton* (Kan.), 6 R. R. R. 187, 29 Am. & Eng. R. Cas., N. S., 187 (lady carried beyond her destination at night); *Sanderson v. Northern Pac. Ry. Co.* (Minn.), 5 R. R. R. 675, 28 Am. & Eng. R. Cas., N. S., 675; note, 8 Am. & Eng. R. Cas., N. S., 218; note, 7 Am. & Eng. R. Cas., N. S., 584; *Consolidated Traction Co. v. Lambertson* (N. J.), 6 Am. & Eng. R. Cas., N. S., 793 (incidental fright where party is injured); *Tuttle v. Atlantic City R. Co.* (N. J.), 22 Am. & Eng. R. Cas., N. S., 876.

the district court sought to show that the ride over the land was the cause of the miscarriage, and not the short trip on the cars.

After her arrival at her father's house, and until she took the cars, she was in good health and cheerful. Her constitution was strong, and she was not inclined to nervousness.

On Sunday night, the 28th of December, 1902, she boarded the train at Allendale for Jonesboro, her home. On entering the car she was told by the conductor that the train was crowded, and the conductor directed her, and others with whom she was, to take seats in the smoker, as there were no seats in the other passenger compartments of the train.

It was about 9 o'clock on a dark night in winter, and the cars in which she and her husband were riding became separated, i. e. disconnected. The smoker and cars ahead of it went on, and the cars in the rear of the smoker stopped, owing to the disconnection between the two. There were sharp jerks of the car, and jars felt. The car rocked from side to side, up and down. Some of the lamp chimneys were broken, and the glass scattered in and about the smoker. Part of the lights were extinguished. Immediately near, a man was slightly wounded in the face, and showed blood on his face. Plaintiff testifies that she saw the man's bleeding face. The pressure on the bell cord of the car bore against the partition between the smoker and the car in the rear. Pieces of board were thereby torn from the partition and fell to the floor, and the bell cord broke.

There was excitement for the moment. The train was running at the usual speed. The track was not in good order at the place of the accident. The place was near a stream known as "Dogdemonia," near the town of Hodge. It seems that there was mud on the track. Indeed, it was covered with mud. The lateral ditches were small. It follows that the drain was poor.

Some of the witnesses charged the accident to the bad condition of the road. The coupling between the cars was automatic. When the two portions of the train were brought together again, a coupling pin was used, and some of the testimony shows that there was no coupling pin used before the accident.

At the drawhead, to add to the confusion, when the brakeman was about to complete the connection of the cars by putting the pin in its place, several persons thought that he was in some danger and hallooed to him, and thereby created further apprehension among the passengers, as they did not understand the cry of warning.

Plaintiff, as a witness examined under commission, testified that she felt a pain in her back immediately after the accident, and that on her arrival at Jonesboro, about 15 minutes after the accident, she suffered from sick stomach and internal pains; that she was taken to her home; that the next

Stewart v. Arkansas Southern R. Co

day she had hemorrhages. She suffered about a week, and at the end of the week had an abortion. She was confined after the abortion about two weeks, and since that time she say she had not enjoyed good health.

It may as well be stated here that when she testified she, a second time, expected to be a mother, and had been in an interesting condition for some time. This would go far toward showing that the ill effects of the abortion were not as permanent in effect as she thought, as she so soon after the abortion was again expected to have a child.

The contention of the defendant in answer to plaintiff's claims is that she cannot recover for injuries occasioned by fright, and that her injuries were not the natural, proximate, or probable consequence of the accident, nor such as, in law, the defendant is answerable for.

In our view, the injuries were not, as contended by defendant, confined to mere fright. It follows that defendant's defense on this score is not entirely sustained by the facts. We think there was fright, and the testimony is positive that there were consequences to this fright, i. e., that it caused an abortion.

If due care had been taken, and the road had been repaired so as to enable defendant to run it at average rate of speed, the accident might have been avoided.

The shock suffered was sudden and violent, and, immediately after, the pain complained of was felt.

The facts were heard by the jury. They and the judge a quo knew the witnesses, and doubtless knew something of the physicians who testified as experts, and from the facts traced the abortion to the accident. The jury saw and heard their testimony, believed them, and came to the conclusion that defendant is liable.

We have not come to the conclusion that they erred.

The argument that fright, as an element of damages, is not to be considered, has interesting features.

It would perhaps be convenient and expeditious, in determining suits such as this, to adopt the simple rule that no recovery of any kind can be had for fright occasioned by the negligence of another, be the fright what it may, although its consequences are most serious—such as blindness, insanity, and even miscarriage. This is a view (with which we do not agree) expressed in *Mitchell v. Rochester Ry. Co.* (N. Y.) 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604, and other decisions.

There are well-reviewed opinions to the contrary in other jurisdictions, notably *Hill v. Kimball* (Tex. Sup.) 13 S. W. 59, 7 L. R. A. 618; *Purcell v. St. Paul City R. Co.* (Minn.) 50 N. W. 1034, 16 L. R. A. 203.

Under our jurisprudence and special laws, we would not be justified if we were to adopt this simple rule. In our Code (articles 2315-2317) the wise precept of the Institutes

Tuttle v. Cincinnati, etc., Ry. Co

of Justinian are incorporated in substance, to wit: "Juris præcepta sunt, alterum non lædere, suum cuique tribuere," and, as translated and inserted in our Code, its text looks to the liability for all damages.

There is no necessity in this case to go as far as our court has gone heretofore. Even mental distress was considered as ground sufficient to decree damages. *Lewis v. Holmes*, 109 La. 1030, 34 South. 66, 61 L. R. A. 274.

In our case here there was immediate injury felt, and it follows that it was not the question of mere fright, or fright in itself, but fright and a violent shock, to which the illness of plaintiff was traced by sufficient and competent evidence.

The testimony is that immediate personal injury was suffered directly after the accident.

Question of damages presents the next important issue. The facts, in our view, do not warrant a large amount for damages. We cannot charge all the ills felt by plaintiff after the abortion to the accident. The testimony does not sustain a claim for a large amount for damages.

All the illness was not the consequence, we take it, of the abortion, although plaintiff may have thought it was.

While medical experts thought the accident was the cause of the abortion, they have not shown by their testimony that it was the cause of great illness after the recovery from the abortion.

We will not go into details further, for reasons which are obvious. It is safe to say that we think the verdict should be reduced.

For reasons assigned, and the law and the evidence being in favor of plaintiff, it is ordered, adjudged, and decreed that the verdict of the jury be reduced from \$2,500 to \$1,000, and, as amended, the judgment appealed from is affirmed.

TUTTLE v. CINCINNATI, N. O. & T. P. RY. CO.

(Court of Appeals of Kentucky, May 20, 1904.)

[80 S. W. Rep. 802.]

Ejection of Intoxicated Passenger—Liability.*

To render a railroad company liable for the ejection of a drunken passenger for failure to pay his fare, resulting in his injury, his condi-

*As to the duties and liabilities of the carrier with respect to passengers or prospective passengers in a state of intoxication, see *Story v. Norfolk & S. R. Co.* (N. Car.), 9 R. R. R. 631, 32 Am. & Eng. R. Cas., N. S., 631 (railroad can refuse to admit on its trains a person who is drunk, though he has a ticket); *Nash v. Southern Ry. Co.* (Ala.), 6 R. R. R. 780, 29 Am. & Eng. R. Cas., N. S., 780 (liability where ejected intoxicated passenger was injured by another train); *Gaukler v. Detroit, G. H. & M. Ry. Co.* (Mich.), 3 R. R. R. 806, 26 Am. & Eng. R. Cas., N. S., 806 (it was not negligence, as matter of law, to leave ejected intoxicated passenger at certain point); foot-note appended to *Chesapeake & O. Ry. Co. v. Saulsberry* (Ky.), 2 R. R. R. 84, 25 Am. & Eng.

Tuttle v. Cincinnati, etc., Ry. Co

tion must be such as to reasonably indicate that, in view of the surrounding circumstances, he would be liable to the injury.

Same—Same—Evidence.

In an action against a railroad company for injuries resulting from the ejection of a drunken passenger, evidence held not to show that he was in such a condition that he would probably not be able to take care of himself when ejected shortly after noon on a not inclement day in April.

Same—Proximate Cause of Subsequent Injury.

Where a drunken passenger was ejected from a train shortly after noon, and started towards home, but drank more liquor, and became so drunk that he lay out all night near the railroad, and early the next morning went upon the track, where he was injured by a passing train, the injury was not the proximate result of the ejection nor of his condition when ejected.

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

Action by Henry Tuttle against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. A. Morrow, for appellant.

O. H. Waddle and John Galvin, for appellee.

O'REAR, J. Appellant alleges in his petition that he purchased a ticket for passage on appellee's train from

R. Cas., N. S., 84 (care required in ejecting drunken passenger); note appended to *Eidson v. Southern Ry. Co.* (Miss.), 11 Am. & Eng. R. Cas., N. S., 832; *Louisville & N. R. Co. v. McEwan* (Ky.), 2 Am. & Eng. R. Cas., N. S., 438 (liability for assaults upon intoxicated passengers who are disorderly and dangerous); *Haug v. Great Northern Co.* (N. Dak.), 12 Am. & Eng. R. Cas., N. S., 25 (carrier was liable for death of intoxicated passenger carried beyond station and then expelled from depot); *Wheeler v. Grand Trunk Ry. Co.* (N. H.), 23 Am. & Eng. R. Cas., N. S., 84 (effect of passenger's intoxication in violation of statute on company's duty to protect him); *Trumbull v. Erickson* (C. C. A.), 17 Am. & Eng. R. Cas., N. S., 93 (intoxication not contributory negligence per se); *Brown v. Louisville, etc., R. Co.* (Ky.), 10 Am. & Eng. R. Cas., N. S., 55 (carrier was not liable on account of ejection of drunken passenger, for refusal to pay fare, at regular station); *Louisville, etc., R. Co. v. Ellis* (Ky.), 2 Am. & Eng. R. Cas., N. S., 132 (liability for death of intoxicated passenger killed by passing train after being ejected while in a helpless condition); *Edgerly v. Union St. R. Co.* (N. H.), 6 Am. & Eng. R. Cas., N. S., 795 (right to eject intoxicated passenger; and proximate cause of his death on track); *Hamilton v. Pittsburgh, etc., R. Co.* (Pa.), 10 Am. & Eng. R. Cas., N. S., 70 (conductor's act in assisting slightly intoxicated passenger to alight was not the proximate cause of his death); *Wheeler v. Grand Trunk Ry. Co.* (N. H.), 23 Am. & Eng. R. Cas., N. S., 84 (liability for injury to intoxicated passenger caused by fall from train, sufficiency of evidence); *Raynor v. Wilmington, etc., R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 561 (admissibility of evidence of plaintiff's drunkenness at time of ejection); *Bohannon v. Southern Ry. Co.* (Ky.), 23 Am. & Eng. R. Cas., N. S., 548 (liability on account of ejection of drunken passenger at dangerous place); note, 6 Am. & Eng. R. Cas., N. S., 271 (right to refuse to carry intoxicated persons); note, 7 Am. & Eng. R. Cas., N. S., 313 (admissibility of evidence of rule forbidding car drivers to allow intoxicated passengers to ride on front platform, where plaintiff's evidence tended to show that he was pushed from car by its driver).

Somerset to Burnside; that he was at the time drunk and practically helpless, mentally and physically; that he boarded the train; that his ticket was taken from him by some employee of the train, or was misplaced by him, but that he is unable to say which; that the employees of the train, knowing his condition, negligently ejected him from the train at a point remote from any station or dwelling, in a dangerous place, and there left him; that while in this helpless condition he wandered onto the railroad track to reach shelter, and while there was struck by a passing train and injured. His proof tended to establish that he did purchase the ticket, and was at the time more or less drunk. He was able to get on the train and to control his own movements. When the conductor asked him for his ticket after the train had started, he was unable to produce it. He refused to tell the conductor where he was going. A brakeman attempted to help him find his ticket, but it was not found. Appellant did not pay, or offer to pay, his fare. Thereupon the train was stopped, and he was invited to get off, which he did. The weather is not shown to have been inclement, the season was in the month of April, and the time of day was shortly after noon. Appellant had with him a jug of whisky. He was not so drunk but what he remembered all that was recited above. He knew about where he was when he left the train, and started in the proper direction to reach his home, but he admits that he took more of his whisky, and continued to do so at intervals. He became so drunk that he lay out all night in the vicinity of the railroad track. Early the next morning he wandered onto the track, sat down on its edge, and went to sleep. It was then that he was injured by the passing train, whose operators were unaware of his presence or condition, so far as anything in the record shows. At the conclusion of plaintiff's evidence the court peremptorily instructed the jury to find a verdict for the defendant. It is of this action of the court that appellant complains on this appeal.

While it is settled that those in charge of a railroad train, in ejecting a drunken passenger who fails to pay his fare or to produce a ticket, must exercise due care, such as may be required by the circumstances, in selecting a place for depositing such passenger as that he will probably be able to protect himself, or can be afforded protection by others, from danger from passing trains at that point, and from danger on account of the inclement condition of the weather, etc., yet the condition of the person ejected must be such that it would reasonably indicate to the railroad employees that he, on account of his condition and the surrounding circumstances, would be liable to such injury. *L. & N. R. R. Co. v. Ellis'* Adm'r, 97 Ky. 340, 30 S. W. 979; *Fagg's Adm'r v. L. & N. R. R. Co.*, 63 S. W. 580, 54 L. R. A. 919, 23 Ky. Law Rep. 383; *Brown's Adm'r v. L. & N. R. R. Co.*, 103 Ky. 211, 44 S.

State *v.* Chicago, etc., R. Co

W. 648. The proof in this case does not show that appellant was in that state of mind and physical disability that he would probably be not able to properly take care of himself. But the controlling reason why the peremptory instruction should have been given is that, whatever may have been appellant's condition at the time he was ejected from the train, it is manifest from the record that the injury sued for was not proximately due to that condition. But for the whisky drunk by him afterwards, by which he voluntarily continued and increased his state of helplessness, there is no reasonable probability that his injury would have occurred. Judgment affirmed.

STATE *ex rel.* McCOMB *v.* CHICAGO, B. & Q. R. CO.

(Supreme Court of Nebraska, April 7, 1904.)

[99 N. W. Rep. 309.]

Carriage of Freight—Duty to Furnish Cars—Unusual Volume of Business.*

It is the duty of a railroad company to furnish the necessary cars to transport the goods which are offered to it for carriage, but, when the carrier has furnished itself with the appliances necessary to transport an amount of freight which may in the usual course of events be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in any given locality temporarily or at long intervals of time.

Same—Discrimination.*

It is the duty of a railroad corporation, both under the common law, and by statute in this state, to supply cars to all persons or associations handling or shipping grain, without favoritism or discrimination in any respect whatever.

Same—Apportioning Cars—Discrimination.*

During a temporary scarcity of cars, a railroad company is entitled to consider, in apportioning cars among grain dealers, their relative volumes of business and facilities for the loading of cars. Though there may be a difference in the number of cars furnished different grain dealers at the same railroad station, still, if no favoritism or discrimination is shown, and the number of cars furnished each is in a fair proportion to his volume of business, facilities for loading, and grain in sight, no shipper has a right to complain of this difference.

*See foot-note appended to *Memphis News Pub. Co. v. Southern Ry. Co.* (Tenn.), 8 R. R. R. 202, 31 Am. & Eng. R. Cas., N. S., 202; *Lorraine v. Pittsburg, J., E. & E. R. Co.* (Pa.), 9 R. R. R. 306, 32 Am. & Eng. R. Cas. N. S., 306 (refusal to furnish cars, immaterial that other shippers were refused); foot-note appended to *Bedford-Bowling Green Stone Co. v. Oman* (Ky.), 8 R. R. R. 249, 31 Am. & Eng. R. Cas., N. S., 249; *Mathis v. Southern Ry. Co.* (S. Car.), 7 R. R. R. 825, 30 Am. & Eng. R. Cas., N. S., 825 (defenses where failure to furnish iced cars); *United States v. Norfolk & W. Ry. Co.* (W. Va.), 3 R. R. R. 19, 26 Am. & Eng. R. Cas., N. S., 19 (discrimination justifying the issuance of mandamus to compel common carrier to transport interstate traffic, or to furnish facilities for its transportation; and duty to prorate supply of cars on hand).

State v. Chicago, etc., R. Co

though he may not obtain all the cars he deems necessary for his business.

(Syllabus by the Court.)

Commissioners' Opinion. Department No. 3.

Action by the state, on the relation of C. W. McComb, for a writ of mandamus against the Chicago, Burlington & Quincy Railroad Company. Denied.

Smyth & Smith, for relator.

J. W. Deweese and Frank E. Bishop, for respondent.

LETTON, C. This is an original application for a writ of mandamus in this court. On the 22d day of August, 1903, C. W. McComb, farmer, a living about four miles from Wilsonville, in Furnas county, Neb., began the business of buying and shipping grain at Wilsonville in competition with two elevators there situated—one owned by S. A. Austin and the other by the Central Granaries Company, a corporation. From the day he began business until about September 5th he obtained all the cars from the respondent necessary for the carrying on of his business. He alleges in his application that on or about the 1st day of October, 1903, and on divers dates since then, he requested that the respondent furnish him all the cars he needed in his business, or that, if it could not do that, it supply him with two cars for each three furnished each of the elevators. He alleges that the volume of his business is such that he requires two cars for each three used by each elevator. He says that it refused to furnish him cars as he required, and that during the two weeks ending October 18, 1903, it supplied him with only two cars, while it supplied the elevators with twenty-three cars; that he demanded of the respondent a just proportion of the empty grain cars available at Wilsonville, but that the company, through its agent, declared that the elevators should have the preference. He avers that such discrimination will ruin his business, and he prays for a peremptory writ of mandamus commanding the respondent to furnish him, whenever demanded, with two cars to each three furnished each of the elevators; that the respondent be commanded to afford him equal facilities in all respects with each elevator, and to cease all discrimination of any kind and character against him in favor of the elevators. The answer of the respondent to the alternative writ alleges, in substance, that there are two large and well-equipped grain elevators at Wilsonville; that the relator, McComb, has no elevator, shovel house, or any convenience adjacent to the track for loading of grain into the cars; that, owing to the manner of his loading, he occupies a whole day for loading one car, while the elevators load cars at the rate of one car in two hours, and consequently the elevators need and can use many more cars than he could handle. It further says that the demand for

cars about the 1st day of September, 1903, was so great that it was temporarily impossible for the company to furnish sufficient cars; that it used every reasonable effort to procure cars, and, since it could not obtain all that were demanded at Wilsonville, it adopted the plan of dividing the cars between the two elevators and the relator on an equitable and just basis, in accordance with the relative amount of grain handled by the elevators and the relator, and taking into consideration the facilities for handling of grain by each of said shippers. It denies that during the two weeks ending October 18, 1903, the relator was supplied with but two cars, while the elevators had twenty-three, but alleges that the relator had five cars during this period, while one elevator was furnished with seven and the other with eight cars. It denies any discrimination between the relator and the elevators, and alleges that, although at the time it was well equipped with the necessary cars for handling the ordinary business coming to the railroad, yet at that time the demand for cars in the shipment of grain was unusual, and that temporarily all the cars demanded could not be furnished.

It is the duty of a railroad company to provide itself with all the instrumentalities and facilities necessary to carry on the business for which it is organized. It must furnish the necessary cars to transport the goods which are offered to it for carriage. But to this rule there is an exception. When the carrier has furnished itself with the appliances necessary to transport an amount of freight which may in the usual course of events be reasonably expected to be offered to it for carriage, taking into consideration the fact that at certain seasons more cars are needed, it has fulfilled its duty in that regard, and it will not be required to provide for such a rush of grain or other goods for transportation as may only occur in any given locality temporarily or at long intervals of time. In this connection the testimony of Mr. Calvert, the superintendent of the lines of the respondent west of the Missouri river, is that the railroad company is well supplied with cars; that at times the cars are so plentiful that they have difficulty in storing them, and that usually it has more cars than it needs in taking care of the business offered; that a scarcity of cars existed at the time the relator complains of; and that at the present time cars are comparatively plentiful. He testifies that frequently, by the manner of doing business by grain dealers, shipments are delayed until a certain time, when the markets will justify a quick sale, and this causes a congestion of business on the railroad; that he has frequently known on the Burlington & Missouri in Nebraska upwards of 2,000 box cars held for orders up to the 20th of the month, and by the 26th the railroad company would be probably that many cars short of being able to fill its orders; that at times there is a rush, and at times there is a dearth, of business,

but that the railroad company has enough cars to take care of the business. These facts are not denied. Under this state of facts, the complaint of the relator that the respondent is not sufficiently provided with cars in order to transact the business of the public does not seem to be well founded.

Since there was a scarcity of cars during a part of the period Mr. McComb was in business, what was the duty of the respondent as to their distribution among those desiring to ship grain over their line of road? Part of section 1, art. 5, c. 72, Comp. St. Neb. 1903, is as follows: “* * * Every railroad company or corporation operating a railroad in the state of Nebraska shall afford equal facilities to all persons or associations who desire to erect or operate, or who are engaged in operating grain elevators, or in handling or shipping grain at or contiguous to any station of its road and shall supply side tracks and switch connections, and shall supply cars and all facilities for erecting elevators and for handling and shipping grain to all persons or associations so erecting or operating such elevators, or handling and shipping grain, without favoritism or discrimination in any respect whatever.” This provision, so far as it requires railroad companies to supply cars for shipping grain without discrimination, is merely declaratory of the common law. Under this provision, it was manifestly the duty of the respondent to refrain from discrimination between McComb and the two elevators in the furnishing of cars for use in the business of buying and shipping grain at the station at Wilsonville. Whether or not this has been done is a question of fact, which must be determined from the evidence.

The evidence shows that the elevator and bins of the Central Granaries Company have a capacity of over 10,000 to 12,000 bushels of grain; that the elevator and bins of Mr. Austin have a capacity of about 8,500 bushels; that these elevators and bins are situated close to the railroad tracks; that the Central Granaries Company has facilities for and can load 8 cars of grain per day; that the Austin elevator can load 10 cars per day; that Mr. McComb has a bin at his residence, which is about two blocks from the railroad track, that holds 2,500 bushels; and that he has rented other bins in the town, which, in all, have a storage capacity of about 7,500 bushels. Upon his farm, about four miles from town, he has about 4,500 bushels of grain, which was raised on the farm; but this, we think, should not be taken into consideration, upon the question of the volume of his business as a grain dealer. The only means of loading cars which he possesses is by hauling the grain in wagons, and shoveling the same into cars. The evidence shows that he has usually loaded one car a day, although upon one occasion he loaded two cars in that length of time. It appears that both the elevators and Mr. McComb received all the cars they needed up to about the 5th day of September, but afterwards, up to

the time of the beginning of the suit, a scarcity of cars existed—in fact, to such an extent that each of the elevators and McComb also were compelled to turn away and refuse to buy large quantities of grain; one of the dealers stating that he had turned away 60,000 bushels, and the other 50,000 bushels. The only question, then, necessary for us to decide, is as to whether or not, taking into consideration the volume of Mr. McComb's business, his facilities for loading cars, and all the circumstances, as compared with the volume of business and facilities of loading of each of the elevator owners, he has been unjustly discriminated against by the respondent, and whether it is the respondent's duty to furnish him with two cars for each three furnished to each of the elevators.

Mr. McComb began business on the 22d of August. Up to the 5th of September he obtained all the cars that he could use, as did both of the elevators. The scarcity of cars appears to have begun at that time. The evidence shows that from August 22d to September 5th, inclusive, Mr. McComb received 8 cars, Mr. Austin 17, and the Central Granaries Company 15. Mr. McComb therefore received one-fourth of the number of cars received by both elevators, and, as this was all he wanted, it was presumably the measure of the volume of his business, and of his ability to handle grain with his inadequate facilities, as compared with those possessed by the elevators. From the 22d of August to October 20th, the day before this action was commenced, Mr. McComb had received 15 cars, Mr. Austin 41, and the Central Granaries Company 34. During the entire period from August 22d to October 20th, therefore, Mr. McComb had received exactly one-fifth of the number of cars furnished to both elevators. If we compare the cars furnished during the entire period with that in which each party was supplied with all the cars that could be used in his business, it will appear that McComb received $3\frac{1}{5}$ cars less during the entire period than he would have been entitled to if we take his needs during the time from August 22d to September 5th as a fair and just criterion. According to his testimony, he could have used more cars than this, but so could each of the elevators. The question is not whether he received all the cars he wanted, but whether the cars on hand were apportioned in fairness and without unjust discrimination among the three grain dealers. It is clear that an individual loading grain into cars by shoveling the same from wagons, other things being equal, has not the ability to load as many cars in a day as a well-equipped elevator; and the testimony in this case clearly shows that the volume of Mr. McComb's business is not such as to require him to be furnished with four cars to every six furnished to both of the elevators in Wilsonville. It further appears that the railroad company prefers to have the grain shipped from elevators, and that Mr. McComb received something less than his fair

proportion of cars; but under no view of the evidence that we have been able to take can we say he was, at the time this action was begun, entitled to the number of cars that he asks. From a statement in the evidence furnished by the agent at Wilsonville, it appears that since the 23d of October, inclusive, to the 30th of November, inclusive, Mr. McComb has been furnished with 23 cars, Austin 44, and the Central Granaries Company 48, which is the exact proportion furnished him before September 5th, when he had all he wanted; and, from Mr. Calvert's testimony, it would seem that the scarcity of cars is now over.

The purpose of a writ of mandamus is to compel something to be done which ought to be done. "The question whether a mandamus should issue to protect the interest of the public does not depend upon a state of facts existing when the petition is filed, if that state of facts has ceased to exist when the final judgment is rendered." *Northern Pacific R. Co. v. Dustin*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092; *State ex rel. Anderson v. Newman*, 25 Neb. 35, 40 N. W. 603. The respondent is not discriminating against the relator at this time, and the neglect of duty of which he complains does not now exist. The object of the writ of mandamus being only to compel action, the relator is not at this time entitled to the writ. Although he was not entitled to all he asked for in his application, yet he had cause to complain at the time his action was begun, and for that reason it is only just to him that he should recover his costs herein expended. *State ex rel. Anderson v. Newman*, 25 Neb. 35, 40 N. W. 603; *State ex rel. Runge v. Anderson*, 100 Wis. 523, 76 N. W. 482, 42 L. R. A. 239. He is also entitled to the benefit of his action, so far as may be. Since it is a continuing duty on the part of the respondent to furnish him cars without unjust discrimination, and in order to afford speedy relief if this duty is not performed in future, we recommend that the writ be refused at this time, with leave to relator to apply for the issuance of the same in this case in the future if the necessity arises, upon notice to the respondent, and that the costs of this proceeding be taxed to the respondent.

DUFFIE and KIRKPATRICK, CC., concur.

PER CURIAM. For the reasons stated in the foregoing opinion, the writ of mandamus applied for is refused, with leave to relator to apply for the issuance of the same in the future if the necessity arises, upon notice to the respondent. It is further ordered that the costs of this proceeding be taxed to the respondent.

HARP *v.* SOUTHERN RY. CO.

(Supreme Court of Georgia, March 31, 1904.)

[47 S. E. Rep. 206.]

Ejection of Passenger—Lost Ticket.

As many tickets entitle the bearer to transportation, they might be used by the finder, with the result that two could ride for one fare, if the carrier were required to carry a passenger who has lost the ticket purchased by him.

Same—Same.*

A passenger who loses his ticket has no right to be carried upon making or offering to make proof that the one paid for has been lost. The loss falls on him, and not on the carrier.

Same—Legality—Pleading.

It affirmatively appears from the allegations of the petition that the plaintiff neither had paid nor offered to pay the fare. On his failure to produce a ticket, he was lawfully evicted.

Same—Amendment.

Where a petition has been dismissed on general demurrer, and the judgment thereon has been affirmed, there is nothing to amend by; nor do the facts here call for the exercise of any discretionary power by this court to grant an order allowing the plaintiff to amend before the entry of the remittitur in the trial court.

(Syllabus by the Court.)

Error from Superior Court, Clayton County; L. S. Roan, Judge.

Action by E. D. Harp, by his next friend, against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Harp, a minor of 16, sued the Southern Railway Company for a wrongful ejection. He alleges that he bought a ticket entitling him to ride from Atlanta to Topeka Junction, in Upson county, on the line of defendant's road, passing through Clayton; that while on the rear platform of the train an employee of the company asked him how far he was going, whereupon the plaintiff showed him the ticket; that the employee looked at it and handed it back to the plaintiff, when the ticket was blown out of plaintiff's hands; that shortly thereafter the conductor asked the plaintiff for his ticket, and he, in the presence of the employee, explained the circumstances of its loss, the employee corroborating his statement; that notwithstanding this fact the conductor ordered the plaintiff to leave the train, and put his hand on him for the purpose of removing plaintiff from the moving car, and, to prevent being violently ejected, the plaintiff leaped from the car, running at from 10 to 15 miles an hour, about half a mile before reaching Riverdale; that, when plaintiff handed the ticket to the employee, he thought the

*Southern Ry. Co. *v.* DeSaussure (Ga.), 6 R. R. R. 147, 29 Am. & Eng. R. Cas., N. S., 147 (rights of purchaser of lost commutation ticket).

Harp v. Southern Ry. Co

latter was the conductor; that he was compelled to walk to Atlanta, 14 or 15 miles; that there were few passengers for Topeka, and that it would have been easy on arriving at Riverdale for the conductor to have telegraphed to Atlanta, and verified petitioner's statement that he had purchased the ticket to the station named; that petitioner was young and unaccustomed to travel, and did not have sufficient money to pay his fare from Atlanta to Topeka at the time a ticket was demanded; and that the manner of his ejection was aggravated by the threats and commands of the conductor. The defendant demurred generally and specially, on the grounds that there was no cause of action set out; that the petition was duplicitous; that it was uncertain whether the action was for an illegal eviction, or for an abuse of duty in a lawfully eviction. After argument the court passed an order reciting that "the plaintiff admitted that the suit was only for the wrongful expulsion, and that the company had a regulation authorizing conductors to eject passengers who neither paid fare or produced a ticket," and directing that the general demurrer to the original and amended petition be sustained, and the case dismissed. In plaintiff's brief, he requests that, if the judgment be affirmed, leave be granted him to amend by alleging that the conductor failed to demand the cash fare.

M. D. Womble and W. R. Hammond, for plaintiff in error.
Dorsey, Brewster & Howell, Arthur Heyman, and J. B. Hutcheson, for defendant in error.

LAMAR, J. This suit was for wrongful expulsion, and not for damages inflicted upon the plaintiff as a result of his being compelled to alight from a moving train. The fact that one actually purchased a ticket, and that this was known to the agent who sold it, or to the gatekeeper who examined or to employees on the train who saw it, would not relieve the passenger of the obligation to surrender it to the conductor. Tickets vary in their terms. Some are good only on certain trains; others only on particular dates; others require validation. The mere fact that the plaintiff has a ticket does not, therefore, necessarily establish his right to be transported on a given train. These matters must be passed on by the conductor, and not by other employees who are not charged with this duty by the company. When the conductor makes his demand, he is entitled to have the ticket surrendered. He cannot be required to hear evidence or investigate the bona fides of the passenger's excuse for its non-delivery, nor to wait until he arrives at the next station, and, by telegraphic correspondence with the selling agent, undertake to verify the correctness of the plaintiff's statement, or determine the character and validity of the ticket sold. It is manifest that such course would necessarily give rise to delay, and seriously interfere with the operation of trains

Missouri, etc., Ry. Co. v. Huff

and the rights of the traveling public. Had the plaintiff's money blown out of his hand, it is evident that his misfortune would have to fall upon himself, and not upon the company. Such loss would not have prevented his lawful eviction. The same result would follow where the ticket itself was lost, for it might have come into the hands of another, and the company might thereby have been compelled to carry two passengers for one fare. Besides, any rule allowing an excuse as a substitute for a ticket would give rise to so much uncertainty and so many possibilities of fraud that the courts have uniformly held that the failure to pay the fare or produce the ticket warrants an eviction. In fact, the plaintiff in error concedes the general rule to be that the passenger must produce his ticket, pay his fare, or suffer expulsion. He insists, however, that the special circumstances take this case out of the general rule. We fail to find any case warranting such a holding. Those cited by him, including *Sloane v. Railroad Co.* (Cal.) 44 Pac. 320, 32 L. R. A. 193, and *Scofield v. Pennsylvania Co.*, 112 Fed. 855, 50 C. C. A. 553, 56 L. R. A. 224, as well as *Pullman P. Co. v. Reed*, 75 Ill. 125, 20 Am. Rep. 232, were on facts essentially different. See, on the general subject, *L. & N. R. Co. v. Fleming*, 14 Lea, 128; *Rogers v. Atlantic City R. Co.* (N. J. Sup.) 34 Atl. 11; *Fetter on Carriers*, § 279. Compare *Southern Ry. Co. v. De Saussure*, 116 Ga. 53, 42 S. E. 479; *G. S. & F. Ry. Co. v. Asmore*, 88 Ga. 529, 15 S. E. 13, 16 L. R. A. 53.

Pleadings are to be more strictly construed against the pleader. Here it affirmatively appears that plaintiff did not have funds with which to pay the cash fare. The general demurrer having been sustained, and the judgment affirmed here, there is nothing to amend by. It is not like the case where the demurrer was overruled in the lower court, and the judgment reversed, nor like the case where the demurrer was sustained or should have been sustained only on a special ground, not concluding the merits. *Central R. v. Patterson*, 87 Ga. 646, 13 S. E. 525; *Savannah Ry. v. Chaney*, 102 Ga. 817, 30 S. E. 437; *Brown v. Bowman*, 119 Ga. —, 46 S. E. 410. There is nothing in the facts here to require the exercise of any discretionary power by this court to permit such amendment.

Judgment affirmed. All the Justices concurring.

MISSOURI, K. & T. RY. CO. OF TEXAS v. HUFF.

(Supreme Court of Texas, June 23, 1904.)

[81 S. W. Rep. 525.]

Who Are Passengers—Riding on Freight Car.

Where plaintiff took passage on defendant's freight train under an agreement with the brakeman, and did not ride in the caboose, but on

Missouri, etc., Ry. Co. v. Huff

a coal car, in an action for personal injuries it was not sufficient to submit merely the question as to whether one taking passage on such train in good faith might become a passenger, but there should have been a submission as to whether plaintiff acquired that relation.

Same—Same—Presumption—Brakeman's Authority.*

It was not to be presumed that the brakeman had authority to make such agreement, or that plaintiff acquired the relation of passenger by getting on such car, but the burden was on plaintiff to prove such facts.

Same—Same—Same—Same—Instruction.

In an action for personal injuries, the court instructed that if a carrier of passengers was using for its purposes the kind of freight train which plaintiff boarded, and if plaintiff paid his fare to a brakeman, and was authorized by him to board the train, though the brakeman had no express authority, and if the conductor had no knowledge of plaintiff's presence, but the carrier's brakemen had been exercising such authority for so long that the carrier should have known it, then "plaintiff had the right to presume that such servant was authorized to perform such duties;" held erroneous, for authorizing such presumption, especially in view of evidence tending to show that plaintiff was informed that the brakeman was acting without authority.

Instructions.

A reference in such instruction to only those parts of the general charge relating to the question whether or not the freight train carried passengers, and not to any instruction concerning the authority of brakemen, did not cure the error.

Same.

The instruction was erroneous for excluding from consideration evidence that such course of conduct was difficult to suppress, and was pursued in spite of efforts to suppress it.

Carrying Passengers on Freight Train—Authority of Brakeman.

No inference would arise that a brakeman on a freight train had authority to agree to carry passengers merely because his employer knew that such acts were done, as they might be done while the company was endeavoring to enforce rules forbidding such acts.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by J. C. Huff against the Missouri, Kansas & Texas Railway Company of Texas. There was a judgment of the Court of Civil Appeals (78 S. W. 249) affirming a judgment in plaintiff's favor, and defendant brings error. Reversed.

T. S. Miller and Perkins, Craddock & Wall, for plaintiff in error.

Evans & Elder, for defendant in error.

WILLIAMS, J. The defendant in error received the injuries, for which he recovered the judgment now before us for revision, in alighting from one of defendant's freight

*As to the authority of trainmen to receive passengers on freight trains, see *Dysart v. Missouri, K. & T. Ry. Co.* (C. C. A.), 8 R. R. R. 197, 31 Am. & Eng. R. Cas., N. S., 197 (apparent authority of trainmaster to take passenger on freight train binding upon carrier); *Greenfield v. Detroit & M. Ry. Co.* (Mich.), 8 R. R. R. 271, 31 Am. & Eng. R. Cas., N. S., 271 (person riding on freight train under arrangement with conductor, in violation of rule known to both, is not a passenger); *Mendenhall v. Atchison, etc., R. Co.* (Kan.), 6 R. R. R. 685, 29 Am. & Eng. R. Cas., N. S., 685; *Crawleigh v. Galveston, H. & S. A. Ry. Co.* (Tex.), 2 R. R. R. 630, 25 Am. & Eng. R. Cas., N. S., 630 (authority of conductor of freight train).

trains at Greenville, to which place he had traveled on the train from Celeste. He claims that he was a passenger, while the defendant (the plaintiff in error) claims that he was on the train in violation of its rules by collusion with one of its brakemen. The evidence tended to show that the servants operating such trains as the one in question were prohibited from carrying passengers, and that they had no authority from the company to do so. And there was evidence of insistence by the company upon the observance of this rule by its employees. A great mass of testimony was introduced, tending to show an extensive violation of such rules by the trainmen, from which plaintiff sought to raise the inference that the defendant must have known of this conduct of its employees; that it had made no reasonable effort to suppress it, and had thereby justified the belief that the carriage of passengers on such trains was authorized. The jury could, however, have viewed this evidence as showing merely that the travel on these trains was without the consent of superior officers, and for the benefit of the trainmen, who appropriated the fares paid, and that this was understood by the travelers. The questions thus arising were submitted to the jury by instructions of which no complaint is made before this court, and we must assume that the train was one upon which a person taking passage in good faith could have lawfully become a passenger. There was, however, the further question whether or not, under the facts shown, plaintiff acquired that relation to the company. It does not necessarily follow that, because he was on a train upon which passengers could be taken, he was such. He traveled, not upon the caboose and under the care of the conductor, but upon a flat car laden with coal, and the jury could have found that he took this position upon the direction of a brakeman who received and appropriated his fare; and when he arrived at Greenville he was hurt because of his being at that place in the train, while alighting, still under the direction of the brakeman, and without the knowledge of the conductor. The question whether or not the relation of passenger and carrier ever arose between him and the railway company was thus made prominent, and this depends upon the authority of the brakeman to bind the company by receiving him at such a place in such a train. Certainly it is not to be presumed either that the brakeman had authority to make a contract of carriage at all, or that a traveler could acquire the rights of a passenger by getting and remaining in such a car. *I. & G. N. R. R. Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; *M., K. & T. Ry. Co. v. Williams*, 91 Tex. 255, 42 S. W. 855; *T. & P. Ry. Co. v. Black*, 87 Tex. 160, 27 S. W. 118.

The burden was upon the plaintiff to make it appear not only that passengers had the right to take passage on such a train, but that the employee who contracted to let him ride

at that unusual place had real or apparent authority from the company to make such a contract. Upon this subject the court gave, at plaintiff's request, the following special charge: "If you find from the evidence that the defendant was a common carrier of passengers for hire on the 16th day of March, 1902, and was using for that purpose the kind of freight train that plaintiff boarded, in accordance with the instructions given you in the general charge; and if you find from the evidence that plaintiff approached J. F. Haddock, and was authorized by him to board said train; and you find that plaintiff paid the fare to him; and if you further find that J. F. Haddock was a brakeman on said train, and had no express authority to invite persons on said train or to collect fares; and you find that the conductor of said train had no knowledge of plaintiff's presence on said train, and did not authorize him to board said train—yet if you find from the evidence that the defendant's brakeman on its freight trains on its lines in Hunt county were exercising such authority or performing such duties for such a length of time that the defendant, in the proper conduct of its business, must have known of such facts, then and in that event the plaintiff had the right to presume that such servant was authorized to perform such duties." We are of opinion that this charge is erroneous for several reasons: First. It declares, as a matter of law, that from the facts stated the plaintiff was authorized to presume authority in the brakeman, when the question was for the jury itself to determine whether or not such facts as the evidence disclosed justified an interference of such authority in a person of ordinary prudence. Second. It authorizes such presumption on plaintiff's part, without regard to circumstances which there was evidence tending to show, from which plaintiff may have been sufficiently informed that this brakeman was acting in violation of his duty to his employer, in his own behalf, and for his own private gain. Third. It excludes from consideration evidence tending to show that the supposed course of conduct of brakemen was very difficult to prevent, and was pursued in spite of efforts on the part of their superiors to suppress it. Fourth. It is not true that the inference of authority to do such forbidden acts would necessarily arise from the mere facts that they were done and the company knew it. Those facts might exist while the company was doing enough to show that it was not acquiescing, but was endeavoring to enforce its rules and suppress violations of them. It must be remembered that no one would be authorized to presume, without evidence, that a brakeman has authority to make such a contract of carriage, express or implied, as that which is claimed to have arisen in this case, and he who asserts such authority has the burden of showing it otherwise than by inference arising from the position held by such an employee, because no such inference arises from

Sprague v. Northern Pac. Ry. Co

the character of the employment. It is true that the evidence tends to show that this brakeman represented himself to the plaintiff to be the conductor, but other questions would arise as to the effect of that fact, to which this charge is not addressed, and which therefore are not before us for consideration. The charge was well calculated to deprive the defendant of the judgment of the jury upon the several matters which we have pointed out, if not others, and cannot be held harmless in a case like this, where most of the facts which plaintiff must establish are, to say the least, debatable. Nor does the reference to the general charge relieve the special instruction of its erroneous features; the reference being only to those parts of the general charge relating to the question whether or not the freight train carried passengers, and not to any instruction concerning the authority of the brakemen.

Reversed and remanded.

SPRAGUE et al. v. NORTHERN PAC. RY. CO.

(Supreme Court of Wisconsin, Sept. 27, 1904.)

[100 N. W. Rep. 842.]

Condemnation Proceedings—Dismissal after Filing of Award.

The statement of the court on an appeal, where the controversy is whether a party instituting condemnation proceedings can dismiss before the filing of the award, that under the statute it cannot dismiss after such filing, is not a mere dictum, though an interpretation of that question was not expressly required by the decision.

Same—Same.*

Under Rev. St. 1878, § 1850, providing that the report of commissioners to assess damages in condemnation proceedings shall be recorded in the judgment book by the clerk of the court in whose office it is filed; that, after the making of such award, the railroad company may pay to the owners of the land, or to the clerk for their use, the amounts awarded, and thereupon may enter on, take, and use the land for the purposes for which it was condemned, and may have a writ of assistance; and that in case of no appeal, and of neglect of the railroad company, for 60 days, to pay the award, the landowners may, on motion, have execution, for the amount of the award—the railroad company may not, after the filing of the report, dismiss the proceedings, such filing being, in effect, a judgment fixing the rights of the parties.

Appeal from Circuit Court, Bayfield County; John K. Parish, Judge.

Condemnation proceedings by the Northern Pacific Railway Company. From an order dismissing the proceedings M. A. Sprague and others, landowners, appeal. Reversed.

*As to the right to abandon condemnation proceeding, and at what stage of the proceedings the right may be exercised, see monograph by William Mack, Esq., 3 Am. & Eng. R. Cas., N. S., 1; Fischer v. Catavissa R. Co. (Pa.), 4 Am. & Eng. R. Cas., N. S., 310; Bellingham Bay & British Columbia R. Co. v. Strand (Wash.), 3 Am. & Eng. R. Cas., N. S., 171 (after award of damages).

Proceedings to condemn land for the use of the petitioner, the Northern Pacific Railway Company. The Railway Company commenced these proceedings by petition to the judge of the circuit court for Bayfield county for the condemnation of a strip of land, described in the petition, owned by the appellants, and lying in the village of Washburn, Bayfield county. The petition was filed in the office of the clerk of the circuit court, where the land is situated, on the 11th day of August, 1903. On October 22d following the court appointed commissioners to ascertain and appraise the compensation to be awarded to the owners. The commissioners duly qualified, and took the steps required of them under the law for making the award. On November 21, 1903, the commissioners at their final meeting determined the value of the land to be taken, and the damages to the adjoining land at the sum of \$4,700, and filed their report on this day with the clerk of the circuit court for Bayfield county. On December 21st following the circuit court, upon application of the railway company, without notice to appellants, made an order dismissing the proceedings instituted for the condemnation of the land, and found and imposed as terms of such dismissal that it pay the amounts due the commissioners for their services and disbursements, all costs, disbursements, and damages incurred by the owners of the land sought to be taken, and all costs and fees due the clerk of the court. This is an appeal by the landowners from the order of dismissal.

John Walsh, for appellants.

Louis Hanitch, A. W. McLeod, and J. B. Kerr, for respondent.

SIEBECKER, J. (after stating the facts). The application of the respondent railway company for the dismissal of this condemnation proceeding represents that it has never taken possession of any part of the strip of land sought to be condemned, and that the value of the land and the amount of damages to adjoining land resulting from the condemnation exceed in amount any benefit to the public or petitioners for the use of the land as a right of way for a branch or spur track for railroad purposes, and that it deems it unwise and inexpedient to take the strip of land for these uses, and therefore asks that the proceeding be dismissed upon such terms as the court may find just to all parties interested in the proceeding.

The question is: Can a railroad corporation dismiss such a proceeding, instituted by it, against the protest of the landowners, after the commissioners have filed their award with the clerk of the circuit court as prescribed by section 1848, Rev. St. 1898? The nature of the proceeding is recognized in the statutes on the subject by providing that "the filing of such petition [for condemnation] shall be the commencement

of a suit in said court." Section 1846, Rev. St. 1898. The courts have held that these proceedings are governed by the law of procedure in actions. The rights of parties to such a proceeding become established in the law as in the ordinary form of suits between contending parties. Upon an appeal to this court from an order dismissing such proceeding prior to the filing of the commissioners' award, it was stated that: "The ordinary principle is that the moving party in actions or proceedings may, with the consent of the court, dismiss or discontinue the same before the result sought for in the proceedings has been reached and the rights of the parties fixed, and no reason is perceived why this principal should not apply here." *The M. & L. W. Ry. Co. v. Stolze*, 101 Wis. 91, 76 N. W. 1113. In further consideration of such a right the court continued: "Certainly, if the proceedings cannot be stopped prior to the award, it would seem that they can never be stopped at all, because the statutory provisions as to the effect of the award upon the rights of the parties (Rev. St. 1878, § 1850) seem to preclude the idea of there being any stopping place after the filing of the award." It is argued that the interpretation of the statute bearing upon the rights of the parties after the filing of the award was not included in the case then under consideration, nor in the cases therein referred to, and these expressions should, therefore, be treated as mere dicta in construing the statute. We cannot accede to this suggestion. The court was naturally lead to consider whether the proceedings had reached the point where the rights of the parties had become fixed, and that is the question in the instant case. An examination of the authorities cited in the opinion, presented in support of the conclusions therein announced, supports the inference that the question now presented was deemed a pertinent consideration in deciding that case. While an interpretation on that question was not expressly required by the decision, it showed the views entertained by the court at that time, and is of persuasive force in construing the statute, and it should be followed unless it is found to be erroneous. *Buchner v. The C., M. & N. W. Ry. Co.*, 60 Wis. 264, 19 N. W. 56; *Brown v. C. & N. W. Ry. Co.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 579.

All further consideration of the subject confirms us in the correctness of the conclusions therein expressed. The terms of the statutes clearly indicate that the filing of the report of the commissioners with the clerk of the circuit court of the county where the land is situated to be recorded by him in the judgment book of such court is, in effect, a judgment in the proceeding, fixing the rights of the parties arising from the taking of the land under the right of eminent domain. After this step the land is treated by the statute in express terms as condemned, and the railroad corporation is entitled to "enter upon, take, and use the land for the purposes for

Thompson v. Schenectady Ry. Co

which it was condemned," upon condition of paying the amount to the owners, or to the clerk of the court for the owners' use; and it may have a writ of assistance to secure possession in case the owners refuse voluntarily to yield possession. It is also provided, in case of no appeal, and in case of a neglect by the railroad corporation to pay the award, that the parties interested in the award may, upon motion, have execution for the amount due on the award. The provision that such execution shall not issue until the expiration of 60 days from the filing, and then only upon motion, in no way affects the rights fixed by the filing of the award. It is the policy of the state, as evidence by the statute, to give railroad corporations extensive powers for acquiring real estate for corporate uses, but such powers should be exercised in good faith on occasions when the interests of the public and of the corporations are to be promoted by it. It is upon these considerations that the right is granted to these corporations of taking all necessary real estate at its fair market value, regardless of the wishes of the owner, who must yield to the necessities of the public undertaking. If the right is asserted and established by the condemnation and prosecuted to the point of ascertaining the amount of the award, and the railroad company is permitted to elect to abandon the proceeding or not, after such award, upon the ground that it cannot secure the property at its own price, it might readily transpire that the owners would be subjected to many hardships, and their rights might be seriously interfered with. We must hold that the proceeding cannot be dismissed after the commissioners' report has been filed with the clerk of the circuit court. *The M. & L. W. Ry. Co. v. Stolze*, 101 Wis. 91, 76 N. W. 1113; *Uniacke v. C., M. & St. P. Ry. Co.*, 67 Wis. 108, 29 N. W. 899; *West v. M., L. S. & W. Ry. Co.*, 56 Wis. 318, 14 N. W. 292; *Morris v. W. M. Ry. Co.*, 82 Wis. 541, 52 N. W. 758; *People ex rel v. Highway Com'rs*, 188 Ill. 150, 58 N. E. 989; *Drath v. B. & M. Ry. Co.*, 15 Neb. 367, 18 N. W. 717; *Brown et al. v. C., etc., Ry. Co.*, 64 Neb. 62, 89 N. W. 405. We think that the commissioners fully complied with the statute, and that their report must be presumed to cover all the lands described in the petition and sought to be taken, with the improvements thereon.

The order of the circuit court dismissing the proceeding is reversed, with directions to deny the application.

THOMPSON et al. *v.* SCHENECTADY RY. CO. et al.
(Circuit Court of Appeals, Second Circuit, April 5, 1904.)

[131 Fed. Rep. 577.]

Judgment—Conclusiveness—Parties.

Where whatever rights complainants acquired in the property of a street railway company were acquired after a foreclosure decree had

Thompson v. Schenectady Ry. Co

been entered, but before the decree had been executed by a sale of the mortgaged property, under an agreement between complainants and the street railway company's receiver, and complainants were not parties to the foreclosure proceeding, they were not bound by the decree therein.
Street Railways—Franchise—Surrender—Consent of State.

Where the consent of the state was not obtained to a contract between complainants and the receiver of a street railway company and a city, by which the railway company was permitted to permanently discontinue its railway on a certain street, such contract was void as against public policy, the right to operate the same being a franchise granted by the state on considerations of public welfare.

Appeal from the Circuit Court of the United States for the Northern District of New York.

See 119 Fed. 634; 124 Fed. 274.

Marcus T. Hun, for railway company.

A. H. Van Brunt, for trust company.

Edward W. Paige, for appellees.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from a decree for the complainants, and presents the question whether, upon the conceded facts, as appearing by the bill of complaint, the complainant was entitled to relief. The bill is one in the nature of a bill of review to revise a decree of the United States Circuit Court for the Northern District of New York in an action brought by the Central Trust Company against the Schenectady Street Railway Company for the foreclosure of a mortgage made by the railway company. The decree was entered September 1, 1894. Included in the property covered by the mortgage was that part of the railroad of the mortgagor which had been constructed along Washington avenue, in the city of Schenectady, and this part of the railroad was included in the property decreed to be sold, and was sold under the decree January 12, 1895, to Kobbe and others. The sale was confirmed, and a conveyance made to the purchasers February 8, 1895. The complainants are property owners upon Washington avenue, who seek to restrain the Schenectady Railway Company, a corporation, which acquired the mortgaged premises February 17, 1895, from operating its road upon a portion of that street. They assert by their bill that during the pendency of the foreclosure action the receiver in the action, appointed by the court, was in possession of the mortgaged property, and joined with certain property owners upon Washington avenue, including some of the present complainants, in a petition to the common council of the city of Schenectady asking that body to consent and authorize the mortgagor to discontinue permanently the running of its cars upon said street and to remove its track, and that October 2, 1894, the common council adopted a consenting resolution.

The specific relief prayed for by the bill is that the fore-

Thompson v. Schenectady Ry. Co

closure decree be revised so as to omit the Washington avenue property from the property therein, and so as to provide that the agreement between the receiver and the Washington avenue property owners and the city of Schenectady be approved by the court, and be binding upon all the parties to the action; and that the defendants be permanently enjoined from doing any act in the construction or operation of any sort of a railroad upon any part of the street.

Whether the matters set forth in the bill make a case which, assuming it to be one entitling the complainants to relief in equity, can be appropriately presented by a bill or a supplemental bill in the nature of a bill of review, or which can be presented only by an original bill, we need not decide. The original suit decided nothing which could prejudice the complainants. They were not parties, and could not be affected by any decree. Whatever rights they acquired in the mortgaged premises were acquired after the decree had been entered, but before the decree had been executed by a sale of the mortgaged premises by an agreement made with the receiver. Doubtless they could have applied to the court for an approval of that agreement and a modification of the decree recognizing and giving effect to it. The requisite diversity of citizenship to maintain an original bill in this court does not exist between the parties. We think the facts did not afford any ground of relief, whether by a bill of review, or one in the nature of such a bill. The relief which they seek to obtain is the enforcement of an agreement which they assert was constituted by the action of the receiver, the property owners, and the common council of Schenectady, and by which they claim that the parties to the foreclosure action and their successors in title to the mortgaged premises are bound to an abandonment of the right to operate a railroad upon part of the street; and they urge that the court can now approve the action of the receiver and ratify the agreement with the same effect as though an application had been made and granted in the foreclosure suit. To do this would be, in effect, to decide that the court, whose officer the receiver was, would have approved the agreement if an application had been made to it, or ought to have approved it had an application been made. The approval of a receiver's contract rests in the sound discretion of the court. It will not be granted merely because the agreement is for the interests of the immediate parties to the suit, and is often determined upon consideration of the interests of those who are not parties, or of the public. It is apparent, from the facts disclosed by the bill, that the so-called agreement was made in the supposed interests of the receiver and the parties to the foreclosure action, and in order to lift the burden of maintaining an unprofitable part of the railroad. It does not appear by the bill that the receiver obtained the consent of the Railroad Commissioners or of the state to the agree-

Georgia R. & B. Co. v. Mayor, etc

ment, and the argument for the complainants concedes that such consent was not obtained. The right to construct and operate a street railway is a franchise granted by the state upon considerations of the public welfare; and any contract which disables the corporation from performing its functions without the consent of the state, and made to relieve the corporation of the burden which it has assumed, is void as against public policy. That consideration alone would have justified and compelled the court in the foreclosure suit to withhold its sanction to the agreement. It presents an insuperable objection to the making of any new decree which would now sanction the agreement. The very recent decision of the highest court of the state in actions between some of the present parties is authoritative to the effect that the attempted abandonment was a nullity because against public policy. *Thompson v. Schenectady Railway Company* (N. Y.) 70 N. E. 213. The court say:

"Within the principle of the cases cited, it is obvious that the public has an interest in that portion of the Schenectady Railway which was constructed in Washington avenue, which could not be destroyed or abandoned without the consent of the state."

The authorities cited in the opinion in that case abundantly prove the proposition decided, and no further reference to them is necessary. If the decision had been rendered before the decision in the present case, and brought to the attention of the learned judge of the court below, doubtless he would have dismissed the bill.

The decree is reversed, with costs, and with instructions to the court below to dismiss the bill.

GEORGIA R. & BANKING CO. *v.* MAYOR, ETC., OF TOWN OF UNION POINT.

(Supreme Court of Georgia, March 30, 1904.)

[47 S. E. Rep. 183.]

Opening Streets across Railroad Right of Way—Authority of Town—Compensation—Eminent Domain.

Where, in the charter of a town, the Legislature has granted to the municipal corporation authority "to require any railroad running through said town to make such crossings as may be needed for public conveniences," this does not confer upon the municipal authorities power to open a new street across the right of way and tracks of a railroad company whose railroad runs through such town, against the consent of the company, and without making compensation for the taking or damaging of its property for such purpose. Nor does the grant of such authority confer upon the municipality the right to exercise the power of eminent domain for this purpose.

Same—Same.

The right to exercise the power of eminent domain for the purpose of laying out and opening a new street cannot be implied from the grant,

Georgia R. & B. Co. v. Mayor, etc

in a municipal charter, of authority, "to establish and lay out new streets as public necessity requires."

Same—Eminent Domain.*

The laying out and opening of a public street across the right of way and track of a railroad company without the consent of the company is a taking or damaging of private property for a public purpose, which requires the exercise of the power of eminent domain.

(Syllabus by the Court.)

Error from Superior Court, Green County; H. G. Lewis, Judge.

Action by the Georgia Railroad & Banking Company against the mayor and council of Union Point. From the judgment both parties bring error. Reversed on first bill of exceptions, and writ of error dismissed.

Jos. B. & Bryan Cumming and J. B. Park, for plaintiff.

Samuel H. Sibley, for defendant.

FISH, P. J. The town of Union Point undertook to open a street at a designated point within the incorporate limits of the municipality across the tracks and right of way of the Georgia Railroad & Banking Company, without instituting any condemnation proceeding for such purpose, and without the consent of the railroad company. The railroad company brought a petition to perpetually enjoin the town "from taking or undertaking to take the land of petitioner" for this purpose, alleging that the municipality had no authority to do so, and that, if certain provisions of its charter, which will be hereinafter considered, were intended to give it such authority, they were unconstitutional. At the interlocutory hearing the following judgment was rendered: "Upon hearing evidence and argument in the case, * * * it is concluded that the defendant has power under its charter to open said crossing, or to have the petitioner to do so; that the charter of the defendant is not unconstitutional. It is further concluded that such legal damages as the railroad may suffer should be assessed and ascertained under the provisions of the general law for condemning property. It is therefore ordered that the defendant be enjoined from opening up said crossing until it shall have had an inquiry into the

*See note, appended to Illinois Cent. R. Co. v. Town of Normal (Ill.), 13 Am. & Eng. R. Cas., N. S., 367; Chicago, M. & St. P. Ry. Co. v. City of Milwaukee (Wis.), 9 Am. & Eng. R. Cas., N. S., 537; City of Newark v. Paterson N. & N. Y. R. Co. (N. J.), 10 Am. & Eng. R. Cas., N. S., 182; Morris & E. R. Co. v. City of Orange (N. J.), 16 Am. & Eng. R. Cas., N. S., 631; City of Terre Haute v. Evansville, etc., R. Co. (Ind.), 8 Am. & Eng. R. Cas., N. S., 759; Illinois Cent. R. Co. v. City of Chicago (Ill.), 3 Am. & Eng. R. Cas., N. S., 181; Chicago & N. W. Co. v. Cicero (Ill.), 3 Am. & Eng. R. Cas., N. S., 187; Cincinnati W. & M. R. Co. v. City of Anderson (Ind.), 3 Am. & Eng. R. Cas., N. S., 194; Chicago & N. W. R. Co. v. Chicago (Ill.), 3 Am. & Eng. R. Cas., N. S., 199; St. Louis & S. F. R. Co. v. Gordon (Mo.), 19 Am. & Eng. R. Cas., N. S., 561; Southern Kansas Ry. Co. v. Oklahoma City (Okla.), 6 R. R. R. 244, 29 Am. & Eng. R. Cas., N. S., 244.

damages as aforesaid." Neither side to the controversy was satisfied with this judgment, and we have before us two bills of exceptions, one sued out by the petitioner and the other by the defendant. The railroad company excepted to so much of the judgment as held that the defendant has power, "under its charter, to open the crossing described," or to have the railroad company do so, and for specific assignment of error alleged that "such portion of the judgment is contrary to law." For further assignment of error it alleged that so much of the judgment as held that the charter of the town was not unconstitutional was erroneous, in that the portion of the defendant's charter alleged in the petition to be unconstitutional is so "for the reason that it fails to provide for the paying of just compensation for opening of any street across the lands of petitioner or others." The municipality excepted to so much of the judgment as held that, in order for it to cross the tracks of petitioner with its street, condemnation proceedings must be had, and damages paid, and that an injunction should issue till this be done.

Section 10 of the Charter of the town of Union Point provides that the mayor and council of the town shall have power "to require any railroad running through said town to make such crossings as may be needed for public conveniences," and shall have power "to establish and lay out new streets as public necessity requires." Acts 1901, p. 669. The main question in the case is whether, under these provisions of the charter, the state has granted to the municipal corporation the right to exercise the power of eminent domain for the purpose of laying out and opening streets. The exercise of the power of eminent domain being in derogation of common right, the power cannot be inferred or implied from vague or doubtful language, but must be given in express terms or by necessary implication. Lewis on Eminent Domain, § 240. Another eminent author has said: "The right to appropriate private property to public uses lies dormant in the state until legislative action is had pointing out the occasions, modes, conditions, and agencies for its appropriation." Cooley's Const. Lim. (5th Ed.) 653. The fact that the Legislature has undertaken to confer upon the municipal corporation authority to require any railroad company whose railroad runs through the town to make such crossings over the road as may be needed for public convenience, does not necessarily imply that the Legislature intended to confer upon the municipality the right to exercise the power of eminent domain for this purpose. It is rather a negation of such an intention, for it contemplates, not a necessity for the exercise of a power which cannot be exerted without compensation for the property taken or damaged by its exercise, but a right to compel a given thing to be done without compensation. So the town construes its own charter, for its bill of exceptions is based upon the idea, and

Georgia R. & B. Co. v. Mayor, etc

it contends here, that it has the right to open the street across the right of way and tracks of the railroad company without paying the railroad company any compensation whatever. Authority to require a crossing to be made does not involve the idea of purchasing the right to cross, either under condemnation proceedings or otherwise, but presupposes the existence of such right. The clause now in question seems to contemplate the exercise by the municipality of the police power of the state, which is exercised without compensation for the loss occasioned thereby, instead of the power of eminent domain, which cannot be exercised without compensation. Certainly, there is nothing in this provision of the charter which by clear and necessary implication confers upon the municipality the right to exercise the power of eminent domain.

2. It has been decided by this court that power granted to a municipal corporation to lay out and open streets when there is no grant of power to take or damage private property for the purpose or to make compensation therefor, does not enable the municipality to lay out and open a street over the land and tracks of a chartered railway company without the consent of the company. *Brunswick & Western Railway Co. v. Waycross*, 94 Ga. 102, 21 S. E. 145. In the opinion the present chief justice said: "Such authority cannot be implied from the grant of power to lay out and open streets. In the absence of any further provision authorizing the municipal authorities to condemn property for that purpose, the presumption is that the Legislature intended that the necessary property should be acquired by contract." A similar ruling was made by the Supreme Court of Washington in *City of Tacoma v. State*, 4 Wash. 64, 29 Pac. 847. In delivering the opinion of the court, Stiles, J., said: "It may be contended that the seventh subdivision of section 5 of the act, which is a grant of power to 'lay out, establish,' etc., 'streets, alleys, avenues,' etc., necessarily includes the implied power to condemn lands for those purposes. But there have been many such contentions in the courts, and they have been, with entire uniformity, resolved the other way, as there is nothing in such a grant which may not be accomplished by purchase of necessary lands by agreement with the owners. A very strong case of this kind is that of *Chaffee's Appeal*, 56 Mich. 244, 22 N. W. 871. An act of the Legislature of Michigan authorized the city of Detroit to open, extend, widen, or straighten streets and alleys, and to take private property therefor, under proceedings further specified in the act. But, although the jury were instructed by the act how they were to award compensation for the opening of streets and alleys, nothing was said about compensation for widening; and it was held that the whole act, so far as concerned widening of a street, was inoperative. The authority remained, but the method of taking was com-

Georgia R. & B. Co. v. Mayor, etc

pletely paralyzed, because no compensation was provided." The Supreme Court of Illinois took the contrary view, holding that the power to lay out and open a new street necessarily implies and includes the power to institute a condemnation proceeding to carry such power into effect. *Chicago & Northwestern Ry. Co. v. Cicero*, 154 Ill. 656, 39 N. E. 574. The decision of this court in the *Waycross Case* is in line with the decision in *Markham v. Howell*, 33 Ga. 508, where it was held: "Authority by the Legislature to inferior courts of this state to establish smallpox hospitals does not authorize those courts to impress private property of citizens. This power, to be exercised by individuals, etc., does not arise by implication, but must be specially conferred by the Legislature." In the opinion *Lyon, J.*, said: "This is too dangerous and extraordinary power to be conferred by implication. It must be expressly granted, and must provide in the grant the mode of compensation," etc. This ruling was adhered to in *Markham v. Brown*, 37 Ga. 277, 92 Am. Dec. 73, in which *Walker, J.*, said: "The right of the inferior court to provide hospitals for smallpox patients, under the law, is one thing; but their right to seize or impress the private property of the citizen for that purpose is another, and quite a different, thing. No express power is given them in the law to do so, and we cannot give it to them by implication." The Supreme Court of Missouri held broadly that "the power to take private property for public use is in derogation of property and the right of the citizen, and the authority so conferred by law must not be implied or inferred, but must be given in express language." *Schmidt v. Densmore*, 42 Mo. 225. So, in *Phillips v. Dunkirk, Warren & Pittsburgh R. Co.*, 78 Pa. 177, it was held: "The right of eminent domain will not be presumed to exist in a corporation unless by express legislative grant." In *Boston & Lowell Railroad Corporation v. Salem & Lowell Railroad Co.*, 2 Gray, 36, Chief Justice *Shaw* said: "It must appear that the government intend to exercise this high sovereign right by clear and express terms or by necessary implication, leaving no doubt or uncertainty respecting such intent. It must also appear by the act that they recognize the right of private property, and mean to respect it; and under our Constitution the act conferring the power must be accompanied by just and constitutional provisions for full compensation to be made to the owner. * * * In general, therefore, when an act seems to confer an authority on another to take property, and the grant is not clear and explicit, and no compensation is provided by it for the owner or party whose rights are injuriously affected, the law will conclude that it was not the intent of the Legislature to exercise the right of eminent domain, but simply to confer a right to do the act or to exercise the power given on first obtaining the consent of those thus affected." The decision

of this court in the Waycross Case is in accordance with the great weight of authority; and, even if it were not, it would be controlling authority in the case under review. It is contended by the defendant in error, however, that the decision in that case is not controlling in the present one, because at the time it was rendered there was no statutory authority to which the municipality could resort for the purpose of having compensation for property taken or damaged by the opening of a street assessed; while at the time the charter of the town of Union Point was enacted there was in existence a general law providing the method for condemning private property for public uses, which went into effect on December 18, 1894. Acts 1894, p. 95; Civ. Code 1895, § 4657 et seq. Undoubtedly, there is that difference between the two cases. Still we do not think the contention is sound. If the right to condemn private property cannot be implied from the grant of authority to lay out and open streets, then a municipal corporation, which, in reference to streets, has been granted no more authority than this, is not authorized to exercise the power of eminent domain for the purpose of opening a street, and it is only corporations or persons who are authorized to exercise this power who can resort to the provisions of the act of 1894 in order to condemn private property. The purpose of that act, as declared in its title, was "to provide a uniform method of exercising the right of condemning, taking, or damaging private property," and its first section declared that "all corporations or persons authorized to take or damage private property for public purposes shall proceed as herein set forth." The codification of the act did not enlarge its purpose, for Civ. Code 1895, § 4657, adopts literally the language above quoted from the first section of the act. This statute was certainly not intended to confer power, or to enlarge or supplement the meaning of any statute then in existence or which might thereafter be passed, but was simply intended to provide a general and uniform method of exercising a power which had been or should thereafter be given. It applies only to "corporations or persons authorized to take or damage private property for public purposes." The authority of a given corporation "to take or damage private property for public purposes" must be looked for in its charter. If it is not expressed there, it must be necessarily implied from what is expressed there. When the authority is found in the charter, the method of its exercise is found in the provisions of the Civil Code taken from the act of 1894. If the right to exercise the power of eminent domain had been conferred by the Legislature upon the town of Union Point, the method for the exercise of such right would be found in the provisions of the act of 1894, but, as this right has neither expressly nor by necessary implication been conferred upon the municipality, the provisions of this statute have no application to anything contained in its charter.

3. The contention of the municipal corporation that the opening of the street across the right of way and tracks of the railroad company is not a taking or damaging of private property, "but is a mere subjection of the railroad right of way and tracks to another consistent public use, which the Legislature may lawfully authorize the town authorities to impose, without any compensation or provision therefor," is contrary to the decisions of this court upon the subject. Undoubtedly, the right of way and tracks of a railroad company may be subjected to another and consistent public use, provided the power to condemn the property of the railroad company for such a purpose exists, and just compensation is first paid the railroad company for the damage its property will thereby sustain. But this court has held that the right of way and tracks of a railroad company cannot be subjected to another and consistent public use, against the consent of the company, except under condemnation proceedings duly authorized. *Georgia Midland R. Co. v. Columbus R. Co.*, 89 Ga. 205, 15 S. E. 305; *Brunswick Ry. Co. v. Waycross*, supra; *Atlantic & B. R. Co. v. Seaboard Air Line Ry.*, 116 Ga. 412, 42 S. E. 761. While all three of the cases just cited are directly in point so far as the principal involved is concerned, the ruling in the Waycross Case is especially applicable here; for, if the contention that there is nothing to condemn when a municipal corporation seeks to open a street across the right of way and track of a railroad company were sound, this court would not have decided that the city of Waycross could not open a street across the right of way and tracks of the Brunswick & Western Railroad Company, because it had no power to condemn the property of the railroad company for this purpose. There is nothing to the contrary in *Cleveland v. Augusta*, 102 Ga. 233, 29 S. E. 584, 43 L. R. A. 638, upon which the municipal corporation relies to sustain its contention. There the railroad corporation constructed its railroad across an existing public highway or street, while here the effort is to construct a public street across an existing railroad. The learned counsel for the municipality says in his brief: "For the correctness of the proposition that the requirement of the railroads to construct crossings is an exercise of the police power, and not a taking of private property, no better proof or argument can be presented than the opinion of this court in the" *Cleveland Case*. We are entirely satisfied with the decision of this court in that case, and think the compliment paid by counsel to the able opinion delivered by Mr. Justice Little is well deserved. But there is as much difference between requiring a railroad company to maintain a street crossing over its track at a point where such track has intersected an existing public street and requiring a railroad company to extend a public street over its right of way and tracks as there is between the exercise of the police power and the exercise of the power of

Connery v. Quincy, etc., R. Co

eminent domain. In the one case the municipal authorities do not have to acquire the right to subject the property of the railroad company to a new public use, as the railroad company acquired its right of way and constructed its track across the street subject to the existing public use; while in the other the position of the parties is reversed, and it is the municipal corporation which seeks to subject the property of the railroad company to an additional public use. Whenever municipal authorities have lawfully subjected the property of a railroad company to the public use for street purposes, then, and not until then, can the railroad company be required to maintain a street crossing over its tracks. In this case it has only been necessary to decide whether the municipality, under its charter, has the power to lay out and open a street across the right of way and tracks of the railroad company, against the consent of the company. But in determining this question it was necessary to decide whether the railroad company had any property right which would be taken or damaged by the laying out and opening of the street across its right of way and tracks. This last question, as we have seen, was already settled by decisions of this court which are cited above. As the municipality has no power to exercise the right of eminent domain for the purpose in question, it has, of course, not been necessary for us to determine what would be the amount of damages, in such a case, under condemnation proceedings, or what elements would go to make up the damages. There are many cases which hold that the expense of maintaining a street crossing over a railroad cannot be taken into consideration in determining the amount of damages to be assessed for acquiring the right to lay out and establish a street across the right of way and track of a railroad company; but that, after the street has been lawfully laid out and established over the property of the railroad company, the company is bound, under statutes requiring it to maintain in good order street crossings over its tracks, to keep up such crossings at its own expense, such statutes being held to be a legitimate exercise of the police power of the state. So it may be that in most cases the damages to be awarded for acquiring the right to subject the right of way and track of a railroad company to the public use for street crossing would be merely nominal in amount.

Judgment reversed on the first bill of exceptions; writ of error dismissed on the second. All the Justices concurring.

CONNERY v. QUINCY, O. & K. C. R. CO.

Supreme Court of Minnesota, April 22, 1904.)

[99 N. W. Rep. 365.]

Attachment—Property Subject—Foreign Railroad Car.

A railroad car of a foreign company sent into this state with freight

Connery v. Quincy, etc., R. Co

to be delivered here, and then, within a reasonable time necessary for its return, reloaded, and in the customary and usual course of business forwarded to the state from which it came, is not liable to attachment issued in an action in our courts.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; Willard R. Cray, J.

Action by Edward E. Connery against the Quincy, Omaha & Kansas City Railroad Company. From an order refusing to dissolve an attachment, defendant appeals. Reversed.

Al. J. Smith, Rome G. Brown, and Charles S. Albert, for appellant.

George C. Stiles, for respondent.

LOVELY, J. Appeal from an order denying a motion to vacate a writ of attachment under which one of defendant's freight cars was seized in an action for an alleged delay in forwarding a consignment of strawberries shipped from a point on defendant's road in Missouri to be sent through successive railway carriers to Minneapolis. The complaint alleges a cause of action which, if established, would entitle plaintiff to recover for an alleged negligent delay in transmitting perishable goods to the consignee, but it is claimed by the moving party that the property levied upon, though owned by the defendant, and within this state, was not subject to the processes of our courts. The defendant company was a railway corporation of Missouri, had no line of road or office in this state, and did no business herein, its only property being the car in question temporarily within our boundaries to be returned as soon as its errand was fulfilled. From the facts established on the hearing of the motion it appears that an agreement existed between the defendant company and the intermediate subsequent common carriers whereby the defendant, instead of unloading and transferring freight at the points of connection or at state lines, received the car in question to be hauled to the place of destination without breaking bulk or discharging its contents under an implied agreement to return it as soon as practical, reloaded, to some point on or near its line in Missouri; that the car in question was used by the carriers bringing it into this state, and delivered to the Minnesota Transfer Company, an independent corporation here, paying to the first carriers for the use of the same a per diem or mileage; that this method of receiving and returning cars facilitated traffic, which is claimed to be a substantial accommodation to the shipping public, and a compliance with the system of freight transportation adopted universally throughout the United States. Under this custom it appears that the car in question had been used in an interstate shipment of goods therein from St. Louis to points in Minnesota, North Dakota, and Montana, and at the time of the levy was awaiting reloading by the

Connery v. Quincy, etc., R. Co

Minnesota Transfer Company in its yard with a return shipment to points in Missouri. While the car was in fact empty when seized, it appears that there was no unreasonable or unnecessary delay in securing its return according to the regular course of business, and that the car was a part of the actual equipment of the foreign railway corporation to which it belonged.

Under our statute, although a cause of action may not have arisen in this state, jurisdiction of a foreign corporation can be acquired by our courts through service of summons on one of its officers or agents who may be found therein, providing it has property here; otherwise not. Section 5200, Gen. St. 1894. But within the sensible intent of the statute such property must be of a kind and value to justify the reasonable probability that the creditor can secure something from a sale thereof which may be applied to the debt on judgment; and we have also held that, while no precise rule is applicable to all cases, the mere fact that freight cars are in transit through the state would not constitute such property for the purposes of meeting the jurisdictional requirements. *Strom v. Montana Central Ry.*, 81 Minn. 346, 84 N. W. 46. Again, it is in substance provided that, where a foreign corporation has property within the state, a creditor may acquire a lien thereon by attachment or garnishment, but only to the extent of the property at the time the jurisdiction acquired thereby attaches. Section 5211, Gen. St. 1894. Strictly speaking, the freight car which was seized in this case was actually property owned by defendant corporation, and under a technical reading of this statute was subject to attachment or garnishment; but we do not think this conclusion absolutely follows in all cases. We have held that the property of a nonresident within the state, while strictly subject to garnishment, as, for instance, in the case of a common carrier receiving goods consigned for transit to a place outside of the state, is not amenable to such process. *Stevenot v. Eastern Minnesota Railway*, 61 Minn. 104, 63 N. W. 256, 28 L. R. A. 600; *Baldwin v. Great Northern Ry. Co.*, 19 Am. & Eng. R. Cas., N. S., 202, 81 Minn. 247, 83 N. W. 986, 51 L. R. A. 640, 83 Am. St. Rep. 370. From the cases above cited from this court it would follow that we should not give such literal interpretation to our statute in securing jurisdictional powers as would overcome by artifice the mere presence of property here which has practically been enforced under exceptional circumstances that required its presence temporarily to meet the necessities of commerce, traffic, public policy, and is made essential to secure benefits to our citizens, where its presence is not intended to serve any other purpose. Under the laws of this State common carriers doing business herein are required to establish joint through rates and transfer through car-load shipments to their destination without unloading. Laws 1887, p. 50, c.

Connery v. Quincy, etc., R. Co

10, § 2. The federal government has expressly required that the movement of railway cars shall not be stopped or delayed at the point where the lines of such railway companies cross the borders of states, or at the point where the carriers deliver the cars to the next connecting carrier; but that shipments shall go forward from the originating point to their destination in the cars in which they are first loaded. Rev. St. U. S. § 5258 [U. S. Comp. St. 1901, p. 3564]. Under the interstate commerce act (so called) it is provided in terms: "That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act." 24 Stat. 382, c. 104. These well-known provisions of law are expressive of a universal condition that exists upon all the railway lines of this country, and without giving them effect and permitting the railway carriers from other states to come into our boundaries with goods which are shipped here, and return without being retarded, or so treated that the carriers must protect themselves against litigation away from home, that they would transfer the contents of such cars to others in our state would be provocative of the greatest detriment to the business interest of our citizens, and be violative of the terms and spirit of the enactments to which we have referred. It follows that we cannot justify a construction of our attachment or garnishee statutes that would effectuate such a result, and, while it was a part of the contract between the nonresident corporation in this state and the connecting carriers that the freight cars should be reloaded, and within reasonable time returned, this custom was but a practical method of securing compensation for bringing the car into and out of the state in the necessary effort for continuous and unbroken transit, which is essential to the purposes of traffic and interstate commerce; hence it should not be treated as property subject to attachment. This subject has been thoroughly and exhaustively considered in two recent cases, and the reasoning therein within the lines above suggested meets our approval. *M. C. R. R. Co. v. C. & M. L. S. R. R. Co.*, 1 Ill. App. 399-440; *Wall v. Norfolk & Western Ry. Co.* (W. Va.) 44 S. E. 294. Had the car seized in this case been delayed longer than was necessary in the course of business to

Dean v. Ann Arbor R. R.

return it to the place from whence it came, or had it been diverted within the state to uses and purposes exceptional to its presence here under the demands of interstate commerce with the consent of the owning corporation, a different proposition would be presented; but practically it was engaged in a transit into and from the state upon such reasonable conditions as ought not to impose upon it such property conditions and characteristics as should subject it to seizure in coming into and returning from the state for the purposes of giving jurisdiction to litigants here who otherwise would be compelled to contest their causes of action in the tribunals where the property had its undoubted legal situs.

The order refusing to vacate the attachment is reversed, and the cause remanded.

DEAN et al. v. ANN ARBOR R. R. et al.

(Supreme Court of Michigan, Sept. 13, 1904.)

[100 N. W. Rep. 773.]

Streets—Raising Grade of Railroad Crossing—Special Injury to Abutter—Injunction.*

One whose frontage on a street would be lessened by the raising of the grade of a railroad crossing the street in the block in which his lots are located, and whose passage out of the block in the direction of the railroad would thereby be cut off, increasing the cost of trucking to and from his warehouses on the lots, and depreciating the value of his property, suffers a special damage different from that of the public, authorizing him to maintain a suit for injunction.

Same—Same—Authority of City.

Power in a city charter to designate grades of railroads coming into the city, and to establish a grade for streets and sidewalks, does not authorize the city to in effect vacate part of a street by allowing a railroad to cross it on an embankment above the grade of the street.

Appeal from Circuit Court, Washtenaw County, in Chancery; Harry A. Lockwood, Judge.

Suit by Sedgwick Dean and another against the Ann Arbor Railroad and others. Decree for plaintiffs. Defendants appeal. Affirmed.

The following is the plat referred to in the opinion:
(Plat omitted as not essential.)

A. J. Sawyer & Son (Alex L. Smith, of counsel), for appellants.

Jasper C. Gates and Frank E. Jones, for appellees.

*As to the rights of abutting owners as affected by the construction and operation of ordinary railroads in streets, see foot-note appended to *Bork v. United New Jersey R. & Canal Co.* (N. J.), 11 R. R. R. 115, 34 Am. & Eng. R. Cas., N. S., 115, where all the preceding authorities in this series are collected.

As to whether an abutting owner is entitled to compensation from ordinary railroads or street railways, see foot-note appended to *Knapp & Cowles Mfg. Co. v. New York, etc., R. Co.* (Conn.), 11 R. R. R. 134, 34 Am. & Eng. R. Cas., N. S., 134, where all the preceding authorities in this series are collected or referred to.

Dean v. Ann Arbor R. R

MOORE, C. J. A reference to the plat and a reading of the opinion filed by the circuit judge will give an understanding of the questions involved in this case. The opinion reads:

"The bill in this case is filed to enjoin the Ann Arbor Railroad Company and the city of Ann Arbor and its officers from building an embankment in and across First street, in the city of Ann Arbor, and from closing or diverting First street, and for a decree compelling the defendants to keep First street from William street to Liberty street in good repair and in a condition reasonably safe for public travel. A long time prior to 1882, William S. Maynard's Addition to the village (now city) of Ann Arbor had been made, and the streets therein, including First street, had been opened and used as public streets. In 1872 the common council of the city of Ann Arbor granted permission, by ordinance, to the Toledo, Ann Arbor & Northern Railroad Company, the predecessors of the present corporation, to construct its tracks through the city of Ann Arbor and across many of its streets, fixing the grade of the railroad at the then existing grade of each street crossed. At this time Roger Mathews and Mary Mathews were owners of lots 12, 13, and 14 of block 3 south of Huron street, range 2 east, according to the plat of Wm. S. Maynard's Addition. These lots are situated on the east side of First street, in the middle of the block between William street on the south and Liberty street on the north, and had a frontage of 150 feet on First street, with no frontage on any other street. After the passage of said ordinance, the owners of these three lots conveyed to the railroad company a right of way across said lots, described as being 25 feet wide on each side of the center line of the railroad as located. The railroad was constructed between 1872 and 1876, its general course through the city of Ann Arbor being north and south, but at the point where it crossed First street its course was north, 22 degrees west; the crossing at First street being at an angle of 22 degrees. The right of way took the westerly part of lot 14 and the southwest corner of lot 13, the easterly line of the said right of way intersecting the easterly line of First street near the center of lot 13. The grade of the railroad as then constructed was at the grade of the street, which was but little, if any, above the level of the surrounding lots. In 1882 the complainants purchased from the said Roger and Mary Mathews said three lots 'except' the land in the southwest corner conveyed to the railroad company. This land purchased by the complainants exclusive of the railroad right of way had frontage of about 95 feet on First street. The complainants, who are dealers in groceries, crockery, and oils, doing a wholesale and retail business in the city of Ann Arbor, built warehouses and oil tanks upon these lots, which are used in storing goods handled in their business. The

defendant railroad company furnished a siding so that cars could be unloaded at the warehouse on these premises. The freight house of the railroad company stands upon the east side of First street, across the railroad tracks and across William street to this freight house. Their business has gradually increased since 1882, and they are now handling very large quantities of merchandise each year in these warehouses and oil tanks. The buildings and improvements placed on these lots by complainants for the purpose of accommodating their business cost about \$8,000. The grade of the railroad has remained substantially as first constructed at the crossing of First street. On October 1, 1902, the common council of the city of Ann Arbor passed an ordinance entitled 'An ordinance relative to changing the course and grade of certain streets, and elevating the tracks of the Ann Arbor R. R.' This ordinance was duly approved, published, and accepted by the railroad company as therein provided. A copy of this ordinance is attached to the bill of complaint, and it provides, in brief, for raising the grade of five east and west streets in the southerly portions of the city, at the points where they are intersected by the tracks of the railroad company, from 1½ to about 7 feet, and for lowering the grades of other streets at the intersection of the said railroad tracks from 2 to 3 feet. It provides for steel viaducts above Felch street, Miller avenue, Huron, Washington, and Liberty streets, and at the foot of Ann street. These last-mentioned streets are east and west streets, and are north of the premises of complainants. This ordinance contemplates the raising of the grade of the Ann Arbor Railroad from William street north to from 9 to 15 feet above its present grade. The provision in said ordinance in relation to First street is as follows: 'That First street be diverted so as to intersect Liberty street west of the present right of way of the said company.' The next day after the passage of this ordinance the complainants notified the defendant railroad company that they would resist by legal proceedings, if necessary, any attempt to do the work contemplated, and that they claimed that said ordinance was not valid. The defendant railroad company proceeded to do work in preparation for raising its grade, and had done a small amount of work on its grade in the ways of surveys, testing the foundations, and the like, prior to the filing of this bill. This bill was filed March 7, 1903. Upon its filing a preliminary injunction was issued, restraining the defendant from building any embankment either in First street, in said city of Ann Arbor, between William and Liberty streets, or in front of the premises of said complainants, and from in any wise closing or diverting First street, or placing any obstruction therein, and from interfering with or obstructing the said complainants, or either of them, in their free use of said First street, in either direction, north or south, from their

Dean v. Ann Arbor R. R

said premises. This injunction was later dissolved on motion of the defendants. The defendant railroad company has continued to do work in raising its grade, and has raised a portion of its grade north of Liberty street, and put in foundations for the abutments in the streets over which viaducts are to be constructed. It has purchased and has upon the ground a large amount of steel and material for the construction of the viaducts, and is going forward in the work in raising its grade. It has now expended large amounts in doing the work and buying material. At the time this case was heard no change had been made at the intersection of First street or south thereof. The evidence in this case shows that it was the plan and purpose of the railroad company to put in all the viaducts provided in the ordinance except perhaps the one at the foot of Ann street, which street does not cross the railroad track, and to provide for the separation of the grades of their track and the streets on Felch street, Miller avenue, Huron, Washington, and Liberty streets. In each case the street is to pass under the railroad track. That the east and west streets south of Liberty street will cross the railroad track at grade, the grade of the streets being raised in most cases to bring it to the proposed grade of the railroad. That at the intersection of First street it is proposed to build a grade for the railroad from 12 to 13 feet higher than it is at present, and higher than the level of the street. That the railroad company proposes that, if it finds it necessary, in order to retain this embankment upon its 50-foot right of way, to build foot walls of masonry to hold the base of the embankment. The embankment will occupy the whole of the 50-foot right of way of the railroad company, and will occupy all of that part of First street falling within this 50 feet. The crossing of First street is a long one. If this embankment is made, it will occupy most of the street in front of complainants' premises. The north line of their premises projected west will intersect the east line of the embankment at about the middle of the street. The only portion of the street in front of any of these premises unoccupied by the embankment will be a right-angled triangle, with a base about 95 feet along the east line of the street, and a perpendicular of about 32 feet along the north line of the premises projected west. In other words, all the street left open in front of these premises would be about 32 feet wide at the north line, and would narrow to nothing at a point about 95 feet south of the north line. All the balance of this street in front of the complainants' premises would be entirely obstructed, and practically vacated and abandoned as a public way. It also appears from the evidence that no provision is to be made for the crossing of the railroad track on First street; that the portion of First street within the 50-foot right of way will be entirely obstructed; that it will be impossible to cross the tracks of the defendant railroad

company on First street when the contemplated grade is completed. It also appears from the evidence in the case that the intention to open First street along the westerly side of the right of way of the defendant railroad company to Liberty street has been abandoned. It appears that after the passage of the grade ordinance proceedings were instituted for the purpose of opening this street, but that the common council of the city of Ann Arbor determined not to open it. There is no evidence in this case tending to show a purpose on the part of the city to vacate or abandon that portion of First street north of the railroad right of way between it and Liberty street. The driveway which provides ingress and egress from complainants' property on First street with trucks and wagons is near the north line of lot 12. If the embankment proposed, is constructed across First street, the complainants can get to their property from the north, but cannot get to their property on First street from the south. The portion of First street north of the railroad right of way will be a cul-de-sac. It appears from the evidence in this case that the value of the complainants' premises for the purpose for which they are used would be depreciated if the said embankment is constructed, and if the complainants continue to use their premises for the purpose for which they have been used since they have owned them, and they will be compelled to travel considerably further in getting to the freight house of the railroad company, and that the added expense of trucking their goods from their warehouse to the freight house by reason of the increased distance would amount to several hundred dollars each year."

It is the claim of appellants that the city is the owner of the fee in the street. This is denied by complainants. Appellants say it is not important. Their position is: "The right to use First street is in common with the public—that is, the right to use First street between Liberty and William streets with their teams and vehicles—but manifestly this right they enjoyed in common with all the rest of the public who might have occasion to pass that way. So far as this right was interfered with, they have no standing in court to pray for an injunction. It is well settled that in cases of this kind an injunction will not be granted except to one who has suffered a special damage or inconvenience, different in kind from that suffered by the rest of the public. Differences in degree are of no importance here. *Henry v. Ann Arbor Railroad Co.*, 116 Mich. 314, 75 N. W. 886; *Buhl v. Union Depot Co.*, 98 Mich. 596, 57 N. W. 829, 23 L. R. A. 392; *People ex rel. v. Supervisors of Ingham Co.*, 20 Mich. 95. The complainants, as the owners of abutting property, are not entitled to any compensation for damages for any injury to the use of the street that is common to the general public. * * * It cannot be honestly denied that all the means of access that were ever owned by the complainants are

preserved to them in this instance intact. That right would be in no way infringed upon by the building of the embankment contemplated under this ordinance. The same mode of ingress and egress would remain to and from First street, and therefore, under the authorities cited, the complainants are not entitled to any redress, and certainly not entitled to an injunction." Counsel for complainants do not admit this contention, and the learned circuit judge reached a different conclusion. He is justified by the record in saying that for many years the complainants had a frontage on First street of 95 feet, and, when they reached the street at any point in front of their premises, could travel either north or south thereon. The result of the proposed action of defendants will be to make of this street a cul-de-sac, very materially shortening the frontage of complainants, and making it impossible for them, when they reach the street, to travel south thereon. The conclusion cannot be avoided that, if this proposed improvement is carried out, the value of complainants' property will be greatly depreciated, and the expense of conducting their business will be greatly increased. These are effects limited to the property of complainants and its business, and not common to the public. It is said by counsel: "Subdivision 10 of section 88 of the charter of Ann Arbor reads as follows: 'Tenth. To determine and designate the routes and grades of any railroad coming into or passing through said city, and to restrain and regulate the use of locomotives, engines and cars upon any railroad within the city.' Subdivision 31 reads as follows: 'Thirty-first. To establish a grade for streets and sidewalks and cause the sidewalks to be constructed in accordance with the same.' Is there any doubt but that these subdivisions of this section authorize the city of Ann Arbor not only to designate the route of the Ann Arbor Railroad, but to fix and establish the grade, and to fix the grade of the streets over which it crosses? And by these provisions it may raise the grade of the railroad above or beneath the grade of the streets over which it passes. The ordinance in question simply establishes the grade of the Ann Arbor Railroad through the city of Ann Arbor, and changes the grade of certain streets, and authorizes the railroad to build viaducts over certain streets; and clearly the charter authorizes such an ordinance"—citing *City of Pontiac v. Carter*, 32 Mich. 164; *Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507; *Larned v. Briscoe et al.*, 62 Mich. 339, 29 N. W. 22. The facts do not disclose that the city was simply attempting to change a grade for highway and sidewalk purposes. The effect of what it attempts to do is to vacate a considerable portion of a street, and deprive not only the complainants, but the public, of the use of it, and give it over to the use of a railroad company. The principles involved are fully discussed in *Schneider v. Detroit*, 72 Mich. 240, 40 N. W. 329, 2 L. R. A. 54, *Harper v.*

Coakley v. Southern Ry. Co

City of Detroit, 110 Mich. 427, 68 N. W. 265, and *Phelps v. Detroit*, 120 Mich. 447, 79 N. W. 640, which cases are controlling. Desirable as this improvement undoubtedly is, the complainants cannot be compelled to submit to the loss which they would be obliged to sustain if it was made without due compensation.

The decree of the court below is affirmed, with costs. The other Justices concurred.

COAKLEY v. SOUTHERN RY. CO.

(Supreme Court of Georgia, Aug. 12, 1904.)

[48 S. E. Rep. 372.]

Railroads—Venue.*

An action for personal injuries against a railroad company, foreign or domestic (*Mitchell v. Ry. Co.*, 45 S. E. 703, 118 Ga. 845; *Hazlehurst v. Railway*, 45 S. E. 703, 118 Ga. 858), must be brought in the county in which the cause of action originated, if such company have an agent in that county; and a judgment rendered in any other county is utterly void. Civ. Code 1895, § 2334.

Same—Same.*

If the company have no agent in the county in which the cause of action originated, the action may nevertheless be brought in that county; the court having power to perfect service upon the defendant. *Devereux v. Atlanta R. Co.*, 36 S. E. 939, 111 Ga. 855; *Mitchell v. Railroad*, 75 Ga. 398.

Same—Same.*

Where there is no agent in the county in which the cause of action originated, then, if the company be a domestic corporation, suit may be

*As to where actions against railroads may be brought, and upon whom, in such actions, summons may be served, see *Louisville, etc., R. Co. v. Chestnut & Bro.* (Ky.), 7 R. R. R. 252, 30 Am. & Eng. R. Cas., N. S., 252 (meaning of "passenger or freight agent" under Civ. Code Prac. § 51, subsecs. 3, 4); *Brown v. Chicago, M. & St. P. Ry. Co.* (N. Dak.), 8 R. R. R. 783, 31 Am. & Eng. R. Cas., N. S., 783 (service of summons on foreign corporation); *Boyd v. Blue Ridge Ry. Co.* (S. Car.), 6 R. R. R. 754, 29 Am. & Eng. R. Cas., N. S., 754 (venue); *Le Croix v. Western & A. R. Co.* (Ga.), 7 R. R. R. 448, 30 Am. & Eng. R. Cas., N. S., 448 (venue under act approved Nov. 12, 1889, of Georgia, providing for lease of Western & Atlantic Railroad); *Burnett & Goodman v. Central of Georgia R. Co.* (Ga.), 7 R. R. R. 945, 30 Am. & Eng. R. Cas., N. S., 945 (service of summons on railroad agent in garnishment proceedings); *Pittsburg, C. & St. L. Ry. Co. v. Viers* (Ky.), 3 R. R. R. 62, 26 Am. & Eng. R. Cas., N. S., 62 (venue of action where ratification by connecting carrier of original contract of initial carrier); *Fremont, etc., R. Co. v. New York, etc., R. Co.* (Neb.), 5 R. R. R. 470, 28 Am. & Eng. R. Cas., N. S., 470 (agent employed to solicit traffic for foreign company a managing agent for purpose of receiving summons for company); *Atlanta K. & N. Ry. Co. v. Wilson* (Ga.), 4 R. R. R. 610, 27 Am. & Eng. R. Cas., N. S., 610 (venue of action for injuries, under Georgia statute); *Southern Ry. Co. v. Brock* (Ga.), 4 R. R. R. 771, 27 Am. & Eng. R. Cas., N. S., 771 (action for killing stock should be brought, under Georgia statute, in county where principal office of railroad company is situated); *Bule v. Chicago, R. I. & P. Ry. Co.* (Tex.), 2 R. R. R. 556, 25 Am. & Eng. R. Cas., N. S., 556 (service of process where foreign company and domestic company operate railroad together); *Connor v. Tennessee Cent. Ry. Co.* (C. C. A.), 3 R. R. R. 417, 26 Am. &

Coakley v. Southern Ry. Co

brought in the county of the residence of the defendant; or, if it be a foreign corporation leasing or operating a domestic franchise, suit may be brought in the county of the residence of the company owning the franchise. Civ. Code 1895, §§ 1863, 2335. If, however, it be a foreign corporation not operating under a domestic franchise, it has no residence in this state, within the meaning of Civ. Code 1895, § 2334, and the action, if brought in this state, must be brought in the county in which the cause of action originated, whether the defendant have an agent in that county or not.

(Syllabus by the Court.)

Error from City Court of Brunswick; J. D. Sparks, Judge.

Action by S. F. Coakley against the Southern Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Toomer & Reynolds, for plaintiff in error.

Kay, Bennet & Conyers, for defendant in error.

SIMMONS, C. J. Judgment affirmed. All the Justices concurring.

Eng. R. Cas., N. S., 417 (power of state to authorize service upon non-residents by publication); note, 15 Am. & Eng. R. Cas., N. S., 425 (service of process upon agents of foreign corporations); note, 11 Am. & Eng. R. Cas., N. S., 737 (service of process in action against corporation); note, 12 Am. & Eng. R. Cas., N. S., 865 (service of process upon common agent of carriers); *South Carolina & G. R. Co. v. Deitzen* (Ga.), 10 Am. & Eng. R. Cas., N. S., 232 (venue of actions for injuries where accident occurred in foreign state); *Texas & P. Ry. Co. v. Hornbeck* (Tex.), 9 Am. & Eng. R. Cas., N. S., 238 (venue of action for injuries to goods in transit); *Louisville & N. R. Co. v. Cooley* (Ky.), 12 Am. & Eng. R. Cas., N. S., 553 (action for death may be brought in circuit court of county where deceased resided, although the accident occurred in another county); *St. Louis, I. M. & S. Ry. Co. v. Brown* (Ark.), 16 Am. & Eng. R. Cas., N. S., 440 (venue of action against railroad for personal injuries is transitory); *Eichhorn v. Louisville & N. R. Co.* (Ky.), 23 Am. & Eng. R. Cas., N. S., 941 (residence of railroad corporation under Connecticut Code); *State v. Bogardus* (Kan.), 22 Am. & Eng. R. Cas., N. S., 142 (residence of railroad company under Kansas statute relating to establishment of highway); *Eel River R. Co. v. State* (Ind.), 17 Am. & Eng. R. Cas., N. S., 595; *State v. Adams Exp. Co* (Minn.), 7 Am. & Eng. R. Cas., N. S., 781 (service of process); *Douglass v. Kanawha & M. Ry. Co.* (W. Va.), 10 Am. & Eng. R. Cas., N. S., 883 (action for injuries to stock); *Wall v. Chesapeake & O. Ry. Co.* (C. C. A.), 15 Am. & Eng. R. Cas., N. S., 413 (service of process upon agents of foreign corporations); *Pierce v. Southern Pac. Co.* (Cal.), 7 Am. & Eng. R. Cas., N. S., 564 (service of process upon foreign corporation); *Hillary v. Great Northern Ry. Co.* (Minn.), 4 Am. & Eng. R. Cas., N. S., 51; *Nashville, C. & St. L. Ry. Co. v. Mattingly* (Ky.), 11 Am. & Eng. R. Cas., N. S., 736 (locality of service in action against railroad companies); *Denver & R. G. R. Co. v. Roller* (C. C. A.), 18 Am. & Eng. R. Cas., N. S., 595 (service of process on foreign railroad company); *Mayesville & B. S. R. Co. v. Ball* (Ky.), 20 Am. & Eng. R. Cas., N. S., 186 (constitutionality of statute providing that service of process on operator of railroad shall be sufficient); *Leroy & C. Val. Air-Line R. Co. v. Sidell* (Kan.), 21 Am. & Eng. R. Cas., N. S., 741 (service of process on foreign corporation); *Holbrook v. Evansville, etc., R. Co.* (Ga.), 23 Am. & Eng. R. Cas., N. S., 597 (service of summons upon railroad in garnishment proceedings).

CITY OF HARRIMAN *v.* SOUTHERN RY. CO.

(Supreme Court of Tennessee, Aug. 30, 1904.)

[82 S. W. Rep. 213.]

Railroads—Construction of Bridge over Tracks—Police Power of City.*

Act March 6, 1891 (Acts 1891, p. 93, c. 49), empowering a city to require railroad companies to construct bridges at public crossings, and viaducts over their tracks where they cross streets, being referable to the police power, applies to railroads whose tracks were laid before the street was built or the city was incorporated, and to the case of tracks laid in a cut 20 feet below the grade of the crossing street.

Appeal from Chancery Court, Roane County; Hugh G. Kyle, Chancellor.

Suit by the city of Harriman against the Southern Railway Company. A decree of the chancellor for complainant was affirmed by the Court of Chancery Appeals, and defendant appeals. Affirmed.

H. N. Carr and Jourolman, Welcker & Hudson, for appellant.

S. C. Brown and R. B. Cassell, for appellee.

McALISTER, J. This bill was filed by the municipality of Harriman to compel the Southern Railway Company by mandatory injunction to build a bridge or viaduct across its main track on Roane street where the latter crosses the track of the railway 22 to 24 feet above the grade. The bill alleged that complainant is a municipal corporation; that the Southern Railway owns and operates a line of road which runs through the corporate limits of said city for a distance of 1½ miles; that among the enumeration of powers granted complainant in its charter are included the power to require railroad companies to construct at their own expense bridges over their tracks where same cross or extend along public highways or streets; that Roane street crosses the track of defendant railway company at a point about midway between the main section of the city of Harriman and that part of said municipality known as "Walnut Hill," and at the intersection of said street with defendant's lines of railway in the city of Harriman there is, and has been for years, a bridge over defendant's railway track, which is located in a deep cut; the bridge has been in continual use for many years, and is the only means the public have of crossing the same in traveling said street, and is about 22 feet above the grade of the railroad; that said bridge is a public necessity, and the only means by which the public can cross said track in traveling said avenue; that the defendant railway company has been exercising ownership and control over said bridge, which is now in need of repairs, and has become in

*See generally, foot-note appended to Illinois Cent. R. Co. *v.* Swalm (Miss.), 11 R. R. R. 118, 34 Am. & Eng. R. Cas., N. S., 118.

such condition that it is dangerous for the traveling public, and has been so since October 8, 1902; that in that condition of affairs, on October 13, 1902, the board of mayor and aldermen passed an ordinance requiring defendant company to build a new bridge at said point. The bill prays for a mandatory injunction to compel the erection of said bridge. An answer was filed by the company denying all the principal allegations of the bill. Proof was taken, and the chancellor decreed in favor of the complainant, granting the full relief sought. On appeal the Court of Chancery Appeals affirmed the decree of the chancellor. Defendant has again appealed, and two assignments of error are filed:

First. The Court of Chancery Appeals erred in decreeing that complainant was entitled to the relief sought by the bill, and that the city of Harriman has authority under its charter to require railroad companies to construct bridges or viaducts over their tracks, and to require defendant railway company to construct a bridge over its tracks where Roane street is now located, and in granting a mandatory injunction requiring the Southern Railway Company to build a bridge over the railroad track upon Roane street in the city of Harriman, and in adjudging that defendant company pay the costs.

Second. That the court erred in decreeing that the defendant company should construct a bridge, because there were no plans or specifications embodied in the ordinance in question, or accompanying the same.

The facts found by the Court of Chancery Appeals are substantially as follows:

The city of Harriman was incorporated by an act of the Legislature passed March 2, 1891, approved March 6, 1891. Acts 1891, p. 93, c. 49. Among the powers conferred by the act upon the city it was given authority "to regulate the use of locomotive engines; to direct and control the location of cable and other railroad tracks; and to require the railroad companies to construct at their own expense such bridges and approaches, tunnels, or other conveniences at public crossings, and such viaducts and their approaches over their tracks where the same cross or extend along public highways or streets, and to put such streets in such condition and state of repair as not to interfere with the free and proper use of said streets or crossings, as the city council may deem necessary; and where a viaduct or viaducts cross the tracks of such railroad companies, to compel them to build their portion of a continuous viaduct or viaducts over said tracks with their approaches; and to regulate the rate of speed of all railroad trains within the city, and their stops at said crossings." That court further finds that 10 years or more ago, when the city of Harriman was laid out, it projected what was known as Roane street or avenue across a deep cut 20 or 24 feet deep where the railroad tracks were laid. This street being convenient and important to the public in passing from one

City of Harriman v. Southern Ry. Co

portion of this city to another, a bridge or viaduct was constructed over this cut by private subscription. It appears that the city of Harriman paid the contractor a balance of \$30 due on his contract, which he was unable to collect from the subscribers. Since that time the city has made some repairs on the bridge, so as to make it safe, or reasonably safe, for the public to use it. The proof shows that at this time the bridge, on account of its aged condition, has become manifestly unsafe for use by the public. The city authorities demanded that the railroad company should build a new bridge at said point, or repair the old one so as to make it safe. Defendant company declined to make said improvement, claiming that it was not responsible for the existence of said bridge, nor for its condition, and hence was under no obligation to keep it in repair or to build a new one to replace it. To meet this exigency, the board of mayor and aldermen of the city on the 13th of October, 1902, passed the following ordinance:

"An ordinance to require the Southern Railway Company to construct at its expense a viaduct or bridge over its railway track where the same crosses Roane street or avenue in the city of Harriman, Tennessee:

"Section 1. That said Southern Railway be and is hereby required to construct at its own expense a viaduct or bridge over its railroad track where the same crosses Roane street or avenue in the city of Harriman, Tennessee.

"Sec. 2. That the said viaduct or bridge shall be built of good, sound material, and constructed in a substantial and workmanlike manner, with its middle line on the middle line of said street or avenue, at the usual or necessary height over said railway track, and shall have the necessary approaches the full width of the bridge, so as to put said street crossing in such condition and state of repair as not to interfere with the free and proper use of said crossing by the public. Said viaduct or bridge shall be wide enough for a full road-way and foot-way thereon, properly separated by a suitable railing, and completed within sixty days from the publication and service of this ordinance.

"Sec. 3. That upon the passage and publication of this ordinance, the city clerk is hereby required to serve upon the agent of said Southern Railway Company at Harriman, Tennessee, a certified copy of this ordinance, and if, within sixty days thereafter, said company shall fail to construct said viaduct or bridge herein required, the city attorney is hereby directed to institute proper legal proceedings to enforce a compliance with this ordinance.

"Sec. 4. That all ordinances and parts of ordinances in conflict with this ordinance are hereby repealed, and this ordinance shall take effect from and after its publication, the public welfare requiring it."

The Court of Chancery Appeals, through Judge Wilson,

after an elaborate review of the authorities, reached the conclusion that: "It is competent for the state, in the exercise of its police power, to pass a law requiring railroads, whether existing or thereafter to come into existence, to build an overhead bridge where a public road, laid out by public authority to meet the convenience, necessity, or safety of the public, crosses its track, requires such erection. To hold otherwise is to say, it seems to the writer, that a railroad corporation, having located its road and put it into operation, is exempt from the duty of so using its franchise and property as to avoid injuring the property of others and endangering the lives and limbs of citizens. Otherwise expressed, it is to assert, in effect, the principle that if a railroad acquires a right of way, and constructs its railroad along it, and a population thereafter congregate in a given area on each side of its railroad, and organize under the law of the state a town or city, and lay off streets crossing its tracks necessary for the use and convenience of its citizens and those dealing with them, the railroad cannot be compelled to do all that is reasonably necessary to protect the lives of the people using such crossing, and that, too, when the Legislature of the state has expressly vested the power in the town or city to require it to do these things."

It will be observed from the facts found by the Court of Chancery Appeals that the railroad was built and in operation many years before the city of Harriman was founded. At the place where Roane street was afterwards located, the railroad ran through a deep cut, between 22 and 24 feet in height. The city of Harriman was chartered in 1891, and in laying off the city a number of streets were laid off crossing the railroad, one of them being Roane street.

Counsel for the company invoke the principle laid down by this court in *Dyer County v. Railroad*, 87 Tenn. 712, 11 S. W. 943, as follows:

"It is a well-settled rule of the common law, resting upon the most obvious considerations of fairness and justice, that where a new highway is made across another one already in use the crossing must not only be made with as little injury as possible to the old way, but whatever structures may be necessary to the convenience and safety of the crossing must be erected and maintained by the person or corporation constructing and using the same."

It must be admitted that the rule thus laid down is an equitable one; but the present case must turn upon the construction of the charter powers of the city of Harriman, already mentioned, rather than upon any general principles of the common law or inherent rules of equity. It is conceded that the grant of authority from the Legislature to the corporation of the city of Harriman is ample to compel railroad companies thereafter built and operating within the city to build bridges and viaducts, especially at grade crossings.

City of Harriman v. Southern Ry. Co

But the controverted question in this case is whether such grant of power was intended, or is broad enough, to embrace railroads whose tracks were laid before the street was built or the town incorporated. It is insisted on behalf of the defendant company that this ordinance cannot be referred to the exercise of the police power, because it involves purely a matter of revenue. It is argued that the passage of the ordinance was not done for the regulation of railroads in the interest of public safety, but simply to onerate the railroad company with the burden of building a new bridge for the city. It is insisted that this ordinance was not passed because the crossing was in a populous part of the city, and on a much traveled thoroughfare, where the public safety demanded an overhead crossing, instead of a grade crossing. Hence it cannot be referred, is the argument, to the exercise of the police power of the state. Counsel cite in support of this position *Cooley on Taxation*, as follows:

"The distinction between a demand of money under the police power and one under the power to tax is not so much one of form as one of substance. The proceedings may be the same in the two cases, though the purpose is essentially different—the one is made for regulation, and the other for revenue. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case, and referring it to the proper powers. Only those cases where regulation is the primary purpose can be specifically referred to the police powers." *Levee District v. Dawson*, 97 Tenn. 172, 36 S. W. 1041, 34 L. R. A. 725.

Counsel affirm there was no allegation in the bill, and no finding by the Court of Appeals, that a new bridge was needed to avoid a dangerous grade crossing. In this statement counsel is in error. The bill alleges as follows:

"As before stated, said bridge is getting more dilapidated and dangerous each day, and it is now a public necessity that a viaduct or bridge be constructed on said Roane street or avenue over the defendant railway company's track at the point above mentioned, without further delay, or the public will suffer irreparable injury."

The Court of Chancery Appeals on this subject finds as follows: That "when Harriman was laid out there was no necessity for a street at the point indicated, and where it crosses the railroad, but that the growth of the city since it was laid out has rendered said street a public convenience and public necessity, and that an overhead bridge at the point indicated is a public necessity, as well as a proper means for protecting the lives of its citizens."

So we think that counsel for the company is in error in stating that the question presented by the city ordinance was purely a matter of revenue.

But we return to the question propounded whether a grant of power from the Legislature can be employed to constrain

City of Harriman v. Southern Ry. Co

the erection of bridges and viaducts by companies whose tracks were laid out prior to the incorporation of the municipality. In *Thompson on Corporations*, vol. 4, p. 5505, it is said as follows:

"The Legislature may compel a railroad company to construct a bridge at the point of intersection of a railroad and turnpike so as to carry the turnpike over the railroad in a manner particularly specified, and it may do this although it may not possess a reserve power to alter or modify the charter of the railroad company; in other words, it may do it in the mere exercise of its police power." *People v. Boston R. R. Co.*, 70 N. Y. 569; *Inhabitants v. New York R. R. Co.*, 45 N. J. Eq. 436, 18 Atl. 242.

Again, the same author, in volume 2, p. 124, says as follows:

"Under a statute requiring railroad companies to construct and keep in repair suitable highway crossings, it was held to be the duty of the railroad company to make said crossings with approaches, notwithstanding the fact that the highway was laid out after the road was built."

In the case of the *Chicago, Burlington & Quincy Railroad Company v. City of Omaha* (Neb.) 66 N. W. 624, 41 L. R. A. 484, 53 Am. St. Rep. 557, the court said:

"The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public. It is one of the powers which has been reserved by the people of the state, and it cannot be surrendered to require persons and corporations to so exercise and enjoy their rights as not unnecessarily to injure others. That the principle stated is especially applicable to existing rights, without regard to the time of their acquirement, or to the source from whence they are derived, it appears to us a self-evident proposition not requiring argument," etc.

In that case it was said:

"The obvious purpose of the legislation in this case, both state and municipal, is to promote the convenience and safety of the public at a grade crossing, which is judicially recognized as a place of danger. It is, in short, the exercise of the governmental power and duty to secure a safe and necessary highway, and must be upheld, if at all, as a legitimate exercise of the police power of the state."

In the case of the *Illinois Central Railroad Company v. Willenburg* (Ill.) 7 N. E. 698, 57 Am. Rep. 862, it was said as follows:

"The point is made, however, that these provisions are not obligatory upon this corporation, because enacted many years since it received its charter from the state. This is a misapprehension of the law. The regulations in regard to fencing railroad tracks and the construction of farm crossings thereupon of landowners are police regulations, in the strict

City of Harriman v. Southern Ry. Co

sense of that term, and apply with equal force to corporations whose tracks are already built as well as to those thereafter constructed. They have reference to the public security for persons and property. No reason is perceived why, upon the same principle on which a railroad corporation may be required to fence its track and construct cattle guards, that it may not also be required to construct crossings."

In *People v. Squire*, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, it was held that an act requiring telephone and telegraph companies already in operation on the streets of cities of a certain size to put their wires underground was a legitimate exercise of the police power. Said the judge in that case: "The right to exercise this police power cannot be alienated, surrendered, or abridged by legislation, by any grant, contract, or delegation whatsoever, because it constitutes the exercise of a governmental function, without which it would become powerless to protect those rights it was especially designed to accomplish."

It has been held in numerous cases that "uncompensated obedience to a legislative enactment for the public safety under the police power of the state is not a taking or damaging, without just compensation, of private property, or of private property affected by public interests." *Chicago & Northwestern R. R. Co. v. Chicago*, 140 Ill. 309, 29 N. E. 1109; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Chicago, Burlington & Quincy R. R. Co. v. Chicago*, 166 U. S. 255, 17 Sup. Ct. 592, 41 L. Ed. 979, and authorities there cited. In the latter case it was held that: "The expense that will be incurred by the railroad company in erecting grades, planking crossings, and maintaining flagman in order that its road may be safely operated—if all that should be required—necessarily resulted from the maintenance of the public highway, and must be deemed to have been taken into account when it accepted the privileges and franchises granted by the state. Such expenses must be regarded as incidental to the exercise of the police powers of the state." The ordinance adopted by the city of Harriman is based upon an estimate that the improvement will not exceed \$200 or \$300, and is in all respects reasonable. If the exercise of this power by the corporate authorities should be excessive or unreasonable, the courts have plenary jurisdiction to adjudge such ordinance void.

The decree of the chancellor and the Court of Chancery Appeals will be affirmed.

BUBE v. BIRMINGHAM RY., LIGHT & POWER CO.

(Supreme Court of Alabama, April 19, 1904.)

[37 So. Rep. 285.]

Injury to Son—Right of Action.

A father cannot recover exemplary damages for the negligent injury of his minor son, in the absence of statute permitting it.

Same—Same—Application of Statute.

Code 1896, § 26, providing that when the death of a minor child is caused by the wrongful act of another, the father may recover "such damages as the jury may assess," has no application to an action by a father for injuries to his minor child from which death did not result.

Same—Action by Father—Damages—Mental Suffering.*

A father, in an action for injuries to his son, is not entitled to recover for mental anguish or suffering to himself.

Appeal from Circuit Court, Jefferson County.

Action by George H. Bube against the Birmingham Railway, Light & Power Company to recover damages for personal injuries to plaintiff's minor son. From a judgment granting a motion for a new trial after verdict in favor of plaintiff, he appeals. Affirmed.

The complaint contained two counts. The first count

*As to the elements of damages recoverable by parents for injuries to their children, see *Corbett v. Oregon Short Line R. Co.* (Utah), 7 R. R. 736, 30 Am. & Eng. R. Cas., N. S., 736 (loss of services and society elements of damages in action for death of child); *Snyder v. Lake Shore & M. S. Ry. Co.* (Mich.), 5 R. R. 283, 28 Am. & Eng. R. Cas., N. S., 283 (cost of maintenance to be considered in action for death of boy); *Texas & P. Ry. Co. v. Harby* (Tex.), 2 R. R. 602, 25 Am. & Eng. R. Cas., N. S., 602; *Snyder v. Lake Shore & M. S. Ry. Co.* (Mich.), 5 R. R. 283, 28 Am. & Eng. R. Cas., N. S., 283 (measure of damages for death of child); *Le Blanc v. Sweet* (La.), 2 R. R. 243, 25 Am. & Eng. R. Cas., N. S., 243 (measure of damages for death of daughter); notes, 13 Am. & Eng. R. Cas., N. S., 539, 10 Am. & Eng. R. Cas., N. S., 539 (death of child); note, 15 Am. & Eng. R. Cas., N. S., 734 (measure of damages for death of child); note, 11 Am. & Eng. R. Cas., N. S., 297 (when damages for impairment of earning capacity during minority are not recoverable); *Ft. Worth & D. C. Ry. Co. v. Hyatt* (Tex.), 3 Am. & Eng. R. Cas., N. S., 397; *Goodrich v. Burlington, C. R. & N. R. Co.* (Iowa), 3 Am. & Eng. R. Cas., N. S., 620; *Southern Ry. Co. v. Covenia* (Ga.), 10 Am. & Eng. R. Cas., N. S., 551; *Texas & P. Ry. Co. v. Wilder* (C. C. A.), 13 Am. & Eng. R. Cas., N. S., 520 (measure of damages for death of child); *Mason v. Southern Ry. Co.* (S. Car.), 19 Am. & Eng. R. Cas., N. S., 84 (measure of damages, under South Carolina statute, for death of child); *Louisville & N. R. Co. v. Creighton* (Ky.), 15 Am. & Eng. R. Cas., N. S., 713 (death of child); *Chesapeake & O. Ry. Co. v. Davis* (Ky.), 19 Am. & Eng. R. Cas., N. S., 710 (impairment of earning capacity during minority); *Atchison, etc., R. Co. v. Cross* (Kan.), 8 Am. & Eng. R. Cas., N. S., 758 (damages recoverable in action for death of minor son); *Louisville & N. R. Co. v. Creighton* (Ky.), 15 Am. & Eng. R. Cas., N. S., 713 (mental suffering of parents caused by death of child cannot be recovered for). See also, note, 11 Am. & Eng. R. Cas., N. S., 755 et seq.; *Middle Georgia & A. Ry. Co. v. Barnett* (Ga.), 12 Am. & Eng. R. Cas., N. S., 532 (action by parents for death of son); *Texas & P. Ry. Co. v. Wilder* (C. C. A.), 13 Am. & Eng. R. Cas., N. S., 520 (recovery for benefits expected of minor son after he should reach majority).

Bube v. Birmingham Ry., L. & P. Co

claimed \$5,000 for the simple negligence of the defendant in causing or allowing one of its street cars to run upon or drag said Jacob Bube, inflicting personal injuries, by reason of which the "plaintiff was put to great trouble, inconvenience, and expense for medicine, medical attention, care, and nursing in and about his efforts to heal and cure the wounds and injuries of said Jacob Bube, and plaintiff was deprived of the services and society of his said minor son," etc. In the second count it was alleged that the injuries complained of were "wantonly or intentionally caused" by the defendant. The defendant pleaded the general issue and several special pleas, setting up the contributory negligence of the plaintiff's minor son. During the trial of the case, and after the introduction of all the evidence, the court, at the request of the plaintiff, gave to the jury the following written charge: "If the jury find for plaintiff under the second count of the complaint, then they have the right in their sound discretion, to award punitive damages in addition to actual damages." The defendant duly excepted to the giving of this charge, and also separately excepted to the court's refusal to give each of the following charges requested by it: "(1) I charge you that in case of this kind the plaintiff cannot recover punitive or exemplary damages. (2) I charge you that in actions of this kind there can be no recovery of damages for mental pain of the father caused by an injury to his son." The jury returned a verdict assessing the plaintiff's damages at \$750, and judgment was rendered accordingly in favor of the plaintiff. Thereafter the defendant made a motion for a new trial upon the following grounds: "(1) For that the court erred in charging the jury that the plaintiff might recover punitive or exemplary damages against defendant. (2) For that the court erred in refusing to give this charge to the jury, which was requested by the defendant in writing: 'I charge you that in a case of this kind the plaintiff cannot recover punitive or exemplary damages.' (3) For that the court erred in refusing to give this charge to the jury, which was requested by the defendant in writing: 'I charge you that in actions of this kind there can be no recovery of damages for mental pain of the father caused by an injury to his son.' (4) For that the court erred in giving to the jury, at the written request of the plaintiff, the following charge: 'If the jury find for the plaintiff under the second count of the complaint, then they have the right, in their sound discretion, to award punitive damages in addition to actual damages.'"

Bowman, Harsh & Beddow, for appellant.

Walker, Tillman, Campbell & Walker, for appellee.

Punitive or exemplary damages are not recoverable in an action brought by a parent for loss of a minor child's services, resulting from a wrongful injury to that child. The form of

Bube v. Birmingham Ry., L. & P. Co

the action is "per quod servitium amisit," and has its origin in the common-law idea that the parent is entitled to the child's services during its minority. The parent recovers, not for the injury inflicted upon the child, but for the loss of the child's services resulting from that injury. *Pratt C. & I. Co. v. Brawley*, 83 Ala. 374, 3 South. 555, 3 Am. St. Rep. 751; *Cowden v. Wright*, 35 Am. Dec. 633. The Alabama court has expressly decided that the damages recoverable by parent for loss of services resulting from a wrongful injury to the child are purely and solely compensatory, in the cases of *Williams v. S. & N. A. R. R. Co.*, 91 Ala. 638, 9 South. 77, and *Stewart v. L. & N. R. R. Co.*, 83 Ala. 493, 4 South. 373. See, also, *L., N. A. & C. Ry. Co. v. Goodykoontz* (Ind. Sup.) 21 N. E. 472, 12 Am. St. Rep. 371; *Black v. Carrollton R. R. Co.*, 63 Am. Dec. 586; *Cowden v. Wright*, 35 Am. Dec. 633; *Penn. R. Co. v. Kelly*, 31 Pa. 372; 8 Amer. & Eng. Encyc. of Law, 924, 910.

The parent cannot recover for mental distress and anxiety on account of injuries sustained by his minor child. This principle is as well settled as the one we have already discussed, and the same reasons for that rule apply to this one. The measure of damages being purely compensatory, recovery cannot be had for injuries which are speculative, uncertain, and fanciful, as a mental pain and anguish. To allow this kind of damage would defeat the very object of the rule, which denies punitive or exemplary damages. Damages for mental pain and anguish not being measurable by any fixed and definite rule, the jury would be allowed to assess whatever amount they pleased. *Black v. Carrollton R. R. Co.*, 63 Am. Dec. 588; *Fox v. Oakland St. R. Co.* (Cal.) 50 Pac. 25, 62 Am. St. Rep. 216; *Pierce v. Conners* (Colo. Sup.) 37 Pac. 721, 46 Am. St. Rep. 279; *Morgan v. So. Pac. R. R. Co.* (Cal.) 30 Pac. 603, 17 L. R. A. 71, 29 Am. St. Rep. 143; *Chicago v. Major*, 68 Am. Dec. 553; *Ohio & Miss. R. Co. v. Tindall*, 74 Am. Dec. 259; *State v. B. & O. R. R. Co.*, 87 Am. Dec. 600; *Chicago R. Co. v. Swett*, 92 Am. Dec. 206; *Potter v. Chicago R. Co.*, 94 Am. Dec. 548; *Agr. Ass'n v. State* (Md.) 18 Atl. 37, 17 Am. St. Rep. 507; *Tex. & Pac. R. Co. v. Brick* (Tex. Sup.) 18 S. W. 947, 29 Am. St. Rep. 675; *Dwyer v. Chicago R. Co.* (Iowa) 51 N. W. 244, 35 Am. St. Rep. 323; *McHugh v. Schlosser* (Pa.) 28 Atl. 291, 23 L. R. A. 574, 39 Am. St. Rep. 699.

DOWDELL, J. This is a suit by George H. Bube, appellant, to recover damages for injuries received by his son, a minor. The plaintiff recovered a verdict, which upon motion of the defendant was set aside, and to which action of the court in setting aside the verdict and granting a new trial the plaintiff excepted, and now prosecutes this appeal to review said ruling.

The motion for a new trial contained four grounds, but

Bube v. Birmingham Ry., L. & P. Co

only two questions are argued by counsel and here presented for consideration, viz.: (1) In an action of this kind by the father, can punitive damages be recovered? (2) Can a recovery be had for mental suffering by the father? It is a well-recognized principle at common law that the right of action in the father in such a case is based upon the idea of loss of service of the minor to the father, and the damages are compensatory, including, of course, nursing, medical expenses, and the like. In *Williams v. South & North Ala. R. R. Co.*, 91 Ala. 638, 9 South. 78, it was said: "At common law the father could sue for and recover damages for an injury not resulting in death wrongfully done his minor son. The damages were to compensate him for the loss of services. If death resulted, the action was not maintainable;" citing *Stewart v. L. & N. Ry. Co.*, 83 Ala. 493, 4 South. 373; *Louisville R. R. Co. v. Goodykoontz* (Ind. Sup.) 21 N. E. 472, 12 Am. St. Rep. 371. In a note to the last case cited (12 Am. St. Rep. 377) will be found other authorities cited to the proposition that punitive damages are not recoverable in such actions unless they are given by the statute. We have no statute giving punitive damages, or that changes the common-law rule as to damages in such actions. Section 26 of the Code of 1896, which authorizes the recovery of "such damages as the jury may assess," is not applicable here, and only applies when death results from the injury, and the action is for damages for wrongfully causing the death of the minor child. The father cannot, in an action of this kind, recover damages for mental suffering on account of the injuries sustained by his child. This principle is we think as well settled as the one that punitive damages are not recoverable. In *Black v. Carrollton R. R. Co.*, 63 Am. Dec. 588, the rule is thus stated: "In estimating damages sustained by father from injuries to his infant son, the jury may take into consideration the expenses of medical attendance, the loss to the father through neglect of business during his son's illness, and the loss likely to arise to the father from the son's crippled state during the period when he would be unable to provide for his own support or assist his father; but the jury cannot consider the mental anguish or suffering which the injury caused the father." There are many authorities which sustain the proposition, and, without further discussion, we content ourselves by referring to the cases cited in brief of appellee's counsel.

Inasmuch as the court below had instructed the jury contrary to the principles above stated, it committed no error in granting the motion for a new trial, and the judgment appealed from will be affirmed.

Affirmed.

MEMPHIS ST. RY. CO. *v.* HAYNES.

(Supreme Court of Tennessee, May 23, 1904.)

[81 S. W. Rep. 374.]

Negligence—Definition—Harmless Error.

An instruction defining negligence as the neglect to use ordinary care or skill toward a person to whom the defendant owes the duty of observing ordinary care and skill, by which the plaintiff, "without negligence on his part proximately contributing to produce the accident," has suffered injury to his person, while objectionable for containing the clause quoted, was not prejudicial to defendant on that ground.

Accident on Street Car Track—Contributory Negligence, and Subsequent Negligence of Motorman.*

Though the act of a person in crossing or driving along the side of a street car track in front of a car near enough to be struck might have been negligent, yet, if the motorman observed such negligence, or could have observed it by the use of ordinary care, when the peril of the collision became imminent, and might have avoided its effect by due care in time to prevent an accident, and failed to do so, the railway company would be liable for injuries sustained in such collision.

Same—Violation of Ordinance as Negligence.†

Where city ordinances required drivers of street cars to keep a rigid lookout for all teams, etc., on or moving toward the track, and to stop cars in the shortest time and space possible on the first appearance of danger, and limited the speed of cars to 15 miles per hour, a violation of such ordinances was negligence per se, which would render the company liable, if such negligence was the proximate cause of the accident.

Same—Reasonableness of Preventive Ordinances.

A city ordinance requiring street car drivers to keep a rigid lookout for teams, persons, etc., on or moving toward the track, and, on the first appearance of danger to such a team or person, to stop the car in the shortest time and space possible, should be construed to require the car to be stopped only when it is perceived that a collision is imminent, and, as so construed, was not objectionable as unreasonable.

Same—Use of Proper Appliances by Motorman—Instruction Invading Province of Jury.

Where, in an action for injuries to plaintiff by being struck by a street car approaching him from the rear while he was driving along the street sufficiently near to the track to be struck, there was no evidence that the motorman applied the brakes in order to prevent a collision, but only that he sounded the gong and reversed the current when he was so near that a collision was unavoidable, it was error for the court to charge that if the motorman failed to apply the brakes and sound the gong, or give other signal and use other means in his power to stop the car and prevent an accident, when danger became imminent, he was guilty of negligence, since whether, in the exercise of

*As to the combined effect of contributory negligence and negligence after discovery of plaintiff's peril, see foot-note appended to *Harrington v. Los Angeles Ry. Co.* (Cal.), 9 R. R. R. 191, 32 Am. & Eng. R. Cas., N. S., 191; foot-note appended to *Louisville & N. R. Co. v. Vanarsdell's Adm'r* (Ky.), 10 R. R. R. 1, 33 Am. & Eng. R. Cas., N. S., 1; *Atlanta Ry. & Power Co. v. Monk* (Ga.), 9 R. R. R. 426, 32 Am. & Eng. R. Cas., N. S., 426 (negligence after discovery of peril entitled plaintiff to recover); *Richmond Traction Co. v. Martin's Adm'r* (Va.), 9 R. R. R. 817, 32 Am. & Eng. R. Cas., N. S., 817 (where defendant knew, or, by ordinary care, should have known, of plaintiff's negligence, and could have then avoided the accident, but failed to do so, plaintiff can recover).

†See foot-note appended to *Louisville & N. R. Co. v. Vanarsdell's*

Memphis St. Ry. Co. v. Haynes

ordinary care, he was required to use any particular appliance or appliances to stop the car, was for the jury.

Contributory Negligence—Province of Court.

While the question of contributory negligence in an action for injuries is always one of fact for the jury, the trial judge, in a proper case, may instruct the jury that particular conduct on the part of the plaintiff would be negligence per se.

Same—Question for Jury.

In an action for injuries to the driver of a vehicle by being struck by a street car approaching him from the rear, evidence as to plaintiff's contributory negligence held to require the submission of such question to the jury.

Same—Mitigation of Damages.

In an action for injuries, an instruction permitting the jury, in its discretion, to consider plaintiff's contributory negligence in mitigation of damages, in case such negligence was the remote cause of the accident, was erroneous, since such was the jury's duty as a matter of law.

Negligence and Contributory Negligence Concurring.†

In an action for injuries, it was error for the court to refuse to charge that if the jury believe from the evidence that plaintiff was guilty of negligence which, combined with defendant's negligence, produced the accident, so that both acts constituted the proximate cause of the injury, then the negligence of the plaintiff, however slight, would bar recovery.

Instructions.

Requested instructions covered by the general charge may be properly refused.

Error to Circuit Court, Shelby County; J. T. Young, Judge.

Action by J. J. Haynes against the Memphis Street Railway Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Wright, Peters & Wright, for plaintiff in error.

Johnston & Hirsh, for defendant in error.

Adm'r (Ky.), 10 R. R. R. 1, 33 Am. & Eng. R. Cas., N. S., 1, where all the preceding authorities in this series are collected.

†For authorities on the subject of concurring negligence, see foot-note appended to *Bodie v. Charleston & W. C. Ry. Co.* (S. Car.), 9 R. R. R. 95, 32 Am. & Eng. R. Cas., N. S., 95 (railroad company's liability for injury to its own employee, or that of another company, as affected by concurring negligence of fellow servant); *Harrington v. Los Angeles Ry. Co.* (Cal.), 9 R. R. R. 191, 32 Am. & Eng. R. Cas., N. S., 191 (concurring negligence and contributory negligence, insufficiency of evidence, in action for injury in collision between bicycle and street car); *Shealey v. South Carolina & G. Ry. Co.* (S. Car.), 9 R. R. R. 680, 32 Am. & Eng. R. Cas., N. S., 680 (instruction as to effect of negligence and contributory negligence); *Labarge v. Pere Marquette R. Co.* (Mich.), 8 R. R. R. 456, 31 Am. & Eng. R. Cas., N. S., 456 (recovery for gross negligence prevented by subsequent or concurrent contributory negligence); *Ries v. St. Louis Transit Co.* (Mo.), 10 R. R. R. 676, 33 Am. & Eng. R. Cas., N. S., 676 (there could be no recovery under the humanitarian doctrine where deceased's negligence was not only concurrent with that of the motorman, but was contemporaneous and coincident with the injury); note, 10 R. R. R. 114, 33 Am. & Eng. R. Cas., N. S., 114 (imputed negligence); note, 8 R. R. R. 548, 31 Am. & Eng. R. Cas., N. S., 548 (injuries to railroad employees from objects overhead or too near track); *Gulf, C. & S. F. Ry. Co. v. Bryant* (Tex.), 1 R. R. R. 952, 24 Am. & Eng. R. Cas., N. S., 952 (negligence concurring with erroneous conduct induced by fear); *Choctaw, O. & G. R. Co. v. Holloway* (C. C. A.), 4 R. R. R.

Memphis St. Ry. Co. v. Haynes

NEIL, J. This action was brought in the circuit court of Shelby county to recover damages for an injury inflicted upon the defendant in error by a collision between one of the plaintiff in error's cars and a wagon on which the defendant in error was at the time riding. The jury rendered a verdict for \$1,100 damages, judgment was rendered thereon, and the railway company thereupon appealed and assigned errors.

1. The first error assigned is based upon the following instructions, which his honor gave to the jury as a part of his charge:

"The court now instructs you that negligence may generally be defined as the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff (without negligence on his part proximately contributing to produce the accident) has suffered injury to his person."

Objection is made to the matter appearing in parentheses. This matter was improperly inserted, but we do not think the error is grave enough to warrant a reversal; certainly not upon plaintiff in error's application. If any injury was done, it was to the defendant in error, since the jury were told, in substance, that, as a condition of finding negligence against the plaintiff in error, they must also find that the defendant in error was without negligence on his part proximately contributing to produce the accident. *Burke v. Citizens' St. Ry. Co.*, 102 Tenn. 409, 52 S. W. 170.

This assignment of error must be overruled.

2. The second assignment of error is based upon the following instructions:

75, 27 Am. & Eng. R. Cas., N. S., 75 (concurring negligence of third party no excuse); note, 12 Am. & Eng. R. Cas., N. S., 13 (right of recovery where collision occurs through concurrent negligence of carriers); note, 12 Am. & Eng. R. Cas., N. S., 336; *Deery v. Camden & A. R. Co.* (Pa.), 2 Am. & Eng. R. Cas., N. S., 225 (right of passenger when his violation of a rule of the carrier concurred with the negligence of its employees); note, 12 Am. & Eng. R. Cas., N. S., 336; note, 10 Am. & Eng. R. Cas., N. S., 572; notes, 12 Am. & Eng. R. Cas., N. S., 791, 16 Am. & Eng. R. Cas., N. S., 791 (concurring negligence of master and fellow servant); *Cooper v. Georgia, etc., Ry. Co.* (S. Car.), 22 Am. & Eng. R. Cas., N. S., 667 (where passenger is injured while boarding moving car); *Rooney v. New York, N. H. & H. R. Co.* (Mass.), 14 Am. & Eng. R. Cas., N. S., 425 (concurring causes as affecting carrier's liability for injury to passenger); *Chicago, R. I. & P. Ry. Co. v. Martin* (Kan.), 12 Am. & Eng. R. Cas., N. S., 4 (both companies liable where collision resulted from concurrent negligence of the employees of both); *Kansas City, Ft. S. & M. R. Co. v. Becker* (Ark.), 16 Am. & Eng. R. Cas., N. S., 348; *Pool v. Southern Pac. Co.* (Utah), 16 Am. & Eng. R. Cas., N. S., 551 (concurring negligence of master and fellow servant). See also, *Fluhrer v. Lake Short & M. S. Ry. Co.* (Mich.), 17 Am. & Eng. R. Cas., N. S., 463; *Wright v. Southern Pac. Co.* (Utah), 5 Am. & Eng. R. Cas., N. S., 560; *Thompson v. Salt Lake Rapid-Transit Co.* (Utah), 10 Am. & Eng. R. Cas., N. S., 563; *O'Rourke v. Lindell Ry. Co.* (Mo.), 9 Am. & Eng. R. Cas., N. S., 675 (concurring negligence where collision between two street cars belonging to different lines).

Memphis St. Ry. Co. v. Haynes

"Though the act of a person in crossing or driving alongside the track in front of a street railway car which is moving towards him, near enough to be struck, may be negligence, yet, if the motorman in charge of the car observes the negligence, or could have observed the negligence, by the use of ordinary care, when the peril of a collision became imminent, and might have avoided its effect, by due care, in time to prevent an accident, and failed to do so, the company would in that event be liable."

There was no error in this instruction, and the assignment is overruled.

3. The third assignment raises an objection to the following instruction:

"The court further instructs you that there is an ordinance of the city of Memphis, a violation of which is a misdemeanor, which provides as follows:

"Article 39, § 5: 'Conductors and drivers of each car shall keep a rigid lookout for all teams, carriages, and persons, on foot, and especially children, either on the track, or moving towards it, and on the first appearance of danger to such team or person, or other obstructions, the car shall be stopped in the shortest time and space possible.'

"Also another section, namely:

"Article 39, § 25: 'At no point within the city limits shall they [meaning the street cars] run at a greater speed than 15 miles per hour.'

"The court instructs you that a failure to comply with the city ordinances above quoted, within the city limits, is negligence per se, and will render the railway company liable, if its negligence was the proximate cause of the accident and injury."

The facts applicable to this instruction are as follows:

There was testimony tending to show that the defendant in error and two other men were all sitting on the front seat of a covered wagon, which was proceeding along McLemore avenue, in the city of Memphis, near the southwest corner of Magnolia Park, very near to the track of the railway company—near enough to be struck by a moving car; that while in such situation a car ran up behind the wagon, struck it, and threw defendant in error to the ground, severely injuring him; that the wagon could have been seen for a long distance ahead—about 300 yards—and the motorman could have stopped the car if he had begun to do so in time, but that he was propelling it or allowing it to run down grade at a speed of 20 miles per hour, and did not begin to check its speed until it was too late to avoid a collision; that he attempted to stop the car, when it was within a few feet of the wagon, by reversing the current, but it was then too late to prevent the accident.

The first point made against the instruction contained in the foregoing assignment is that the violation of a city ordinance is not negligence per se, as charged by the court.

Memphis St. Ry. Co. v. Haynes

In the case of *Queen v. Dayton Coal & Iron Co.*, 95 Tenn. 458, 32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935, it was held that the employment of an infant in a mine in violation of the statute forbidding such employment, and declaring it a misdemeanor, constituted per se such negligence as rendered the employer liable for all injuries sustained by the infant in the course of the employment.

In *Riden v. Grimm Bros.*, 97 Tenn. 220, 36 S. W. 1097, 35 L. R. A. 587, it was held that the sale of intoxicating liquors to an habitual drunkard, after notice from the latter's wife forbidding it, in violation of Acts 1889, c. 68, making such sale a misdemeanor, was per se such negligence as rendered the seller liable to the wife for the death of the husband, or other injury resulting to her from such sale.

In *Schmalzried v. White*, 97 Tenn. 36, 36 S. W. 393, 32 L. R. A. 782, the court had under consideration the question whether the violation of a city ordinance would impose the same liability as the violation of a statute. The ordinance under examination there concerned the erection of fire escapes on buildings.

In that case the court used the following language:

"It is insisted that the ordinance of 1890 imposed no duty upon the owners of this building, for a breach of which a civil action can be maintained by one sustaining an injury for such breach, and that therefore the trial judge was in error in letting this go to the jury. It is conceded that for a violation of a general statute a civil action will lie at the instance of a party injured thereby. *Queen v. Dayton, etc., Co.*, 95 Tenn. 458 [32 S. W. 460, 30 L. R. A. 82, 49 Am. St. Rep. 935]. But it is insisted that this is not true with regard to a violation of a municipal ordinance. An examination of the authorities will show much diversity of judicial opinion on this question. The cases of *Bott v. Pratt*, 33 Minn. 323, [23 N. W. 237] 53 Am. Rep. 47, *Osborne v. McMasters*, 40 Minn. 103 [41 N. W. 543], 12 Am. St. Rep. 698, *Hayes v. Mich. Central R. R.*, 111 U. S. 228 [4 Sup. Ct. 369, 28 L. Ed. 410], and *Salisbury v. Herchenroder*, 106 Mass. 458, 8 Am. Rep. 354, hold that for the violation of a municipal ordinance an action can be maintained by a private individual injured thereby. The cases of *Philadelphia R. R. v. Ervin*, 89 Pa. 71, 33 Am. Rep. 726, *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603, *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502, and *Vandyke v. City of Cincinnati*, 1 Disn. (Ohio) 532, take the contrary view."

The court, however, did not decide the question, but permitted the decision, on the ground that the case did not call for it, because of the existence of certain special facts which were determinative.

In *Weeks v. McNulty*, 101 Tenn. 495, 48 S. W. 809, 43 L. R. A. 185, 70 Am. St. Rep. 693, the court again referred to the question, citing and discussing authorities upon both

Memphis St. Ry. Co. v. Haynes

sides of it, and intimating an opinion in favor of the liability, but did not find it necessary to render an authoritative decision upon the point.

At the April term, 1903, of this court, at this place, in the case of *Memphis St. Railway Company v. John Williford* (no opinion filed), error was assigned upon the charge of the circuit judge, substantially the same as that now complained of. Indeed, the same city ordinances which are copied into the third assignment *supra* were involved in that case, and were the subjects of the charge of the circuit judge there.

The court held, in an oral opinion delivered by Mr. Justice Shields, that the same rule laid down in *Queen v. Dayton Coal & Iron Company*, *supra*, in respect of statutes, also applied to city ordinances.

We have again examined the question, but deem it unnecessary to go into an extended discussion of it. To what has already been said in our cases we shall only add that we are unable to find any convincing force in the suggestion, occurring in many of the cases, that a distinction should be made between statutes and ordinances, in respect of the question referred to, on the ground that the former can create a cause of action between private individuals, or a civil cause of action in any sense, and the latter cannot. If an ordinance be passed for the protection of the individuals composing the public, as distinguished from the municipality itself, and be within the legislative power of the corporation, and any member of the public suffer an injury peculiar to himself by reason of the violation of such ordinance by some other person, it is difficult to see why, on any sound theory, he may not have an action therefor against the offender. Such ordinances are devised for the purpose of creating rules of conduct for the guidance of the people, just as statutes are, and they may be said to emanate ultimately from the Legislature, since municipalities, in this state, at least, can exercise no powers which are not expressly or by implication conferred upon them by that body.

The next point made under this assignment applies only to the first ordinance quoted.

It is insisted that this ordinance is unreasonable; that it requires that the employees of the company shall use perfect judgment, perfect skill, and that the cars of the company shall be perfect in equipment. Furthermore, it is said that to require the company to stop its cars upon the first appearance of danger is unreasonable, because the necessities of rapid transit require that the danger must be imminent before a stop is made. Again, it is said that the ordinance lays down a rule contrary to that established by this court in *Citizens' Street Railway Company v. Shepherd*, 107 Tenn. 444, 64 S. W. 710.

It is true that the ordinance does use the expression "on the first appearance of danger to such teams or persons

Memphis St. Ry. Co. v. Haynes

* * * the car shall be stopped," etc., but this language must be given a reasonable construction. Taking into consideration the purpose intended to be served by the ordinance, we are of the opinion that it means, when the danger of a collision becomes imminent, the car shall be stopped. The danger to be apprehended is always that of a collision. It is always potential when street cars and other vehicles, horsemen, and pedestrians are using the same thoroughfare. It does not become actual until it is perceived to be imminent. It may be then said to first appear as a real danger.

This construction seems to us a reasonable and just one, and, being such, meets the first part of plaintiff in error's objection.

We think there is less force in the second phase of the objection. When the danger of a collision is imminent, it is certainly not unreasonable to require the railway company to stop its cars in the shortest time and space possible. This, of course, implies that the machinery and appliances shall be in proper condition, and also that the servants of the company shall do all that men of reasonable care, prudence, and alertness, in the same situation and with the same appliances, could do to stop the car and prevent the collision. *St. Ry. Co. v. Dan*, 102 Tenn. 320-325, 52 S. W. 177.

Nor is this rule in conflict with that laid down in *Citizens' St. Railway v. Shepherd*, *supra*.

In that case the court held that, when the danger of a collision became imminent, "then it became the duty of the motorman to use ordinary care to stop his car and prevent an accident." But ordinary care under such circumstances—that is, when the danger of a collision is imminent—is that degree of care which is described in the next, but one, preceding paragraph.

The third assignment is therefore overruled.

4. The fourth assignment is based upon the following instruction contained in the judge's charge:

"So, therefore, if you find from a preponderance of the evidence that on July 12, 1902, plaintiff was driving a covered wagon along McLemore avenue, in this city, and was driving said wagon beside and so near the track of defendant company that a car could not pass that wagon without a collision; and if you find that the servants of defendant company propelled an electric car along the track on said street from the rear of and against the wagon of plaintiff, overturning it and throwing plaintiff out and injuring him; and if you further find that defendant's servants saw, or by the exercise of ordinary and reasonable diligence could have seen, said wagon turning into the track, or moving in such position that it could not be passed without a collision, and failed, when he had reason to apprehend danger, to regulate the speed of his car so that it might be quickly stopped, should occasion require it, or that he failed, when the danger be-

came imminent, to apply the brakes and sound the gong or bell, or give other signal, and use every means in his power to stop the car and prevent an accident; and if you find that such negligence and want of care of defendant's servants, if shown, was the proximate cause of (that is to say, the cause which led to or directly contributed to produce) the accident and injury—then there can be a recovery, and your verdict should be for the plaintiff."

The testimony necessary to be considered in disposing of this assignment is as follows:

There is evidence tending to show that, when the motorman first saw the wagon in which the defendant in error was riding, it was proceeding eastward, along the street, between street crossings, at a distance of four or five feet from the track, leaving sufficient room for the car to pass; that the car was also going east, following the wagon; that when the car reached a point about 30 yards distant from the wagon, at which point the motorman supposed the occupants of the wagon could hear the gong, he sounded it repeatedly; that, when the car had reached a point from 10 to 15 feet distant from the wagon, the horse drawing the wagon suddenly turned in towards the track, bringing the wagon within striking distance of the car moving thereon; that the motorman continued to sound the gong until he got to the wagon and saw that he had to reverse; that he then reversed the car, but not soon enough to prevent the collision; that reversing is the speediest method of stopping the car.

There was also evidence tending to show that, for a space of 50 yards immediately preceding the point where the wagon was struck, it was moving along close enough to the track to be struck by a car moving thereon, and that it was in plain view of any one upon the front of the approaching car, for a distance of 300 yards, from the point of collision.

There was no evidence tending to show that the motorman applied the brakes, but only that he sounded the gong, and then, as above stated, reversed the current.

The error complained of is to be found in the following language appearing in the first excerpt above quoted: "or that he failed, when danger became imminent, to apply the brakes and sound the gong or bell, or give other signal, and use every means in his power to stop the car and prevent an accident."

It is said that the rule thus laid down would impose upon the motorman the performance of duties which were practically impossible of accomplishment; that by this rule he is required to sound his gong, or give other signal, to apply his brake, and to use every means in his power to stop his car; and that this would make the motorman capable of reversing with one hand, of winding the brake with the other, and at the same time stamping his gong to warn the person who had thrust himself or fallen into danger. We have no statute

declaring that the special acts referred to by the circuit judge, or any other special act, should be performed by the servants of the company. The question, then, is one at large, to be determined upon general considerations drawn from the nature of the particular business, and the habits and customs of the people whom it serves. Street cars are designed to ply their business upon public streets—many of the streets densely crowded. People in vehicles and on foot must be constantly encountered, going in both directions, with the course of the car and in the opposite course, and most generally in the hurry of business. In other words, the car may at any time have to pursue its way through the throng of a city's business. Under such circumstances, and even when the streets are not crowded, a mishap may at any moment occur, and may come in a manner which no man can accurately forecast in all its details. The person propelling the car should be left free to choose the best means of preventing the accident at the time, as the situation is then presented to him. The means at hand for preventing the collision or the sounding of the gong for the purpose of warning the person about to be collided with, in order that he may save himself, the putting on of brakes, and the application of the reverse lever. In some situations the sounding of the gong may be the means which the occasion requires as the best means for the prevention of the accident; in others, it may be best to apply the brake; in others, the reverse lever. Sometimes it may be reasonably within the power of the motorman to put in use two of these means, and sometimes, perhaps, all of them; sometimes only one of them; and under some circumstances, we may well assume, it would be best that he should attempt only one of the means provided, as being the most efficient, time lacking to use the others, or even to attempt their use. Subsequently, when his conduct is displayed in the evidence for examination before a court and jury, it is not for the judge to say that, under the circumstances surrounding and attending the accident detailed, he should have done this or that particular thing; but, on the contrary, when all of the circumstances are shown, and it is made to appear what he did at the time for the prevention of the accident, it is for the jury to say whether he did all that he could do (that is, all that a man of ordinary intelligence and prudence and of reasonable alertness could have done under the special circumstances proven) to stop the car and prevent the accident. An instruction that the motorman should do some special thing is an invasion of the province of the jury by the circuit judge. In the present case the invasion of the province of the jury is the more marked, because, while the evidence tended to show that the motorman did reverse his car, there was no evidence tending to show that he put on the brake. The circuit judge, in effect, told the jury that he should have applied the brake.

Memphis St. Ry. Co. v. Haynes

It is insisted that the error was corrected, or at least rendered innocuous, by instructions contained in other parts of the charge, referred to in the brief of counsel for defendant in error. We have carefully examined these excerpts, and do not think they cured the error. We deem it unnecessary to encumber this opinion with a discussion of that matter.

In what has been said in disposing of the foregoing assignment of error, we are not to be understood as denying to the circuit judge the right to call the jury's attention to the various means at hand for preventing accidents shown by the testimony in any given case, and the duty of the company's servants to so employ them as to prevent accidents, if within their power to do so. The error in the present case is in specifying that in a given exigency—that is, the danger of collision—any special one of the means at hand should be employed. The jury should be left to determine from the whole evidence whether the company's servants used the means that should have been employed in the particular exigency under examination, and, in view of all the circumstances, acting as men of ordinary skill, intelligence, prudence, and alertness would act under similar circumstances.

5. It is next insisted that the circuit judge erred in giving the following instruction to the jury:

"And if, therefore, you find from the evidence that plaintiff was driving eastwardly beside the track at the time of the accident, and so near the rails as to prevent the car from passing the rear without collision, and that while so driving he failed to look back from time to time along the track, or to listen for signals from an approaching car, or if you find that, thus driving along the track, he failed to turn out and leave the track unobstructed on the approach of the car from the rear, or if you find that plaintiff drove upon the track in front of an approaching car without looking or listening for same, or so short a time before the wagon was struck as to prevent any possibility of stopping the car in time to prevent an accident, then it is your duty to determine whether, in doing or omitting to do any one of these acts, plaintiff was guilty of contributory negligence."

But this instruction should be read in connection with the following, which immediately succeeds the foregoing in the charge:

"And in doing this you may consider all the facts and circumstances proven at the trial, as surrounding the accident, including, so far as proven, the topography of the locality of the place of the accident; the character of the vehicle in which plaintiff was riding; the position of the vehicle at the time of the accident; the speed of the approaching car; the distance at which it could have been seen or heard by the driver of the wagon if he had looked and listened—in fine, to every minute detail of the accident; and if you find, after considering all the facts and circumstances proven to you,

Memphis St. Ry. Co. v. Haynes

that plaintiff was guilty of contributory negligence in any of these respects, and that such contributory negligence was the proximate cause of (that is to say, the cause which led to or directly contributed to produce) the accident and injury, then there can be no recovery, and your verdict should be for the defendant."

The forgoing instruction should also be considered in connection with the following, likewise appearing in the charge, viz.:

"It is the duty of a driver of a private vehicle, while on the track, or so near to it as to prevent a car passing without a collision, not only to turn off when called upon by the servant of the railroad company, but to listen to whatever signal there may be of an approaching car; and he should also look behind him from time to time, so that he may, if the car be so near, turn off and allow it to pass without hindrance or any slacking of ordinary speed, and, if he fail to observe this precaution, he does so at his own risk."

It is insisted that the error in the first paragraph quoted above consists in allowing the jury to decide whether or not the facts set forth constituted contributory negligence.

It was urgently complained of by counsel for plaintiff in error during the discussion at the bar, and the same statement and complaint appear in the brief, that the circuit judge construed one of the opinions of this court as holding that the question of contributory negligence is always one for the jury, and never for the court; referring to *Knoxville v. Cox*, 103 Tenn. 368, 53 S. W. 734.

In that case the court used the following language: "The question of contributory negligence, whenever the facts of the case raise it, cannot be settled by the court, but goes to the jury, whose exclusive province it is to consider and determine it." A moment's consideration will discover that the proposition, in the sense in which the court intended it to be understood, was and is indisputably sound. To establish the defense of contributory negligence against the plaintiff in an action for personal injuries bought by him, it must always appear (1) that the defendant was guilty of some negligence (*Payne v. Nashville, etc., R. Co.*, 106 Tenn. 167, 61 S. W. 86) in bringing about the injury; (2) facts from which negligence upon the part of the plaintiff can be inferred; (3) that such negligence of the plaintiff contributed to the injury. The third point, under our system of the division of duties between the court and jury, must always be one of fact for the jury. This was the meaning of the court in enunciating the rule referred to. But the court did not mean to say that the circuit judge could not, in a proper case, instruct the jury that such and such conduct on the part of either the plaintiff or defendant would amount to negligence per se or negligence in law. In *Knoxville Iron Com-*

Memphis St. Ry. Co. v. Haynes

pany v. Smith, 86 Tenn. 45, 48, 49, 5 S. W. 438, it was held, on the facts of the case, that such an instruction should have been given by the circuit judge. See *Oliver v. Nashville*, 106 Tenn. 273, 278-280, 61 S. W. 89; also *Postal Tel. Co. v. Zopfi*, 93 Tenn. 369, 372, 373, 24 S. W. 633; *Nashville St. Ry. Co. v. Norman*, 108 Tenn. 324, 67 S. W. 479; also as cited and approved in *Memphis St. Ry. Co. v. Riddick* (Tenn.) 75 S. W. 924; *Stewart v. Nashville*, 96 Tenn. 50, 56, 57, 33 S. W. 613. It is to be observed that in the instruction sanctioned in *Knoxville Iron Co. v. Smith* the question was left to the jury whether the facts therein held to constitute negligence contributed to the injury. This is apparent from the words "and his failure to do so was negligence which would prevent his right to recover from the defendant for any injury resulting to him therefrom."

As above said, the question of contributory negligence, in the aspect above indicated, is always a matter for the jury. Subsequently, however, on appeal, in considering the verdict of the jury under an assignment that there is no evidence to sustain the verdict, or upon reviewing the action of the court below upon a demurrer to the evidence, this court will determine whether the facts proven clearly show contributory negligence upon the part of the plaintiff below that acted as a proximate cause to produce the injury, and, upon ascertaining the existence of such proximate contributory negligence, will reverse the judgment. *Chattanooga Light & Power Co. v. Hodges*, 109 Tenn. 331, 7 S. W. 616, 60 L. R. A. 459; *Heald v. Wallace*, 109 Tenn. 346, 71 S. W. 80.

Whether the facts proven in any given case amount to negligence, in law, must be determined as the cases arise. We need not go further into this matter. It is sufficient to say, for the present case, that we do not think the plaintiff in error has anything to complain of in the instructions which were given, as above set out, when they are all taken together. There was evidence tending to show that the street where the defendant in error was driving was of such a character that it was best to drive close to the track, near enough to be within the sweep of a passing car, and that the wagon did not run suddenly toward the track, or at all, but went straight forward, and that it could have been seen by the motorman from a distance of 300 yards. With these circumstances in the record, we cannot say that the defendant in error could have anticipated that a car in broad daylight would run him down from the rear, and that there was, as matter of law, such failure of duty on the part of plaintiff in error as would justify the circuit judge in giving a peremptory instruction against him in respect of negligence. We think the matter was properly left to the jury. *Wilson v. Citizens' St. Ry. Co.*, 105 Tenn. 74, 58 S. W. 334; *Memphis St. Ry. Co. v. Riddick* (Tenn.) 75 S. W. 924; *Electric Ry. Co. v. Lawson*, 101 Tenn. 406, 47 S. W. 489.

6. Error is assigned upon the following instruction of the court:

"You are likewise instructed that if you find that both plaintiff and defendant were guilty of negligence, but that defendant's negligence was the proximate or contributing cause of the accident, and you find for the plaintiff, you may, in that event, consider plaintiff's negligence in mitigation of damages."

The criticism upon this portion of the charge is that it leaves it entirely optional with the jury to consider or to overlook the plaintiff's negligence; in other words, that, the jury are allowed to take into the reckoning the negligence of the plaintiff, in mitigating the damages, if they feel inclined to do so, but that they are not told positively that any negligence of the plaintiff below, either proximately or remote, should go in reduction of damages which would otherwise be recovered by him.

The well-settled rule of law in this state is that, where the plaintiff's negligence is the direct and proximate cause of the accident, it will bar a recovery, but, if it be remote, it must mitigate or lessen the damages; it being held that where the plaintiff is negligent he should not recover in the same degree as if he were free from fault.

The circuit judge should charge the jury that it is their duty to reduce the plaintiff's damages in case they find that he has been guilty of contributory negligence. In the case of *R. R. v. Nowlin* (no opinion filed), the instruction contained in the charge which was held to be error was as follows:

"The negligence of the person in all cases can be looked to in mitigation of the damages or the amount of recovery."

For this error the judgment was reversed. The court said upon this subject: "If the law be as we do declare—that contributory negligence upon the part of the plaintiff entitled the defendant, as a matter of right, to have such considered by the jury in reduction of damages—then it was the duty of the circuit judge to say to the jury, after first explaining what conduct upon the part of the plaintiff constituted contributory negligence, that, if they found that the plaintiff was guilty of such negligence at the time of the accident, then it was their duty to look to it in assessing the damages, according as they find his negligence to be slight or gross."

This assignment of error must therefore be sustained; the court having, in substance, instructed the jury, as appears from the above excerpt, that it was in their discretion whether they would reduce the damages for the contributory negligence of the plaintiff below, instead of instructing them according to the rule laid down in *R. R. v. Nowlin*, *supra*.

7. Error is assigned upon the refusal of the circuit judge to give in charge to the jury the following instructions requested by the plaintiff in error:

Jordan v. Grand Rapids & I. Ry. Co

"If you believe from the evidence that plaintiff was guilty of negligence, and that this negligence combined with the negligence of defendant to produce the accident, so that both acts together constituted the proximate cause of the injury, then the negligence of the plaintiff, however slight, would bar a recovery, and you should find for the defendant."

This instruction stated a correct rule of law, and should have been given to the jury. *Memphis St. Ry. Co. v. Wilson*, 108 Tenn. 618, 69 S. W. 265; *Nashville St. Ry. Co. v. Norman*, 108 Tenn. 331, 67 S. W. 479; *Saunders v. R. R.*, 99 Tenn. 135, 41 S. W. 1031; *Barr v. R. R.*, 105 Tenn. 547, 58 S. W. 849.

This assignment of error must therefore be sustained.

8. The matters complained of in the eighth assignment of error are sufficiently covered by the general charge, and the request therein referred to was properly refused.

For the errors above indicated, the judgment of the court below must be reversed, and the cause remanded for a new trial.

JORDAN *v.* GRAND RAPIDS & I. RY. CO.

(Supreme Court of Indiana, April 8, 1904.)

[70 N. E. Rep. 524.]

Trespassers—Children.

A boy eight years of age, who climbed on a box car to look at a sale of stock in an adjacent stockyard, was a trespasser.

Same—Duty to Examine Cars.*

A railroad company is not required, before moving cars standing on a side track, to examine them, to prevent injury to possible trespassers thereon.

Same—Care Due.†

A railroad company is not liable for injuries to a trespasser unless the injuries are purposely or recklessly inflicted, or it has knowledge of the injured person's danger in time to have prevented the injury.

Death—Evidence.

In an action for negligence causing almost instantaneous death, a particular description of the various injuries was properly excluded.

*As to whether it is the duty of a railroad company to look out for trespassing children on or about cars or tracks, see foot-note appended to *Wagner v. Chicago & N. W. Ry. Co.* (Iowa), 11 R. R. R. 789, 34 Am. & Eng. R. Cas., N. S., 789, where all the preceding authorities in this series are collected.

†As to the care due trespassers on trains, see foot-note appended to *Johnson v. Chicago, etc., Ry. Co.* (Iowa), 11 R. R. R. 629, 34 Am. & Eng. R. Cas., N. S., 629.

As to the care due trespassers on railroad tracks, see foot-note appended to *Chesapeake & O. R. Co. v. Lee's Adm'r* (Ky.), 11 R. R. R. 342, 34 Am. & Eng. R. Cas., N. S., 342; *Clegg v. Southern Ry. Co.* (N. Car.), 11 R. R. R. 737, 34 Am. & Eng. R. Cas., N. S., 737; *Louisville & N. R. Co. v. Logsdon's Adm'r* (Ky.), 11 R. R. R. 756, 34 Am. & Eng. R. Cas., N. S., 756; foot-note appended to *Erie R. Co. v. McCormick* (Ohio), 11 R. R. R. 783, 34 Am. & Eng. R. Cas., N. S., 783.

*Jordan v. Grand Rapids & I. Ry. Co***Trespassers on Standing Cars—Knowledge of Railroad—Evidence.**

In an action against a railroad company, plaintiff alleged that defendant negligently moved certain cars which had been standing on a side track, and on which plaintiff's decedent and other persons were sitting and standing, watching a sale of horses in an adjoining stockyard: *held*, that evidence that a sale of horses at the same place on a former occasion attracted boys and men to that vicinity was not admissible to show that the railway company had notice that any one was on the cars. **Harmless Error.**

In an action for negligence causing death of plaintiff's infant son, in which the evidence did not show liability on the part of defendant, the exclusion of evidence of plaintiff's occupation and the amount of his property was harmless.

Appeal from Circuit Court, Jay County; John M. Smith, Judge.

Action by John Jordan against the Grand Rapids & Indiana Railway Company. From a judgment for defendant, plaintiff appealed to the Appellate Court, from whence the cause was transferred to this court, under Acts 1901, p. 590, c. 259 (Burns' Ann. St. 1901, § 1337u). **Affirmed.**

McGriff & Bergman, for appellant.
Zollars & Zollars, for appellee.

DOWLING, J. The complaint in this case was in two paragraphs—the first averring that the appellee willfully, purposely, and intentionally inflicted fatal injuries upon the infant son of the appellant, by suddenly attaching a locomotive to two cars standing on a siding, on one of which appellant's son, a child eight years of age, with the knowledge of the appellee, its agents and employees, was sitting or standing, and, without warning, putting the same in motion, thereby causing the child to leap or fall in an attempt to escape therefrom; and the second alleging that the child was killed by the negligence of the appellee, its agents and employees, in so attaching the locomotive and suddenly starting the cars without warning the child, or giving him an opportunity to escape from the car. The cause was tried by a jury, and, at the conclusion of the evidence for the plaintiff, the court gave a peremptory instruction for a verdict for the defendant, which was thereupon returned. Over a motion for a new trial, judgment was rendered for the defendant. The error assigned is the ruling upon the motion for a new trial. The alleged insufficiency of the evidence to sustain the verdict, the exclusion of certain evidence offered by the appellant, and the giving of the peremptory instruction, were the reasons for which a new trial was demanded.

The facts material to a decision of the questions before us were these: On the day of the accident, the appellee owned, and for some time before that had operated, on its own land, a main railroad track, two side tracks, one of which was on the east side of the main track, and the other on the west side, all lying near together, and also a spur track running

from the southwest end of the east side track, in a southwesterly direction, to the property of the Haynes Milling Company. Appellee also owned certain lots inclosed by high board fences, adjacent to its main track and side tracks, and about five feet from the east track, used as stockyards, in which horses and other domestic animals were temporarily kept for shipment, delivery, or sale. On September 2, 1901, the day of the accident, after advertisement by posting, a public sale of wild horses from the West took place at these stockyards, and the lassoing, capture, and management of the animals attracted some 75 or more persons, who stood or sat on cars on appellee's tracks, watching the men and horses. Among these spectators were several young boys. These persons could have been seen by the employees of the appellee while they were switching cars. Appellant's son, a boy eight years old, small in size, but of ordinary intelligence, strength, and activity, was among them. With some 15 or 20 other men and boys, to obtain a better view of the yards, he climbed to the top of an empty box car standing on the side track near the sheds in the stockyards, and overlooking them, and sat down on the roof of the car. The car was not attached to a locomotive, but, with two or three other cars, had been in the same place for several days. While these cars were so standing on the side track, persons in charge of a locomotive engaged in switching cars at this point, and probably in the employment of appellee, caused the said engine to be run along and over the said main track, and near the place where the said sale was in progress, in full view of said place and of the persons on and about the cars who were watching the men and animals in the stockyards. Shortly afterwards, during the same morning, the persons in charge of the said locomotive ran it upon the said east side track, and coupled it to the empty box cars on which the said men and boys, including appellant's son, were standing or sitting, without any previous notice of their intention to do so. When the engine approached the cars, some one shouted to the persons on the cars that the locomotive was coming, and that they had better get off. The engine was in full view of the men and boys on the cars, and was making considerable noise, puffing steam and running over switches. When the coupling took place, the men and boys ran northward on the cars, and tried to get off. Some of them jumped on the stock sheds, a few children were taken off by their parents, and others climbed down. Appellant's son, who was on the third car from the engine, and another boy on the second car, were unable to get off, because of the number of persons who were jumping and climbing off. The former arose and stood on the top of the car some four or five feet from its north end, and acted as if he intended to climb down, but fell off between the cars, and was run over and killed. The train was moving slowly, and he

fell at the moment when the engine was stopped, and the cars "jarred back." He was shaken off. The other lad descended the car ladder and reached the ground in safety. While the switching was going on, the conductor of the switching train was on the ground, and stood for several minutes near the corner of the stock sheds, watching the men and horses in the yards. He uncoupled one of the cars while the engine and its crew were switching on those tracks.

Counsel for appellant insist upon two main propositions: (1) That it appears from the evidence that the acts of the employees of the appellee which caused the death of appellant's son were done under such circumstances as evinced a reckless disregard for the safety of the child, and a willingness to inflict the injury, and therefore that the injury was a willful and an intentional one, for which the appellant was entitled to recover, even if the child was a trespasser on appellee's cars, and was guilty of contributory negligence; and (2) that the injury to and killing of the child were caused by the negligence of the appellee's employees in failing to warn the child of his danger when the engine was coupled to the standing cars, and to give him time to escape, the boy being of tender years and incapable of contributory fault.

It is manifest that the boy, although an infant in years, was a trespasser. *Udell v. Citizens' Street R. Co.*, 152 Ind. 507, 513, 52 N. E. 799, 71 Am. St. Rep. 336. It cannot be said that he was upon the top of the empty box car by the invitation or permission of the railroad company. There was no proof that the appellee gave any invitation or license, express or implied, to any one to get upon its cars for the purpose of looking over the fences and watching the men and animals in the stockyards. The sales took place inside the yards, and the persons attending them for the purpose of examining the horses or purchasing them were not outside the yards, nor on the tops of the cars. The men and boys on the cars were merely idle spectators, gathered by chance, and sustaining no relation to the railroad company except that of trespassers upon its property. It was not proved that the employees of the appellee knew or had reason to believe that any person remained on the cars after the coupling to the locomotive took place. The law did not require them to search the cars for trespassers before moving them. *Udell v. Citizens' Street R. Co.*, *supra*. The appellee, by its switching crew, was engaged in its proper and necessary business, which required that cars should be moved from point to point on its tracks with greater or less celerity. The lives of scores of travelers might be jeopardized by delay in getting cars off of sidings, and in failing to clear the main track of freight or other trains or cars, and rapidity in the performance of such work did not constitute negligence. The circumstances were not such as to author-

ize the inference that the trainmen must have seen and known that the child was in a situation of peril. All the cases hold that, in order to render a defendant liable for an injury to a mere trespasser, he must have had knowledge of the situation of the trespasser in time to have prevented the injury, or that the injury was purposely or recklessly inflicted. *Louisville, N. A. & Erie Ry. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 6 N. E. 310, 10 N. E. 70, 58 Am. Rep. 387; *Krenzer v. Pittsburg Ry. Co.*, 151 Ind. 587, 43 N. E. 649, 52 N. E. 220, 68 Am. St. Rep. 252; *Palmer v. The Chicago, etc., R. Co.*, 112 Ind. 250, 14 N. E. 70, and cases cited. The engine was in plain view of all the persons on the cars as it approached, and it was making a noise by puffing steam and by running over switches. Before it reached the cars near the stockyards, the men and boys on the cars were warned by a volunteer that it was coming, and were admonished to get off the cars. All did so except David Ray Jordan and Glen Kinsey, two small boys. After the coupling was made, the train moved off slowly, and one of the boys climbed down the car ladder in safety. Appellant's son was about to do the same thing, when the sudden stopping of the train caused him to fall off. The evidence does not show that the engineer and the other persons in charge of the train evidenced any disregard for the safety of the child, either in making the coupling, or in moving or in stopping the train. The child was sitting on the top of the third car back from the engine. The duty of the engineer and fireman required them to look forward along the track. *Pittsburgh, etc., Ry. Co. v. Frazee*, 150 Ind. 576, 50 N. E. 576, 65 Am. St. Rep. 377. It does not appear that they could have seen the boy if they had looked back over the train. The evidence fell far short of proving an intentional injury, or of establishing the fact of such a reckless disregard of the safety of the child as amounted to a willingness to injure him. *Palmer v. The Chicago, etc., Ry. Co.*, 112 Ind. 250, 14 N. E. 70; *Louisville, etc., Ry. Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Cooley on Torts*, 674; *Terre Haute, etc., R. Co. v. Graham*, 95 Ind. 286, 48 Am. Rep. 719. It is equally clear, for the reasons already given, that the appellee was not guilty of actionable negligence in failing to warn the child that the locomotive was about to be attached and the cars moved. The evidence was insufficient to charge the appellee with knowledge, express or implied, of the presence of the child on the car and in a place of danger. If the boy had been seen by the engineer or train crew on the top of the car before the train started, or while it was running, a different question would have been presented. But in the absence of proof that they did see him, or that they ought to have looked, and could have discovered him if they had done so, the appellee could not be held responsible for the accident.

Southern Ry. Co. v. Simpson

2. The death of the child was almost instantaneous, and was caused by his fall from the top of the box car under the wheels of the moving train. A particular description of the various injuries he received was not material, and the evidence of these injuries was properly excluded.

3. The court did not err in refusing to admit evidence of a sale of horses at the appellee's stockyards on a former occasion which had the effect of attracting boys and men to that vicinity. Such evidence did not prove that the appellee invited or expected trespassers on its property, nor did a single occurrence of this character require the appellee to anticipate that its cars would be occupied by sightseers, and that its ordinary business of moving its cars and trains on its tracks in that vicinity could not be carried on without special warnings to persons who might congregate outside of the stock yards.

4. As the facts proved did not make the appellee liable for the death of appellant's son, the refusal of the court to admit evidence of the occupation of the appellant and the value of his property, even if erroneous, was harmless.

Giving to the evidence for the appellant its full legal effect, and allowing every reasonable inference from the facts proved, we are of the opinion that it failed to establish the allegations of either paragraph of the complaint, and that it would not have supported a verdict in his favor. Had such a verdict been returned, it would have been the duty of the court to have sustained a motion by the appellee for a new trial on the ground of the insufficiency of the evidence. In view of the failure of the proof to support the complaint, the direction of the court to the jury to return a verdict for the defendant was necessary and proper.

Judgment affirmed.

SOUTHERN RY. CO. v. SIMPSON.

(Circuit Court of Appeals, Sixth Circuit, June 22, 1904.)

[131 Fed. Rep. 705.]

Federal Courts—State Statutes—Construction—State Decisions—Conclusiveness.

The opinion of a state court of last resort, construing a state statute, is conclusive on the federal courts sitting in such state to the extent only of the precise question decided.

Railroads—Injuries at Crossings—Statutes—Construction.

Shannon's Code, §§ 1574-1576, requires every railroad company to keep some person on its locomotive always on the lookout ahead, and, when any person, animal, or other obstruction appears on the road, to sound the alarm whistle, put down brakes, and exercise every possible means to stop the train and prevent an accident, and renders a railroad company absolutely liable for an accident caused by a failure to comply therewith: *held*, that such sections did not render the railroad company absolutely liable for a collision occurring in the daytime, while the engine was being operated backwards with the tender in front, and

Southern Ry. Co. v. Simpson

that the refusal of the court to charge that if the engineer was actually on the lookout ahead of his engine, and saw plaintiff's vehicle as soon as it could have been seen, as it approached and entered on the crossing, and the engineer immediately blew the alarm whistle, put down the brakes, and used every possible means to stop the train and prevent the accident, plaintiff could not recover, though the engine was being operated backwards, was error.

Statutory Obligation—Pleading—Amendment—Departure.

Where a declaration in an action for injuries at a railroad crossing alleged that defendant wrongfully and negligently ran its engine and cars against plaintiff, when crossing its track in a lawful and prudent manner, it stated a cause of action at common law and under Shannon's Code, §§ 1574-1576, requiring every railroad company to maintain a lookout ahead on the locomotive, etc., and rendering the company absolutely liable for damages occasioned by failure to comply with the act, though such act was not referred to in the declaration; and hence the amendment thereof, by adding a count specially declaring liability under the statute, did not constitute a departure.

Same—Contributory Negligence.

In an action against a railroad company for injuries at a crossing, under Shannon's Code, §§ 1574-1576, requiring every railroad company to keep some person on its locomotive on the lookout ahead, and certain other precautions, and rendering such company absolutely liable for injuries occasioned by a failure to comply with such sections, contributory negligence is no defense.

Same—Evidence.*

Where a railroad company was not required by Shannon's Code, § 1574, to blow the whistle or ring the bell at a crossing at which plaintiff was injured, evidence tending to show a custom of the company, subsequent to the collision, to blow the whistle at such crossing, was inadmissible.

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

The following is the opinion of Clark, District Judge, in the court below, on motion for new trial:

It is not deemed necessary to go over the facts of this case in detail. It will be sufficient to say that I have no doubt, on the facts of this case, that the plaintiff was guilty in law of contributory negligence. The doctrine which exempts him from imputed negligence of the hack driver is not to be understood as exonerating him from the consequences of his own personal negligence, and a man of full years and intelligent judgment is not permitted to get in the conveyance of another person, and approach and attempt to go over a dangerous crossing like this, without saying one word or doing one thing for the safety of himself. It is in his power either to suggest to the driver of the conveyance to stop, or to look, or to listen, or to take some other precaution reasonably suggested by the dangerous situation. If the driver should fail to do so, the passenger has the right to insist that the conveyance shall be stopped, and that the passenger be

*As to the admissibility of evidence of subsequent precautions as tending to show negligence, see foot-note appended to *Stevens v. Boston Elevated Ry. Co.* (Mass.), 10 R. R. R. 24, 33 Am. & Eng. R. Cas., N. S., 24, where all the preceding authorities in this series are collected or referred to.

allowed to get out and discharge the duty of reasonable care for the protection of his own life, and it would be a startling announcement to say that the fact that imputed negligence is not recognized would, in its consequences, authorize a man to omit any precaution whatever to take care of himself. The decisions of the State Supreme Court, as I read and understand them (though the point is not free from doubt), so construe the statute of the state as to render the railroad company absolutely liable for an accident which occurs while a train is being moved by an engine coupled to that train with the tender in front, or when the engine is running backward. The Supreme Court seems not to have thought or considered whether, indeed, in many cases, the duty required by the statute might not be better discharged in this way than by having the engine headed forward. It would be difficult to find any substantial reason on which to base such a decision, but nevertheless it seems to be the established rule of that court, and such ruling is binding on this court. This being so, the right to recover could not be questioned, and it was the duty of the jury to assess the damages. The damages allowed should have been reduced by the plaintiff's contributory negligence.

There was one weak point in respect of the evidence introduced by the plaintiff, and that was the omission to sustain the plaintiff's own testimony by the surgeon or physician who had previously had charge of his surgical difficulties. It is not satisfactory, in fixing a serious responsibility on the defendant, to do so on the unsupported testimony of the plaintiff himself, who is without medical education or training, and a very interested party, it is needless to say. There is no doubt that whatever is in the plaintiff's case is the mere aggravation of previously existing injuries, and it is very doubtful if he has really suffered anything new, as distinguished from the mere aggravation of old injuries. I would have been much better satisfied with a verdict of \$2,000 to \$2,500 in this case, and, as the jury should have reduced the amount by contributory negligence, I think the verdict is excessive, and that the jury did not make such reduction. Conceding to the jury, however, the latitude which properly belongs to their discretion, I have concluded that the verdict may stand for the sum of \$3,500, and that the plaintiff must agree to remit \$1,000 of the recovery, or otherwise the verdict will be set aside and a new trial awarded. If the plaintiff shall voluntarily remit \$1,000 of the damages, the motion for a new trial will be overruled. The plaintiff is allowed 10 days within which to signify to the clerk the course intended to be taken in this regard. If there is error in my reading and understanding of the Tennessee cases in relation to the statute, this is readily subject to review by the Circuit Court of Appeals, and the question is one which

it may be very desirable and of practical importance to have reviewed.

Ordered accordingly.

Jourolmon, Welcker & Hudson, for plaintiff in error.

X. Z. Hicks, D. A. Wood, and Lucky, Sanford & Fowler, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The plaintiff below sustained an injury by collision with a railway engine while crossing the railway track at a road crossing. Upon the conclusion of all the evidence the court instructed the jury to return a verdict for the plaintiff, and submitted to them the question of amount of damages only. This instruction was predicated upon an interpretation of a provision of the Tennessee Code requiring railroad companies to exercise certain precautions in the operation of their trains to prevent collision with persons or objects on the track. That requirement is in these words:

"Every railroad company shall keep the engineer, fireman, or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal, or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident."

"Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur."

"No railroad company that observes, or causes to be observed these precautions shall be responsible for any damage done to person or property on its road. The proof that it has observed said precautions shall be upon the company."

Shannon's Code Tenn. §§ 1574-1576.

The engine at the time of the collision was being operated backwards, the tender being in front. The court denied a request by the railroad company to instruct the jury as follows:

"If the engineer was actually upon the lookout ahead of his engine, and saw the vehicle in which plaintiff was riding as soon as it could have been seen as it approached and entered upon the railroad crossing, and immediately blew the alarm whistle, put down the brakes, and used every possible means to stop the train and prevent the accident, then plaintiff cannot recover, notwithstanding the engine was at the time being operated backwards, because this would be a full compliance with the Tennessee statute."

Touching the meaning of section 1574, Shannon's Code

Tenn., set out above, District Judge Clark said to the jury:

"The state does not, according to any just import of the language, require that the engine and tender shall be run headforemost, or that it shall not be run with the tender in front, as was being done in this case; and as an original proposition it is difficult to find any ground upon which to put an interpretation on the statute which would make it mean that it prohibits the railroad company from running its engine with the tender in front, if it chooses to do so, or that it requires any more than, if the engine is so run, that some one shall be kept on the lookout ahead, and be in a position to see ahead."

The learned judge, however, deemed himself precluded from the right to exercise an independent judgment as to the meaning of the statute, because he was under obligation to follow the interpretation of the statute by the Supreme Court of Tennessee in the case of *Railroad v. Dies*, 98 Tenn. 655, 41 S. W. 860, and accordingly instructed the jury that the running of an engine backwards was a violation of the statute, and the company liable for any collision, without regard to whether the "engineer was in a position to see, and did see, and did comply with all the requirements of the statute."

Neither the case of *Railroad v. Dies*, nor any other Tennessee case, has ever involved the precise question presented by the instruction denied, or required the Tennessee court to decide that the statute was violated whenever an engine was run backwards, without regard to the circumstances. Confessedly the statute does not in terms require the engine to run either backwards or forwards. A literal compliance with the statute would not under all circumstances be a compliance with its requirements. Thus the statute prescribes, among other things, that some person upon the locomotive shall always be upon the lookout ahead; but if the locomotive be at the rear of the train, or in the middle thereof, the spirit of the statute would not be obeyed, although some person upon the locomotive so situated should be always upon the lookout ahead. In such a situation the lookout upon the locomotive could not be upon the lookout ahead of the train, and the plain purpose of the statute would be evaded. Upon this consideration the Tennessee court held that the statute was not complied with by the operation of a train through the streets of a city by an engine in the rear. *Railway Co. v. Wilson*, 90 Tenn. 271, 16 S. W. 613, 13 L. R. A. 364, 25 Am. St. Rep. 693.

Neither does the statute in terms require an engine to be equipped with a headlight. But the effectiveness of a lookout would be practically destroyed by the neglect of a company to employ the ordinary means employed by railroad companies to make a lookout effective, and upon this con-

sideration the Tennessee court construed the statute as having been violated by the operation of an engine upon a dark night without a headlight. *Railroad v. Smith*, 6 Heisk. 174. But this construction of the statute, by which it was read as requiring a locomotive to be equipped with a headlight when running at night, would not justify the requirement of a headlight when running in the daytime; for such an equipment would not add to the effectiveness of the lookout, and cannot by implication be added to the requirement of the statute under such conditions. In pursuance of the same considerations in respect of the implied requirement to make the lookout upon the locomotive effective as a lookout ahead, the Tennessee court in *Railroad v. Dies*, 98 Tenn. 655, 41 S. W. 860, held the statute had not been complied with by running a road engine backwards, without a headlight on the tender, through and across the streets of a city, at night. In the case last cited the effectiveness of the lookout upon the engine being run backwards was destroyed by the existence of conditions not found in the case now before us.

Under the facts of the *Dies Case* compliance with the statute in respect to a lookout ahead was impossible, and, as stated by Justice Wilkes, the railway company could not "absolve itself from all duty to comply with the requirements, because, forsooth, they had made it impossible to do so." But in the case under consideration the locomotive was being operated in daylight, and the absence of a headlight, which was the pregnant circumstance destroying the effectiveness of the lookout in the *Dies Case*, can cut no figure whatever. There was evidence in the case on hearing tending to show that the effectiveness of the lookout was not in fact impeded or lessened by the fact of the backward operation of the locomotive, and the request for an instruction submitted to the jury the question as to whether the lookout actually "saw the vehicle in which the plaintiff was riding as soon as it could have been seen as it approached and entered upon the railroad crossing," and whether, when the object did appear upon the track, or within striking distance, all of the requirements of the statute were complied with, so far as was possible.

In every one of the cases cited above, and relied upon by defendant in error to establish the contention that the Tennessee court has authoritatively construed the statute as requiring the locomotive to be at all times run forwards, under penalty of absolute liability, without regard to circumstances, it plainly appeared that under the facts of the case the company had, to again quote from *Railroad v. Dies*, "placed itself in such condition as to be unable to comply with the statute" in respect to keeping an effective lookout ahead. If the facts in this case should establish that the company, in operating its locomotive backwards, did not

"place itself in such a condition as to be unable to comply with the statute," but, upon the contrary, was in a condition to comply with the statute, and did in fact comply, it would be evident that this case is not necessarily governed by the case cited, but is plainly distinguishable.

We recognize the duty of following the construction placed upon a state statute by the highest court of the state. *Western & Atlantic R. Co. v. Roberson*, 61 Fed. 592, 604, 9 C. C. A. 646; *Byrne v. K. C., Ft. & S. M. R. Co.*, 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693. That there are general expressions in the opinion of Judge Wilkes in *Railroad v. Dies* tending to support the contention at the statute is violated when an engine is run backwards, without regard to whether the company was thereby disabled from maintaining an effective lookout or not, must be conceded. But no such broad question was involved, and the actual decision was put upon the ground that the company had, by running its engine backwards at night, without a headlight, disabled itself from complying with that part of the statute requiring an effective lookout ahead. The opinion as a construction of the statute is authoritative to the extent of the precise question decided, and no farther. Nothing more was necessary to the determination of the rights of the parties to that controversy.

Concerning the authority of an opinion, Chief Justice Marshall, in *Cohens v. Virginia*, 6 Wheat. 399, 5 L. Ed. 257, said:

"It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

This is the rule applied by the Tennessee court to its own decisions. In *L. & N. R. R. Co. v. County Court*, 1 Sneed, 639, 696, 62 Am. Dec. 424, it is said that:

"The reasoning, illustrations, or references contained in a judicial opinion are not authority, but only the points in judgment, arising in the particular case before the court. The generality of the language used in an opinion is, therefore, always to be restricted to the case before the court, and is only authority to that extent."

There is nothing in the statute itself which forbids its construction and interpretation according to the well-settled principles applicable to the interpretation of statutes generally, and there is nothing in the Tennessee decisions which forbids the application of the ordinary principles of interpre-

Southern Ry. Co. v. Simpson

tation, where the duty of applying and construing the statute is required. Thus the statute has been construed as not requiring impossibilities, and, if everything is done which it was possible to do to stop the train or prevent a collision after an object appears on the track, liability is escaped, although everything required by the statute had not been done. *Railroad v. Scales*, 2 Lea, 688; *Railroad v. Swaney*, 5 Lea, 119, 121. So, if to reverse the engine under the circumstances would seriously endanger the safety of the train, that requirement has been excused. *Routon v. Railroad Co.*, 1 Tenn. Cas. 528; *Railroad v. Troxlee*, 1 Lea, 520.

The statute has been held not to apply at all in the yards of the company, or when engaged in switching operations. *Cox v. Railroad*, 2 Leg. Rep. 168; *L. & N. R. Co. v. Conner*, 2 Baxt. 385; *Railroad v. Pugh*, 95 Tenn. 419, 32 S. W. 311. Neither does the statute apply to the rear section of a freight train broken in two by accident, when the broken section is following by gravity. *Patton v. Railroad*, 89 Tenn. 372, 15 S. W. 919, 12 L. R. A. 184. We therefore reach the conclusion that the question of construction and application presented by the request of the defendant company was not authoritatively controlled by any decision of the Tennessee court, and that the request embodied a sound and reasonable view of the statute and should have been given, and that it was error to deny same and to instruct the jury to find for the plaintiff.

The plaintiff amended his declaration by the addition of a count which declared specially upon the liability of the company under sections 1574-1576 of Shannon's Tennessee Code, being the provisions heretofore set out, imposing liability upon railroad companies not observing certain precautions in the operation of their trains. The defendant pleaded the Tennessee statute of limitations of one year to this additional count, upon the theory that this amendment introduced a new cause of action against which the statute had run before action brought. This plea was stricken out, and this ruling is now assigned as error.

The statute prescribes the precautions to be observed to avoid collision with objects and persons upon a railway track, and imposes liability for all damages resulting to the person or object directly resulting from a collision when the precautions are not observed, and absolves the company from all liability when the requirements have been complied with. The original declaration stated as a cause of action that the defendant company had wrongfully and negligently run its engine and cars upon and against the plaintiff when crossing its track in a lawful and prudent manner. It did not refer to the statute. But this was unnecessary. The case stated, if made out, was a case against the company under the local statute, as well as at common law, and the plaintiff, without declaring upon the statute, was entitled to

Southern Ry. Co. v. Simpson

proceed against the company for negligent nonobservance of the requirements of the local statute, without especially declaring upon it. The statute was a public law of the state in which the injury had been inflicted, and in which the suit was pending, and the court below was bound to take notice of such a statute, as well as of the principles of the common law. *Stephens on Pleading*, 347. The declaration was, before amendment, one under which, by the pleading and practice in the Tennessee courts, the plaintiff was entitled to rely upon the provisions of the statute. *Railroad v. Pratt*, 85 Tenn. 9, 1 S. W. 618. The amendment, by adding a count specially declaring under the statute, was not, therefore, a departure in law or fact from the cause of action stated in the declaration as originally filed, because the plaintiff could have relied upon statutory negligence, as well before as after the amendment. The case is clearly distinguishable from *Union Pacific R. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed 983, for this reason, as well as for other reasons which need not be alluded to.

The crossing where this collision occurred was not designated by a signboard, as required by the first paragraph of section 1574, *Shannon's Code Tenn.* Unless so designated, the company is not obliged to blow the whistle or ring the bell. *Railroad v. McDonough*, 97 Tenn. 255, 37 S. W. 15; *Southern Ry. Co. v. Elder*, 81 Fed. 791, 26 C. C. A. 615. The plaintiff below was permitted, over objection, to prove that the defendant nevertheless customarily blew for this crossing, and "that they now blow all the time." He had before testified that upon this particular occasion the whistle was not blown or the bell rung. At the time that this evidence was offered the plaintiff admitted that he did not rely upon the failure of the defendant to whistle as a ground for recovery, but desired to prove that it customarily did whistle, for its bearing upon the matter of his own conduct in going upon the crossing at the time and under the conditions shown by the evidence. The evidence was thereupon admitted. The court was asked to exclude any evidence of the habit of the company to whistle since the accident, but this was denied.

The negligence of the plaintiff is not a bar to a recovery of damages for an injury, where the requirements of the Tennessee statute, heretofore cited, have been disobeyed. In such cases negligence of the plaintiff must operate to mitigate the damages, but does not defeat the action. *Western & Atlantic R. Co. v. Roberson*, 61 Fed. 592, 9 C. C. A. 646. The evidence admitted tending to show a settled custom to blow at this crossing, if known to the plaintiff, would have some bearing upon the degree of plaintiff's negligence if he undertook to cross without stopping or looking before crossing the track at grade, and under proper instruction guard-

Means v. Southern California Ry. Co

ing against other use was admissible. But it was clearly not competent to show the custom of the company after the collision, for that could have had no influence upon plaintiff's conduct.

For the errors indicated, the judgment must be reversed, and remanded for a new trial.

MEANS v. SOUTHERN CALIFORNIA RY. CO.

(Supreme Court of California, Aug. 19, 1904.)

[77 Pac. Rep. 1001.]

Care Due Licensee on Depot Premises.*

A railroad company, as owner and occupant of premises for freight depot purposes, owes a mere licensee entering on the premises no legal duty except that while on the premises no wanton or wilful injuries shall be inflicted on him.

Licensees.

In an action against a railroad company as owner and occupant of the premises for freight depot purposes to recover for personal injuries resulting from the explosion of a tank of sulphuric acid while plaintiff was in defendant's freight depot, evidence examined, and held insufficient to show that plaintiff was anything more than a mere licensee on the premises.

Same—Explosion of Sulphuric Acid—Care Required at Depot.

In an action against a railroad company as owner and occupant of premises for freight depot purposes to recover for personal injuries, resulting from the explosion of an iron tank of sulphuric acid, evidence examined, and held insufficient to show that such acid so consigned is inherently such a dangerous substance as required defendant to take extra precautions, or exercise more than ordinary care in disposing of it in its freight depot.

Same—Same—Same.

No positive duty is cast on a railroad company as owner and occupant of premises for freight depot purposes to examine a tank containing sulphuric acid, shipped over its lines, to ascertain whether the tank is in good condition, and a failure so to do amounts to nothing more than passive negligence.

Same—Same—Liability.

A mere licensee on the premises of a railroad company used for freight depot purposes has no right of action against the railroad for injuries received by the explosion of a tank of sulphuric acid, where the defendant is shown to be guilty of nothing more than passive negligence in failing to examine the tank to ascertain whether it was in good condition.

In Bank. Appeal from Superior Court, Los Angeles County; D. K. Trask, Judge.

Action by Walter Means, a minor, by his guardian ad litem, against the Southern California Railway Company.

*As to the care due trespassers and licensees on railroad premises, see foot-note appended to *Kendall v. Louisville & N. R. Co.* (Ky.), 11 R. R. R. 771, 34 Am. & Eng. R. Cas., N. S., 771; foot-note appended to *Sullivan v. Minneapolis, etc., Ry. Co.* (Minn.), 11 R. R. R. 725, 34 Am. & Eng. R. Cas., N. S., 725.

Means v. Southern California Ry. Co

From a judgment for plaintiff, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

Milton K. Young and J. W. McKinley, for appellant.
C. N. Sterry and Henry J. Stevens, for respondent.

LORIGAN, J. This action was brought to recover damages for personal injuries sustained by plaintiff through the bursting of a tank of sulphuric acid in the freight house of defendant. Prior to October 20th, defendant, as a common carrier, received at its station at North Ontario, Cal., consigned to one Jesson, a druggist at that place, an iron tank containing sulphuric acid, which was placed by its agent in its freight house. This tank was of the customary size and kind used in the shipment of sulphuric acid in large quantities. The freight house is separate and distinct from any other building on the depot premises, and is used solely for freight purposes. It is built on a platform, raised some four feet from the ground, the eastern portion being entirely closed, with doors opening to the north, south, and east, and the western portion adjoining being roofed, but uninclosed on the sides. The freight house is reached by inclined approaches at three ends of the platform, and there is ample unobstructed space around the building on the platform for the convenient handling of freight and the passage of persons. The tank in question, with other tanks of similar character and contents, had been placed by defendant's agent about the center of the uninclosed portion of the freight house, and the consignee had made arrangements to take it away upon the day when the accident occurred. In the afternoon of that day—October 20th—plaintiff, a boy 16 years of age, in company with two other boys of about the same age, started for the defendant's depot, the object of plaintiff's visit being to get an express package from the office of Wells, Fargo & Co. This office was located in the passenger building, which in no wise was connected with the freight house or its premises. When some distance from the depot, he saw standing somewhere in the uninclosed portion of the freight house a man to whom he wished to talk about moving a shanty, and, instead of continuing towards Wells, Fargo & Co.'s office, he went with his companions over to the freight house. When he got there the person he wished to see was not in sight, but, hearing voices in the inclosed portion of the freight house, he supposed he was there, and concluded to await his coming out through the south door of the inclosed freight house, which was open. Plaintiff could readily have gone to this south door, to which there was a clear approach, and waited there, and spoken to the party he wished to see, or could have ascertained whether he was in fact inside, and, if not, could have gone directly along down the inclined approach on that side of the freight house to the office of Wells, Fargo & Co., his original point of

Means v. Southern California Ry. Co

destination. Instead of doing this, however, plaintiff and his companions went into the uninclosed freight house to about the middle thereof, to wait, and for that purpose seated themselves upon some cement barrels located a few feet from where the iron tanks of sulphuric acid had been placed. They were only seated a few minutes when one of said tanks burst, throwing some of its contents upon plaintiff, causing the injuries to recover which this action was brought. The evidence further shows that numerous persons, having no business to transact with the defendant company, had been for years permitted to be around and about such freight platform, and were not ordered away by the officers of defendant. At the close of plaintiff's case the court, on defendant's motion, granted a nonsuit. Thereafter plaintiff moved for a new trial, which was denied, and from the order denying the same this appeal is taken.

If it were assumed that there was sufficient proof of negligence on the part of defendant to otherwise warrant the submission of the cause to the jury, we are nevertheless satisfied that upon the entire showing made the plaintiff was not entitled to recover. The complaint alleged, among other things, that one Short was the common agent of the defendant, the railway corporation, and Wells, Fargo & Co., common carrier for hire of express packages; that the latter had its office in the depot premises of defendant as its tenant, and that, in order to transact business with Wells, Fargo & Co. at its office, it was necessary to go upon the premises of defendant; that plaintiff, when said accident occurred, was upon said premises to inquire at the office of said Wells, Fargo & Co. whether a package for him had arrived, etc. The complaint was framed upon the principle that the owner or occupant of premises owes a legal duty to one lawfully entering upon them for the transaction of business to exercise such reasonable care or caution as a prudent person under like circumstances would exercise in seeing that the premises are in a safe condition, so as not to expose one lawfully entering upon them to injury or danger, and that for failure to do so he is liable in damages for any injury sustained through a failure to discharge such duty. The principle is correct. In order to constitute actionable negligence, there must exist three essential elements, namely, a duty or obligation which the defendant is under to protect the plaintiff from injury, a failure to discharge that duty, and injury resulting from the failure. Not only must the complaint disclose these essentials, but the evidence must support them, and the absence of proof of any of them is fatal to a recovery. The facts stated in the complaint met all these essential requirements, but the evidence adduced upon the trial did not accord with the allegations of the complaint, nor square with the principle of law referred to. The plaintiff was not on the freight house premises to obtain any

Means v. Southern California Ry. Co

package from Wells, Fargo & Co. He had changed his mind about going to that office. In fact, the office of Wells, Fargo & Co. was not on the freight house premises, was not near the freight house proper, but was in an entirely different, separate, and distinct building. Nor was the plaintiff in the freight house on business connected with either the defendant company or Wells, Fargo & Co. He was on his own particular business for his own purpose, and with reference to a matter wholly unconnected with either of the companies, and was seated in a place where even the personal business he was to attend to neither required his presence nor gave him any right to enter. This evidence showed an entire absence of any duty resting upon the defendant towards the plaintiff with reference to his safety upon the premises where the accident occurred, and hence the absence of one of the essential requirements to a recovery. While the allegations of the complaint showed the existence of this duty, the evidence failed to substantiate it. On the contrary, it shows that no such duty existed.

If the plaintiff was not technically a trespasser in entering the freight house of the defendant, he was at best but a licensee, entering thereon subject to the rule determining the measure of responsibility of the owner of premises to a mere licensee. He was not upon the premises by the invitation, express or implied, of the defendant, nor for any business purpose connected with defendant, nor in relation to any business for which the freight house in which he was injured was used. He went there of his own volition, uninvited, concerning a matter which was personal to himself, in which the defendant had no interest. As a mere licensee, the defendant owed him no legal duty except that while upon the premises no wanton or willful injury should be inflicted upon him. It owed no duty to him to have its premises, or the contents thereof, in safe condition; and when he entered, uninvited, upon the premises of defendant, he assumed all the ordinary risks which attach to the condition of such premises or the manner of the conduct of defendant's business by its agents therein. Under such circumstances, as has been repeatedly held, he enters upon the premises at his own risk, and enjoys the license with its concomitant perils. "As a general rule," says Thompson in his *Commentaries on the Law of Negligence*, vol. 1, 946, "the owner of private grounds is under no obligation to keep them in a safe condition for the benefit of trespassers, intruders, idlers, bare licensees, or others who go upon them, not by any invitation, express or implied, but for their own purposes, their pleasure, or to gratify their curiosity, however innocent or laudable their purpose may be." And in harmony with the general rule it is said in *Schmidt v. Bauer*, 80 Cal. 569, 22 Pac. 256, 5 L. R. A. 580: "Conceding that the respondent was not wrongfully in the place where the accident occurred,

Means v. Southern California Ry. Co

and giving the most liberal construction to his evidence, he was there by the mere license of the appellant, and for that reason the appellant owed him no duty, and he went there subject to all the risks attending his going." In *Kennedy v. Chase*, 119 Cal. 642, 52 Pac. 35, 63 Am. St. Rep. 153, it was likewise said: "'We have found no support for any rule,' says Mr. Thompson, in speaking of the rights of trespassers or mere licensees, 'which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or their relations with the occupant.'" It is said in *Gibson v. Leonard*, 143 Ill. 189, 32 N. E. 183, 17 L. R. A. 588, 36 Am. St. Rep. 376: "Actionable negligence, or negligence which constitutes a good cause of action, grows out of a want of ordinary care and skill in respect to a person to whom the defendant is under an obligation or duty to use ordinary care and skill. The owner of land and of buildings assumes no duty to one who is on his premises by permission only, and is a mere licensee, except that he will refrain from willful or affirmative acts which are injurious." In *Cusick v. Adams*, 115 N. Y. 59, 21 N. E. 673, 12 Am. St. Rep. 772, the court say: "The principle is now well settled by repeated adjudications in this country and in England that where a person goes upon the premises of another without invitation, but simply as a bare licensee, and the owner of the property passively acquiesces in his coming, if an injury is sustained by reason of a mere defect in the premises the owner is not liable for negligence, for such person has taken all the risk upon himself. The theory of liability in negligence cases is a violation of some legal duty to exercise care." And again, in *Moffatt v. Kenny*, 174 Mass. 315, 54 N. E. 851, the rule is laid down as follows: "It is a general rule that a licensee going upon the land of another must take the land as he finds it. Of course, the landowner is liable if he does him intentional injury, or wantonly or recklessly exposes him to danger. It has sometimes been said that he is liable for a trap upon his land. We are not aware of any decision which distinctly defines the word 'trap' in this use. It would at least, include any very dangerous construction or condition designedly arranged to do injury. But we are of opinion that an owner is under no liability for an unsafe condition of his premises caused by a mere failure to use ordinary care for the safety of persons who may chance to go there by permission while he is using the place for his own proper purposes, and is not intending needlessly to expose others to danger; otherwise there would be no important distinction between his duty to licensees and his duty to invited persons." This general principle is too well settled to need further particular citations, but attention is directed to a few authorities from various jurisdictions which sustain the uniformity of the rule: *Straub v.*

Means v. Southern California Ry. Co

Soderer, 53 Mo. 43; Plummer v. Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; Faris v. Hoberg, 134 Ind. 269, 33 N. E. 1028, 39 Am. St. Rep. 261; Fitzpatrick v. Glass Mfg. Co., 61 N. J. Law, 379, 39 Atl. 675; Woodruff v. Bowen, 136 Ind. 441, 34 N. E. 1113, 22 L. R. A. 198; Leary v. Cleveland, etc., 3 Am. & Eng. R. Cas. p. 498; Mathews v. Bensel, 51 N. J. Law, 33, 16 Atl. 195; Gibson v. Leonard, 143 Ill. 182, 32 N. E. 183, 17 L. R. A. 588, 36 Am. St. Rep. 376; Victory v. Baker, 67 N. Y. 369; Metcalfe v. Cunard Steamship Co., 147 Mass. 66, 16 N. E. 701; Redigan v. B. & M. R. R. Co., 155 Mass. 44, 28 N. E. 1133, 14 L. R. A. 276, 31 Am. St. Rep. 520; Kinney v. Onsted, 113 Mich. 96, 71 N. W. 482, 38 L. R. A. 665, 67 Am. St. Rep. 455; Pitts & Fort Wayne & Chicago R. R. Co. v. Bingham, 29 Ohio St. 364; Gillis v. Pa. R. R. Co., 59 Pa. 129, 98 Am. Dec. 317; Parker v. Portland Pub. Co., 69 Me. 176, 31 Am. Rep. 262; U. S. Y. & T. Co. v. Rourke, 10 Ill. App. 474. Also Grundel v. Union Iron Works, 141 Cal. 564, 75 Pac. 184, and cases there cited.

Appellant insists, however, that under the facts of this case a different rule of liability is to be applied; that this consignment of sulphuric acid was of such a dangerous character that the defendant was under legal obligation to the public generally not to so place and expose it in its freight house that a person—licensee or otherwise—could readily come in proximity to it, but was in duty bound to exercise such care in arranging and disposing of it that no one might be exposed to injury or harmed from it. While the general rule is that one using or handling dangerous articles does so at his peril, and for injuries occasioned thereby, other than through the interposition of strangers or caused by extraordinary natural occurrences, must respond in damages, this rule is nevertheless limited to articles essentially and in their elements dangerous, and calculated, in their nature, to cause injury to property or person. There is nothing in this case to show that sulphuric acid is essentially and inherently a dangerous agency, or that from its nature any particular peril is attendant upon handling it in iron tanks. This is the usual—in fact, the only—method disclosed by the evidence which is employed in its shipment in large quantities. Such tanks had been received and banded by the defendant in considerable quantity at its depot in Ontario prior to the accident in question, and aside from that particular accident there is no evidence showing any similar occurrence attending its receipt or handling on defendant's premises. From the testimony of witnesses—the only ones who had any practical experience in handling sulphuric acid in iron tanks—it appears that they handled it in considerable quantities, covering in one instance a period of eight years, and in the other probably a longer period; that they had handled it in large quantities; and that it was only in exceptional

cases, and after long exposure to the change of seasons, that any of the tanks burst, and then only in a comparatively few instances. There was nothing to show that these witnesses deemed it dangerous to handle it in iron tanks; in fact, the method of their dealing with it would indicate that they did not, and one of them stated that he did not know it was supposed to be, and did not think it was, unsafe so to handle it. These tanks were kept, with others which did not burst, in the open air, without any protection or covering, subject to all changes of weather and variations of temperature, and only burst after months of exposure under these conditions. No reasons could be assigned by the witnesses for their bursting, nor was the fact that they had done so a matter of notoriety in North Ontario, nor was there any evidence that defendant or its agents were advised of this particular fact, or knew under what, if any, circumstances, such tanks were liable to burst. Neither does the evidence disclose the actual cause of the bursting of the tank whereby plaintiff was injured. The reasonable inference is that there was some slight leak in the tank, through which moisture was absorbed, and, as one of the expert witnesses for the plaintiff stated, under the action of the sun's rays on the iron vessel in the presence of the moisture a generation and accumulation of hydrogen gas was induced, which caused the bursting of the vessel. We mention these facts, not as bearing upon the general question of the presence or absence of negligence on the part of defendant, because we do not discuss that branch of the case, but as addressed to the point that sulphuric acid contained and handled in tanks is not inherently such a dangerous substance as to have required defendant to take extra precautions, or exercise more than ordinary care in disposing of it in its freight house, or which calls for the application of the rule contended for by plaintiff, enlarging the liability of defendant. As the acid was not in itself a dangerous agency, and was contained in iron tanks, such as were usually employed for like shipments, the defendant had a right to assume, as far as plaintiff was concerned, that such tanks were sound and secure, and sufficient to withstand the ordinary perils or dangers incident to transportation, handling, and storage. No positive duty was cast upon defendant to examine the tank to ascertain whether it was in good condition or not. A failure to do so amounted to nothing more than passive negligence, and for injury arising from such negligence plaintiff, as a mere licensee, has no right of action.

We are satisfied that the order denying a motion for a new trial was properly made, and it is affirmed.

We concur: McFARLAND, J.; SHAW, J.; ANGELLOTTI, J.; VAN DYKE, J.; HENSHAW, J.

ARKANSAS CENT. R. CO. *v.* STATE.

(Supreme Court of Arkansas, Feb. 27, 1904.)

[79 S. W. Rep. 772.]

Railroads—Crossings—Signboards—Failure to Erect—Actions—Defenses—Receivership.*

Where a railroad company in the hands of a receiver could have erected signboards at a railroad crossing as required by Sand. & H. Dig. § 6197, without in any manner interfering with the receiver or the rightful discharge of his duties, the fact that the railroad and its property were in the hands of a receiver was no defense to the corporation for failure to comply with such requirement.

Bunn. C. J., dissenting.

Appeal from Circuit Court, Sebastian County; Styles T. Rowe, Judge.

Action by the state against the Arkansas Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Oscar L. Miles, for appellant.

Geo. W. Murphy, Atty. Gen., for the State.

BATTLE, J. The defendant, the Arkansas Central Railroad Company, a railroad corporation, was indicted by a grand jury of the circuit court of Sebastian county for the Greenwood District for a misdemeanor, committed by the defendant's failing in the month of November, 1899, to erect and maintain a board at the place where its railroad crosses a public road in said county, "known as 'Road District No. 8,'" as required by section 6197, Sand. & H. Dig., which section is as follows: "Every railroad corporation in this state shall cause boards to be placed, well supported by posts or otherwise, and constantly maintained across each public road or street where the same is crossed by the railroad on the same level. Said boards shall be elevated so as not to obstruct travel, and to be easily seen by travelers; and on each side of said board shall be painted, in capital letters of at least the size of nine inches each, the words 'Railroad Crossing—Look out for the cars while the bell rings or the whistle sounds'; but this shall not apply to streets in cities or villages, unless the corporation be required to put up such boards by the officer having charge of such streets."

The defendant pleaded not guilty. A jury was impaneled to try the issues. It was proved that the defendant failed to erect and maintain a board as charged, and that the railroad and property of the defendant were in the hands of a receiver at the time of such failure. The defendant was found guilty, and appealed.

*As to who is liable for torts committed during receivership, see foot-note appended to *Tobin v. Central Vermont Ry. Co.* (Mass.), 11 R. R. 196, 34 Am. & Eng. R. Cas., N. S., 196, where all the preceding authorities in this series are collected.

Coolbroth v. Pennsylvania R. Co

Appellant contends that, its railroad and property being in the hands of a receiver, it was relieved of the duty imposed by section 6197 of the Digest. But this is not true. Notwithstanding the appointment of a receiver, it still existed as a corporation, clothed with its franchises. It could have exercised such franchises, and discharged the duties imposed upon it by statute, as before the appointment, so far as it could have done so without interfering with the rightful management of its road and property by the receiver; and it was its duty to do so. In this case it was not relieved of the duty to erect and maintain boards as required by the statute because a superior duty or force prevented a compliance. It could have done so without interfering with the receiver in the rightful discharge of his duties. *Ohio & Mississippi Railway Co. v. Russell*, 115 Ill. 52, 57, 3 N. E. 561; *Kansas Pacific Railway Co. v. Wood*, 24 Kan. 619; *High on Receivers* (3d Ed.) § 397; *Beach on Receivers*, § 727. This is unlike the duty of a railroad company to ring a bell or whistle when its trains approach a public crossing. In such cases the railroad company could not do so, if its railroad and trains are in the hands of a receiver, without interfering with the rightful possession and discharge of the duties of the receiver. The omission in the latter case is not the default of the railroad company.

Judgment affirmed.

BUNN, C. J., dissents.

COOLBROTH et al. v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, June 15, 1904.)

[58 Atl. Rep. 806.]

Appeal—Reservation.

A reservation which embraces a mixed question of law and of fact is erroneous.

Accident at Crossing—Stop, Look and Listen—Question for Jury.

Where, in an action for injuries at a crossing, the evidence is conflicting as to whether a person stopped to look and listen, the question is for the jury.

Contributory Negligence—Question of Fact.

If there is any doubt as to whether plaintiff was guilty of contributory negligence, the question is not one of law for the court, but of fact for the jury.

Same—Burden of Proof.*

In an action for negligence, though the burden is on plaintiff to show

*As to whether it is to be presumed that a person stopped, looked and listened before attempting to cross street railway tracks, see foot-note appended to *Baltimore & Potomac R. Co. v. Landrigan* (U. S.), 11 R. R. 716, 34 Am. & Eng. R. Cas., N. S., 716.

As to the burden of proving contributory negligence, see *Burns v. Metropolitan St. Ry. Co.* (Kan.), 6 R. R. R. 476, 29 Am. & Eng. R. Cas., N. S., 476; *Corbett v. Oregon Short Line R. Co.* (Utah), 7 R. R. R. 736, 30

Coolbroth v. Pennsylvania R. Co

negligence on the part of defendant causing the injury, the burden is on defendant to show that plaintiff contributed to the injury, unless plaintiff's evidence discloses contributory negligence.

Appeal from Court of Common Pleas, Clearfield County.

Action by Grace Coolbroth and Charles Coolbroth against the Pennsylvania Railroad Company.

Judgment for defendant notwithstanding the verdict, and plaintiffs appeal. Reversed.

Defendant presented the following point: "First. The court is respectfully requested to direct a verdict in favor of the defendant for the following reasons: (1) Because it appears by the testimony of plaintiff herself that the point where she stopped to look and listen was to the south side of the Irvin siding, and before she got quite to the siding, which is shown by the testimony of her engineer, Mr. Moore, to have been over 53 feet along the sidewalk from the track where she was struck. (2) Because it appears by some of her witnesses, who were a considerable distance from the train, that they were able to see the train, and did see it, and are able to state approximately the distance they were from it. (3) Because the plaintiff was not injured on the track, but just as she was about to step on the track before a locomotive, which is shown by uncontradicted testimony to have been equipped with a proper headlight. (4) Because it ap-

Am. & Eng. R. Cas., N. S., 736; *Dubiver v. City & S. Ry. Co. (Ore.)*, 10 R. R. R. 660, 30 Am. & Eng. R. Cas., N. S., 660, and presumption of due care on part of minor; *Cox v. Wilmington City Ry. Co. (Del.)*, 7 R. R. R. 818, 30 Am. & Eng. R. Cas., N. S., 818 (presumption that person injured on track exercised due care); *Boone v. Oakland Transit Co. (Cal.)*, 9 R. R. R. 601, 32 Am. & Eng. R. Cas., N. S., 601; *Taillon v. Mears (Mont.)*, 10 R. R. R. 516, 33 Am. & Eng. R. Cas., N. S., 516 (burden of proving absence of); *Hunterson v. Union Traction Co. (Pa.)*, 8 R. R. R. 927, 31 Am. & Eng. R. Cas., N. S., 927 (burden of proving absence of on part of person injured while stepping off moving street car); *Baltimore & O. R. Co. v. Stumpf (Md.)*, 9 R. R. R. 203, 32 Am. & Eng. R. Cas., N. S., 203; *Central of Georgia Ry. Co. v. Vining (Ga.)*, 6 R. R. R. 312, 29 Am. & Eng. R. Cas., N. S., 312 (burden of proving that deceased engineer was guilty of contributory negligence); *Cook v. Missouri Pac. Ry. Co. (Mo.)*, 3 R. R. R. 954, 26 Am. & Eng. R. Cas., N. S., 954; *Hemingway v. Illinois Cent. R. Co. (C. C. A.)*, 3 R. R. R. 899, 26 Am. & Eng. R. Cas., N. S., 899 (rule in federal courts); *Brown v. New York, N. H. & H. R. Co. (Mass.)*, 3 R. R. R. 143, 26 Am. & Eng. R. Cas., N. S., 143 (burden of proving due care on plaintiff in action for injury to passenger caused by alighting from moving car); *Louisville & N. R. Co. v. Harmon (Ky.)*, 1 R. R. R. 76, 24 Am. & Eng. R. Cas., N. S., 76 (burden of proving negligence of plaintiff where it is denied that she was a passenger); *Missouri, K. & T. Ry. Co. of Texas v. Scarborough (Tex.)*, 3 R. R. R. 608, 26 Am. & Eng. R. Cas., N. S., 608 (where boy eleven years of age was injured by projection from car while standing near track); *Morbey v. Chicago N. W. Ry. Co. (Iowa)*, 1 R. R. R. 371, 24 Am. & Eng. R. Cas., N. S., 371 (presumption of due care on part of employee killed while working under engine); note, 10 Am. & Eng. R. Cas., N. S., 848 (crossing accidents); note, 12 Am. & Eng. R. Cas., N. S., 415 (negligence of person injured at crossing); *Indianapolis St. Ry. Co. v. Robinson (Ind.)*, 23 Am. & Eng. R. Cas., N. S., 628 (passenger board-

Coolbroth v. Pennsylvania R. Co

pears by the testimony on the part of the plaintiff that the box cars and the lumber pile were necessarily out of view after she passed the Irvin siding, and that there was no obstruction between the Irvin siding and the track where she was struck, and that the distance between them along the sidewalk is 45 feet. (5) Because the plaintiff was struck on the back, showing that she had her face away from the direction from which this train came. (6) Because the place at which she stopped over 53 feet from the track was shown by the testimony to have been a point where the view was obstructed; while on the ground she passed over after crossing the siding, and in which she did not stop, the view was unobstructed for over 300 feet. (7) Because the testimony shows that at any point within the space from the Irvin siding to the track at which she was struck along the sidewalk there was an unobstructed view of the approaching train for several hundred feet; that immediately before stepping on the track she would have had a view of over 300 feet, and this view would be widened in the direction from which she came. (8) Because there is no testimony upon the part of the plaintiff that no bell was rung or whistle sounded, the witnesses only stating that they did not hear such signals; and none of the witnesses are shown to have had any relation to the train which specially called their attention to the signals, and this testimony against the positive testimony of the engineer, fireman, and brakeman that the signals were

ing moving car); *Central Texas & N. W. Ry. Co. v. Bush* (Tex. Civ. App.), 3 Am. & Eng. R. Cas., N. S., 264; *Chase v. Maine Cent. R. R.* (Mass.), 6 Am. & Eng. R. Cas., N. S., 343; *Cleveland, C. C. & St. L. Ry. Co. v. Miller* (Ind.), 9 Am. & Eng. R. Cas., N. S., 684; *Cox v. Norfolk & C. R. Co.* (N. Car.), 12 Am. & Eng. R. Cas., N. S., 390; *Haner v. Northern Pac. Ry. Co.* (Idaho), 19 Am. & Eng. R. Cas., N. S., 629; *Houston & T. C. R. Co. v. Kelly* (Tex. Civ. App.), 3 Am. & Eng. R. Cas., N. S., 444; *Hunter v. Montana Cent. Ry. Co.* (Mont.), 16 Am. & Eng. R. Cas., N. S., 615; *Lee v. International, etc., R. Co.* (Tex.), 5 Am. & Eng. R. Cas., N. S., 376; *Leonard v. Boston & A. R. R.* (Mass.), 13 Am. & Eng. R. Cas., N. S., 825; *Mobile & O. R. Co. v. Wilson* (C. C. A.), 6 Am. & Eng. R. Cas., N. S., 97; *Omaha St. Ry. Co. v. Martain* (Neb.), 4 Am. & Eng. R. Cas., N. S., 1; *Silcock v. Rio Grande W. Ry. Co.* (Utah), 18 Am. & Eng. R. Cas., N. S., 459; *Chicago G. W. Ry. Co. v. Price* (C. C. A.), 16 Am. & Eng. R. Cas., N. S., 324 (rule in federal courts); *Evansville St. R. Co. v. Gentry* (Ind.), 5 Am. & Eng. R. Cas., N. S., 500 (presumptions); *Southern Ind. Ry. Co. v. Peyton* (Ind.), 23 Am. & Eng. R. Cas., N. S., 343; *Dotty v. Atlantic City R. Co.* (N. J.), 18 Am. & Eng. R. Cas., N. S., 157 (crossing accidents); *Steele v. Northern Pac. Ry. Co.* (Wash.), 15 Am. & Eng. R. Cas., N. S., 129 (due care at crossing); *Chattanooga S. R. Co. v. Myers* (Ga.), 19 Am. & Eng. R. Cas., N. S., 776; *Halton v. Southern Ry. Co.* (N. Car.), 19 Am. & Eng. R. Cas., N. S., 776 (actions for injuries to employees); *Norfolk & W. Ry. Co. v. Cromer* (Va.), 23 Am. & Eng. R. Cas., N. S., 720 (burden of proving its absence, in action for injury to employee); foot-note appended to *Riska v. Union Depot R. Co.* (Mo.), 11 R. R. R. 294, 34 Am. & Eng. R. Cas., N. S., 294; *Kansas City-Leavenworth R. Co. v. Gallagher* (Kan.), 11 R. R. R. 750, 34 Am. & Eng. R. Cas., N. S., 750 (presumption of due care on part of deceased); foot-note appended to *Tailon v. Mears* (Mont.), 10 R. R. R. 516, 33 Am. & Eng. R. Cas., N. S., 516 (passenger cases).

Coolbroth v. Pennsylvania R. Co

given is insufficient to justify a finding by the jury that they were not given. (9) Because none of the witnesses who testified on the part of the plaintiff in relation to the speed of the train are shown to have had any qualification or experience to enable them to judge of its speed, and it is testimony of such vague character as would be overborne by the positive testimony of the engineer, fireman, brakeman, and conductor and by the schedule of the train. Answer: This point asks us to take the case from the jury, but, in the view we take of it at this time, we cannot do that, and we therefore refuse this point, and will reserve the question for future consideration."

Argued before MITCHELL, C. J., and DEAN, BROWN, POTTER, and THOMPSON, JJ.

David L. Krebs and Wm. Irvin Swoope, for appellants.
Thomas H. Murry, for appellee.

DEAN, J. As this case is presented on the record, we will have to reverse the judgment, for these reasons: (1) The form of the reservation is very unsatisfactory, because, from the manner of it, it does not clearly disclose the exact legal question reserved. But assuming that we might get around the informality of the reservation, and find that it is good in substance, then (2) the reservation embraces a mixed question of law and fact. These are the facts as plaintiff avers them, and there was some evidence to sustain her averments: "On the afternoon of the 29th of August she went from her home, in the central part of the borough of Curwensville, across the Susquehanna river, and across the railroad of the defendant company, to visit a lady with whom she had business pertaining to some of her work as a seamstress. She remained at this house during all the afternoon and until after eight o'clock in the evening of the same day. It was quite dark when she started to return to her home, which was distant between a quarter and a half a mile. She recrossed the river on an open iron bridge, and as she was about the west end of the bridge—the end nearest the railroad—she heard the whistling of a train. There being but few trains on this end of the railroad, and none due at this hour by any schedule of trains, she was puzzled to know where to look for this train. She not only looked in the direction of Clearfield, from which direction it subsequently appeared a passenger train was coming, and which was running two hours and a half behind time, but she also looked in the opposite direction, thinking it might be a train coming from the region of Grampion, a point north. When she reached the side track which ran from the main track across the street on which she was traveling toward home to a mill that stood near the footwalk on which she was walking, she stopped, looked, and listened, but saw no train, saw no head-

light, nor the reflection of any light, heard no whistle nor any bell. The night was dark, as shown not only by her own testimony, but also of other witnesses called in her behalf. Just beyond the defendant company's road, and at a higher elevation, an engine on the Buffalo, Rochester & Pittsburg Railroad was standing. At the trial of the cause it appeared from the testimony that some cars were standing in the side track near the public road or street that to some extent obstructed the view of the main track. This obstruction, so far as the cars are concerned, was created by the defendant; but how long they had been standing there does not appear from any evidence; whether they were run upon that side track that afternoon or evening does not appear. This obstruction of the view of the main track was something the plaintiff could not anticipate. From the point where she stopped and looked and listened she could see down the main track some considerable distance, and, had the headlight of the engine been burning, it would have surely appeared. From this point, seeing and hearing nothing, no bell being rung and no whistle blown, she proceeded to walk across this side track toward the main track about fifty-two feet distant, continually watching down the road to see if a train was approaching. Seeing nothing in that direction, she turned to look in the opposite direction, and as she stepped on the track she was struck by the engine, and thrown about eighteen feet, and very badly hurt."

We concede that on the facts, taking them to be just as plaintiff alleges them, the case is a close one, and we fully appreciate the difficulties of the learned judge of the court below in arriving at a correct conclusion on the point reserved. Nevertheless, we think in entering judgment for defendant on the point he invaded the province of the jury. The court, in entering judgment for defendant, says: "The question raised by defendant's requests in their points for binding instruction, and the nine reasons given therefor, which points on account of the reservation were refused," and then follows the decree for judgment non obstante verdicto. The defendant had presented nine written points for instruction. The conclusion of each was, in effect, for a peremptory instruction to find for defendant because the facts stated in them were established by the evidence. Logically, then, the judgment was an affirmation of all of them, and the substance of all of them is a request that the court shall, as a matter of law, pronounce the plaintiff guilty of contributory negligence. This affirmation is in direct conflict with the court's instructions on the written request of plaintiff thus: "'(1) That if they believe and find from the testimony that the plaintiff stopped, looked, and listened at a proper place and the best place from which to observe the approach of a train toward the State street crossing, then she was not guilty of contributory negligence; and if they further find from the evidence that the defendant company was negli-

gent in approaching the crossing where the plaintiff was struck by the train, then the plaintiffs are entitled to recover, and the verdict of the jury must be for the plaintiff.' That point is affirmed. But we desire to explain that you have no right to conclude that the plaintiff is not guilty of contributory negligence merely because she stopped, looked, and listened. It is proper to take that into consideration, but she might be guilty of contributory negligence notwithstanding that fact." Which instruction was in law clearly correct, and the only question open is whether there was any evidence of contributory negligence on the part of plaintiff, for on review we must take the verdict as establishing the truth. First, in his opinion on the reserved point and in his charge to the jury, the learned judge says, the burden was on the plaintiff to prove that defendant was negligent and that there was no contributory negligence on her part. This was doubtless an inadvertent error, for the law does not impose on a plaintiff so heavy a burden. She is bound to prove negligence on the part of defendant, and that this negligence caused her injury. She is not bound to go further, and prove that she did not contribute to the result by her own negligence. That burden is on defendant, unless the evidence adduced by her discloses contributory negligence. It may or may not do this. If it do not, she is entitled to a verdict, unless the defendant then adduces evidence establishing her contributory negligence. In most cases the question of contributory negligence is one of fact for the jury, though by no means always. Where the facts are clearly established, and the inference of negligence from them manifest, the court should peremptorily so instruct the jury; but our latest case, preceded by possibly 100 others—*Kuntz v. New York, etc., Railroad Company*, 206 Pa. 162, 55 Atl. 915—says: "The question of contributory negligence cannot be treated as one of law unless the facts and the inferences from them are free from doubt. If there is doubt as to either, the case is for the jury." In passing upon the question of contributory negligence in his opinion on the reserved point, the learned judge almost, if not altogether, in his own language identifies this case as one for the jury. He says: "It is held that the stopping must be at a place where an approaching train may be seen or heard; that it will not do for a pedestrian crossing to say that he stopped, and then stepped in front of a moving engine and was injured; that in such case the legal inference would be either that he did not stop, look, and listen, or that, having done so, he both saw and heard the approaching engine. He must comply with the legal injunction, and then, upon passing over the danger point, keep his eyes and ears open. Does the plaintiff's case here properly measure up to the legal requirement? The question is not entirely one-sided, or free from difficulty, yet after careful consideration, but with considerable reluctance, I have come to the conclusion that it does not." It seems to us that, if the case

Coolbroth v. Pennsylvania R. Co

was not one-sided, it had two sides, and, if not free from difficulty, was not clear, but was one of doubt, and belonged to the jury. But assuming that the learned judge did not mean exactly what he said, was there clearly but one inference, and that one contributory negligence, to be drawn by the jury? Plaintiff says in her testimony that as she passed over the bridge towards the crossing she heard a whistle of some kind; then walked on to the Susquehanna House corner; she then looked down the track, which was unobstructed for 400 feet; she then passed on to a point south of the mill siding, where she stopped, looked, and listened; proceeding on from this point she looked both ways, neither saw nor heard a train, and just as she was about to step on the track was struck by the bumper of a locomotive and injured. There was positive evidence that she stopped, looked, and listened when approaching to cross the railroad. While there is considerable evidence tending to show that the point where she stopped was not the best place for a sight of a coming train, the distance on the track which would be shown to the eye from that point would be greatest. Then, because of a curve in the track and an embankment as the railroads is approached from that point, the view of it is narrowed to 70 or 90 feet. There was evidence that it was dark; that no whistle was blown or bell rung; that plaintiff continued to look and listen until she was struck. It is argued with much force by appellee that, if she had looked before she made the last step, she would not have been struck. But in reply it is urged that a train might have been coming on the track from either direction. The one that injured her was running at high speed. It was visible only a few feet from the crossing. It gave no warning, and as caution required her to look at the tracks both north and south, and while at the very moment her head was turned in the opposite direction, the locomotive came upon her. We cannot certainly say this was not so. Some of the facts are doubtful on the contradictory testimony. The inferences drawn from them may to some minds seem unreasonable; to others reasonable. That the most serious wounds on plaintiff's person were on the back does not conclusively show that she was not listening or looking for a silent locomotive, but only that at the instant it struck her she was not looking in the direction from which it came. As to whether she stopped at the best place to look out for danger when she approached the crossing, the evidence was contradictory. Under such evidence we have more than once held that the question must go to the jury. From a careful consideration of the law and the testimony, we are of opinion that the reserved points embraced a mixed question of law and fact, and therefore was not a legal reservation of a question of law alone.

Judgment reversed, and judgment entered on verdict for plaintiffs.

FRENCH v. GRAND TRUNK RY. CO.

(Supreme Court of Vermont, Essex, Aug. 2, 1904.)

[58 Atl. Rep. 722.]

Motion for Verdict.

A request to instruct that, on all the evidence in the case, plaintiff is not entitled to recover, is, in effect, a motion for a verdict, sufficiently stating the grounds thereof, so that by exception to the refusal thereof is reserved the question whether, on the most favorable view of the evidence, plaintiff was entitled to a verdict.

Accident at Crossing—Contributory Negligence and Negligence Concurring.*

One injured while crossing a railroad track by the train striking him just as he was taking the last step off the track is precluded from recovering, by contributory negligence concurrent with any of the railroad company, where, if he had taken notice of the train, even when he was in the middle of the track, he could have got over in safety.

Exceptions from Essex County Court; Munson, Judge.

Action by Alvin J. French against the Grand Trunk Railway Company. Judgment for plaintiff. Defendant brings exceptions. Reversed.

Argued before ROWELL, C. J., and TYLER, START, WATSON, STAFFORD, and HASELTON, JJ.

J. W. Redmond and E. A. Cook, for plaintiff.

C. A. Hight and L. L. Hight, for defendant.

START, J. The action is for the recovery of damages alleged to have accrued to the plaintiff by reason of being struck by an engine while attempting to cross the defendant's railroad track. The defendant requested the court to instruct the jury "that, on all the evidence in the case, the plaintiff is not entitled to recover." This is, in effect, a motion for a verdict, and sufficiently states the ground of the motion; and, by excepting to the refusal of the court to comply with the request, the defendant has reserved for the consideration of this court the question of whether, upon the most favorable view for the plaintiff of all the evidence, he was entitled to recover.

The plaintiff gave evidence tending to show that he walked from the public crossing through the railroad yard of the defendant, along the side of a line of box cars, some 230 feet, and then passed the end of the line of box cars, and that he looked to the right and left, went right along, and attempted to cross the defendant's main line, and, in so doing, was struck by the defendant's express train coming from the west; that, as he passed the end of the box cars, he could see toward the west a distance of the length of two or three cars; and that

*For authorities in this series on the subject of the application of the doctrine of concurrent negligence, see foot-note appended to *Richmond Traction Co. v. Martin's Adm'r* (Va.), 9 R. R. R. 817, 32 Am. & Eng. R. Cas., N. S., 817.

he knew it was about time for the express to arrive, and was dangerous to be on the track. The actual measurements of the surveyor, which were disputed only by estimates, from the position of a man stepping over the north rail, show that a person could see 188 feet along the north rail, and 223 feet along the south rail. The train made a good deal of noise, and, upon the shout of warning from bystanders, the plaintiff did not quicken his pace in any way, but looked up, not in the direction of the approaching train, but in the direction of those who called to him; and at the time he was struck he was stepping over the last rail—had one foot over.

Upon these facts, the plaintiff was not entitled to recover. There is no view of the evidence that relieves him from the charge of contributory negligence. He was in possession of all his mental and physical faculties. He knew the express train was due. He was struck as he was stepping over the last rail. One step would have brought him to a place of safety. Assuming that he could see along the track over which the train was approaching for a distance of only the length of two or three cars, as testified by him, if he had had a regard for his own safety and looked and listened as he was crossing the track, he would have seen or heard the train, quickened his pace, and reached a place of safety. If he had looked or listened before stepping upon the track, he would have heard or seen the train; and, if mindful of his safety, he would have stopped and avoided the collision. If he had quickened his pace when his attention was called to the approaching train, he could have saved himself. He was unencumbered, and capable of easily hastening or checking his movements; and, if he had looked when he was in the middle of the track, he could have seen the engine in season to have stepped clear of danger. He could have seen the danger and avoided it at a time when it was too late for the defendant's servants to stop the train and avoid a collision. There was no time when the defendant's servants could have stopped the train and avoided the injury, in which the plaintiff could not have avoided being injured, by a vigilant use of his eyes, ears, and physical strength. It was his duty to make a vigilant use of these faculties up to the last moment when it was possible for him to do so. If he did not see or hear the train—if he did not heed the warning that was given him—it was because he was not mindful of his safety, when he was in a place that he knew was dangerous. It was because he was careless, and that carelessness continued until he was injured. His negligence was not a precedent negligence. He exposed himself to danger that was the beginning, and not the end, of his negligence, and his negligence was the proximate cause of the injury.

The case of *Batchelder v. Boston & Maine R. R. Co.*, recently decided by the Supreme Court of New Hampshire, and reported in 57 Atl. 926, is very similar in its facts to the

French v. Grand Trunk Ry. Co

case at bar. The court, in holding that the plaintiff could not recover, said: "If it might be found from the evidence that the defendants would have discovered the plaintiff in time to prevent the accident if they had used ordinary care, it cannot be found that she would not have seen the train in time to escape injury if she had used the same care. * * * So that the plaintiff's failure to use ordinary care to discover the approach of the train was, in any view of the case, a part of the cause of her injury, for her fault would not cease to be the cause, and become merely the occasion of her injury, unless, in the series of events that resulted in the accident, a wrongful act of the defendants was subsequent in point of causation to her failure to use ordinary care to discover the train. The only complaint she makes is that the defendants failed to use such care to discover her in time to avoid the accident. It is clear that their failure to perform this duty concurred both in point of time and causation with her failure to use the same care to discover the train. There was no time when they could have discovered her in season to avoid injuring her, in which she could not have discovered the train in time to avoid being injured." In *Carter v. Central Vermont R. R. Co.*, 72 Vt. 190, 47 Atl. 797, it is held that the duty to look and listen before crossing a railroad track includes the duty to do that which will make looking and listening reasonably effective; and if a traveler, by the vigilant use of his eyes and ears, can discover and avoid injury, and omits such vigilance, he is guilty of contributory negligence, and is chargeable with such knowledge of the approach of a train as he might have obtained by the exercise of that degree of care which, in circumstances of danger, he is bound to use.

The plaintiff relies upon the case of *Willey v. The Boston & Maine R. R. Co.*, 72 Vt. 120, 47 Atl. 398. It is true that, by the rule there broadly and without qualification stated, the defendant would be liable, if, when it became apparent that the plaintiff was going upon the track, its servants did not do what they could to avoid injuring him, notwithstanding he was negligent; but this is not the true rule, or, rather, it is not all there is to the rule. It is true that, when a traveler has reached a point where he cannot help himself—cannot extricate himself—and vigilance on his part will not avert the injury, his negligence in reaching that position becomes the condition, and not the proximate cause, of the injury, and will not preclude a recovery; but it is equally true that if a traveler, when he reaches the point of collision, is in a situation to help himself, and, by a vigilant use of his eyes, ears, and physical strength, to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. In such a case the negligence of the plaintiff

Confer v. Pennsylvania R. Co

is concurrent with the negligence of the defendant, and the negligence of each is operative at the time of the accident. When the negligence is concurrent and operative at the time of the collision, and contributes to it, there can be no recovery.

Judgment reversed, and cause remanded.

CONFER v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, June 15, 1904.)

[58 Atl. Rep. 811.]

Accident at Crossing—Contributory Negligence—Obstructed View—Failure to Look Again—Question for Jury.*

In an action to recover for injuries at a crossing, where there were cars standing on both sides of the crossing, and there was evidence that plaintiff stopped to look and listen at a certain point, whether he was guilty of contributory negligence in not stopping at another place to look and listen was for the jury.

New Trial.

Where the court submits a particular question to the jury to be answered by them yes or no, and the question is answered by the jury in favor of plaintiff, if the court determines that the finding was not justified by the evidence, the proper procedure is to grant a new trial, and not to render judgment for defendant notwithstanding the verdict.

Appeal from Court of Common Pleas, Centre County.

Action by G. J. Confer against the Pennsylvania Railroad Company. From an order of judgment for defendant notwithstanding the verdict, plaintiff appeals. Reversed.

Argued before MITCHELL, C. J., and DEAN, BROWN, POTTER, and THOMPSON, JJ.

Ellis L. Orvis, for appellant.

John Blanchard and Edmund Blanchard, for appellee.

POTTER, J. On the morning of October 27, 1900, the plaintiff was injured at a grade crossing of the public highway on the tracks of the defendant company in the borough of Howard, Centre county. He was driving southward along the main street of the borough in a spring wagon drawn by two horses. At the point where the accident occurred the street crosses three parallel tracks; the northernmost two being sidings, and the third the main track of the railroad. The three tracks have a total width of 28 feet from outer rail to outer rail. The plaintiff testified that on the day of the accident, as he approached the crossing, there was a freight train on one of the sidings, and a wreck train or gravel train

*As to the care required of a highway traveller at a crossing where the view is obstructed, see foot-note appended to *Baltimore & O. R. Co. v. McClellan* (Ohio), 11 R. R. R. 800, 34 Am. & Eng. R. Cas., N. S., 800.

Confer v. Pennsylvania R. Co

on the other. The former extended across the street, and he stopped his team in front of a store 40 feet or more distant from the track. Then he drove on to a point 20 or 25 feet from the tracks, where he stopped again, rose from his seat, and looked and listened for the approach of a train on the main track. He saw and heard nothing, and, the freight cars having meanwhile been moved back from the street, and two other wagons having crossed from the opposite side, he drove upon the tracks. As he crossed the main track his wagon was struck by a special freight train coming from the east, and he was injured. He testified that no whistle was sounded nor bell rung to give notice of the approach of the train which struck him. Plaintiff's account of the accident was corroborated by other witnesses, and it was shown that the point where he stopped, looked, and listened was the place where people usually stopped before crossing the railroad. The negligence alleged was failure to give warning of the approach of the train. Nine witnesses testified that they were in position to hear and observe whether the whistle was sounded or bell rung by the approaching train, and that they heard neither whistle nor bell. Some of them had special reason to take notice, and they were almost all positive that no warning whatever was given. The defendant offered testimony to show that the whistle was sounded, and that, if the plaintiff had looked and listened, as he claimed to have done, he could have both heard and seen that the freight was coming. Upon the trial the defendant presented two points for charge: "First. The undisputed evidence in this case proves that the plaintiff was guilty of contributory negligence as a matter of law, and therefore the plaintiff cannot recover, and the verdict must be for the defendant, and the jury are instructed so to find. Second. There is no evidence in this case that entitles the plaintiff to recover, and therefore the verdict must be for the defendant, and the jury are instructed so to find." To each of these the court answered: "The question of law raised by this point is reserved for further consideration." At the conclusion of the charge the court submitted to the jury five points in writing, saying: "Now, for my own satisfaction hereafter, I desire you to return answers to the following questions, which will be sent out with you to be returned with your verdict: (1) Do you find from the evidence that the whistle was blown and the bell rung on the freight train that collided with the plaintiff, as testified to by defendant's witnesses? (2) Do you find from the evidence that the rear car of the local freight train standing on the warehouse siding was west of the sidings, about opposite the platform of the freight depot? (3) Do you find from the evidence that there were no cars west of the crossing standing upon the middle track of the railroad, so as to obstruct the view of the plaintiff? (4) Do you find

Confer v. Pennsylvania R. Co

that if the plaintiff stopped at twenty-five feet from the north track, and looked and listened, that at that point the station and cars on the track west of the crossing would obscure his view of the track in looking west? (5) Do you find from the evidence that, had the plaintiff approached within ten or fifteen feet of the north track, he could have had a better and more extensive view of the tracks west, and could have seen the approaching train with which he collided? Those questions can all be answered yes or no, and you can return them with your verdict." The jury answered all the questions submitted by the court in the negative, and found a general verdict in favor of the plaintiff for \$4,000. Subsequently the court entered judgment in favor of the defendant non obstante veredicto upon the questions reserved. These appear only in the charge, and were upon the two points submitted by the defendant. The assignments of error are all substantially to the same effect—that the court below erred in the entry of judgment for the defendant.

The question of negligence was found specifically against the defendant as a plain matter of fact. The location of standing cars with relation to the crossing was also in dispute, and that matter was also submitted by the trial judge to the jury, both in his general charge and specifically in the second and third questions, which the jury answered in the negative, thereby sustaining the contentions of the plaintiff in that respect. It appeared from the evidence that the plaintiff first stopped as he approached the crossing at a point farther from the track than the usual place for stopping, because the street was partly obstructed by cars. When they were pulled out of the way, he passed on to a point about 25 feet from the north track, which was apparently the usual place for stopping. In answering the fourth specific question submitted to them, the jury found that at that point the view of the plaintiff looking west would not be obstructed by the station and the cars on the track, west of the crossing. And in answering the fifth question the jury said that, as a matter of fact, the view of the track would not have been improved for the plaintiff if he had approached 10 or 15 feet nearer the north track, instead of stopping where he did the last time. This was purely a question of fact, and its determination would require the position of the cars standing upon the tracks at the time to be taken into consideration. The trial judge, in entering judgment for the defendant notwithstanding the verdict of the jury, assumed that the finding of the jury in this respect was wrong. But the fact was specifically submitted to the jury, and, having been found in favor of the plaintiff, it was error for the trial judge to enter judgment for the defendant on the ground that the evidence was insufficient to sustain the finding. If the fact was improperly found, the remedy was a new trial. *North American Oil Co. v. Forsyth*, 48 Pa. 291. As our

Nashville & K. R. Co. v. Davis

Brother Dean said in *Butts v. Armor*, 164 Pa. 73, 30 Atl. 367, 26 L. R. A. 213: "Whether warranted or unwarranted, the jury believed defendant's witnesses, and on the facts testified to by them drew the inference which the court instructed them they might draw if they thought it was warranted. The court cannot now draw an opposite one, and negative the verdict. It can only set the verdict aside if it be against the weight of the evidence." The verdict of the jury and their special findings of fact take this case out of the principle set forth in *Kinter v. Penna. R. R. Co.*, 204 Pa. 497, 54 Atl. 276, 93 Am. St. Rep. 795, and place it within the lines of the decision in *Elston v. Del., etc., R. R. Co.*, 196 Pa. 595, 46 Atl. 938, to which, indeed, in its facts and circumstances, it bears a close resemblance. Upon the facts as here found by the jury the court could not say, as matter of law, that the plaintiff was guilty of contributory negligence. To justify that conclusion he would have to ignore the conclusions of fact drawn from the evidence by the jury, and draw for himself a different inference of fact. But as Justice Sharswood said in *Com., to Use, etc., v. McDowell*, 86 Pa. 377: "The judge cannot himself draw conclusions of fact from the evidence. Hence the reserved question must be a pure question of law. It cannot be of a mixed question of law and fact, for that would necessarily draw to the court what properly belongs to the jury." Under the facts as found, judgment should have been entered upon the verdict in favor of the plaintiff.

The first, second, fifth, and sixth assignments of error are sustained, and the judgment is reversed. It is further ordered that the record be remitted to the court below, with directions to enter judgment upon the verdict in favor of the plaintiff.

NASHVILLE & K. R. CO. v. DAVIS.

(Supreme Court of Tennessee, Feb. 8, 1902.)

[78 S. W. Rep. 1050.]

Animals—Application of Statute to Prevent Accidents.

A goose is not an "animal or obstruction," within Shannon's Code, § 1574, subsec. 4, requiring the alarm whistle to be sounded on a locomotive, and the brakes to be put down on all railroad trains, and every possible means employed to stop the train to prevent an accident when an "animal or obstruction" appears on the track.

Liability for Killing Trespassing Geese.*

In the absence of recklessness or common-law negligence, a railroad company is not liable for the killing of geese permitted to run at large, while trespassing on the railroad track.

*As to the care required of those in charge of railroad trains to avoid collisions with animals, see foot-note appended to *Seaboard Air-Line Ry. v. Collier* (Ga.), 8 R. R. R. 702, 31 Am. & Eng. R. Cas., N. S., 702 (stock unlawfully at large); *Houston & T. C. Ry. Co. v. Hollingsworth* (Tex.), 2 R. R. R. 905, 25 Am. & Eng. R. Cas., N. S., 905 (duty of engineer after discovery of stock upon track); *Alabama G. S. R. Co. v. Hall*

Nashville & K. R. Co. v. Davis

Appeal from Circuit Court, Putnam County.

Action by one Davis against the Nashville & Knoxville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

O. C. Conatser, for appellant.

Bryant & McBroom, for appellee.

WILKES, J. This is an action for damages against the railroad company for running over and killing three geese of the value of \$1.50. The owner of the geese lived about one mile from the railroad, but permitted them to run at large, and they went upon the railroad track near a public crossing. The engineer blew the whistle and rang the bell for the crossing, but there is no proof that he rang the bell or sounded the alarm for the geese. Whether the geese knew of this failure to whistle for them does not appear. We think there is no evidence of recklessness or common-law negligence shown in the case, and the only question is whether a goose is an animal or obstruction in the sense of the statute (section 1574, subsec. 4, Shannon's Compilation), which requires the alarm whistle to be sounded, and brakes put down, and every possible means employed to stop the train and prevent an accident when an animal or obstruction appears on the track. It is evident that this provision is designed, not only to protect animals on the track, but also the passengers and employees upon the train from accidents and injury. It would not seem that a goose was such an obstruction as would cause the derailment of a train, if run over. It is true, a goose has animal life, and, in the broadest sense, is an animal; but

(Ala.), 5 R. R. R. 73, 28 Am. & Eng. R. Cas., N. S., 73 (duty of engineer upon seeing frightened horse running into danger); Illinois Cent. R. Co. v. Gholson (Ky.), 1 R. R. R. 677, 24 Am. & Eng. R. Cas., N. S., 677; Illinois Cent. R. Co. v. Tucker (Miss.), 4 R. R. R. 297, 27 Am. & Eng. R. Cas., N. S., 297; Southern Ry. Co. v. Camp (Ga.), 4 R. R. R. 772, 27 Am. & Eng. R. Cas., N. S., 772; Southern Ry. Co. v. Gilmore (Ga.), 4 R. R. R. 852, 27 Am. & Eng. R. Cas., N. S., 852; note, 14 Am. & Eng. R. Cas., N. S., 30 (care due to avoid injuring stock on track); note, 19 Am. & Eng. R. Cas., N. S., 240 (care required to avoid injuring stock seen near track); note, 5 Am. & Eng. R. Cas., N. S., 188 (failure to give signals); note, 15 Am. & Eng. R. Cas., N. S., 569 (stock straying on inclosed track); note, 14 Am. & Eng. R. Cas., N. S., 23 (rate of speed); note, 5 Am. & Eng. R. Cas., N. S., 188 (speed of train in cities and villages); note, 5 Am. & Eng. R. Cas., N. S., 186 (in cities and villages); Beattyville & C. G. R. Co. v. Maloney (Ky.), 14 Am. & Eng. R. Cas., N. S., 24; Savannah, etc., Ry. Co. v. Wideman (Ga.), 5 Am. & Eng. R. Cas., N. S., 714; Southern Ry. Co. v. Reaves (Ala.), 20 Am. & Eng. R. Cas., N. S., 784 (cattle seen near track); Evans v. Sherman, S. & S. Ry. Co. (Tex.), 5 Am. & Eng. R. Cas., N. S., 184 (in cities and towns); Ford v. St. Louis, I. M. & S. Ry. Co. (Ark.), 15 Am. & Eng. R. Cas., N. S., 142; Jones v. Oregon Short Line R. Co. (Idaho), 14 Am. & Eng. R. Cas., N. S., 26; Louisville & N. R. Co. v. Bowen (Ky.), 9 Am. & Eng. R. Cas., N. S., 276 (duty to give signals); Yazoo, etc., R. Co. v. Whittington (Miss.), 6 Am. & Eng. R. Cas., N. S., 792 (animals near track); Kirk v. Norfolk & W. R. Co. (W. Va.), 4 Am. & Eng. R. Cas., N. S., 105 (duty with respect to stock subordinate to care due passen-

Nashville & K. R. Co. v. Davis

we think the statute does not require the stopping of trains to prevent running over birds, such as geese, chickens, ducks, pigeons, canaries, or other birds that may be kept for pleasure or profit. Birds have wings to move them quickly from places of danger, and it is presumed that they will use them (a violent presumption, perhaps, in the case of a goose, an animal which appears to be loath to stoop from its dignity to even escape a passing train). But the line must be drawn somewhere, and we are of the opinion that the goose is a proper bird to draw it at. We do not mean to say that in the case of recklessness and common-law negligence there might not be a recovery for killing geese, chickens, ducks, or other fowls, for that case is not presented. Snakes, frogs, and fishing worms, when upon railroad tracks, are, to some extent, obstructions; but it was not contemplated by the statute that for such obstructions as these trains should be stopped, and passengers delayed.

We are of the opinion that there is error in the court below giving judgment for the plaintiff, and the judgment is reversed, and, the case having been heard without a jury, the suit is dismissed, at the plaintiff's cost.

gers); *Central of Ga. Ry. Co. v. Dumas* (Ala.), 23 Am. & Eng. R. Cas., N. S., 956; *Graybill v. Chicago, etc., Ry. Co.* (Iowa), 20 Am. & Eng. R. Cas., N. S., 178 (animals near track); *Hutchinson v. Chicago, etc., Ry. Co.* (S. Dak.), 5 Am. & Eng. R. Cas., N. S., 714; *Schmitt v. Chicago, etc., Ry. Co.* (Iowa), 5 Am. & Eng. R. Cas., N. S., 714; *Lake Erie, etc., R. Co. v. Weisel* (Ohio), 5 Am. & Eng. R. Cas., N. S., 714; *Atlantic, etc., R. Co. v. Irwin* (Ga.), 8 Am. & Eng. R. Cas., N. S., 768; *Blankenship v. Kanawha, etc., Ry. Co.* (W. Va.), 8 Am. & Eng. R. Cas., N. S., 768; *Willingham v. Macon & B. Ry. Co.* (Ga.), 21 Am. & Eng. R. Cas., N. S., 340 (failure to give crossing signals, where stock was killed near crossing); *Georgia R. & B. Co. v. Clary* (Ga.), 11 Am. & Eng. R. Cas., N. S., 856 (failure to give signals and slacken speed for crossing not negligence per se where stock was killed beyond crossing); *Southern Ry. Co. v. New* (Ga.), 14 Am. & Eng. R. Cas., N. S., 19 (failure to observe statutory precautions in approaching crossing does not render company liable for killing stock beyond crossing); *Mooers v. Northern Pac. Ry. Co.* (Minn.), 17 Am. & Eng. R. Cas., N. S., 753 (stock at farm crossing); *Lovejoy v. Chesapeake, etc., R. Co.* (W. Va.), 4 Am. & Eng. R. Cas., N. S., 262; *Roberds v. Mobile & O. R. Co.* (Miss.), 7 Am. & Eng. R. Cas., N. S., 93 (trespassing stock); *Western & A. R. Co. v. Brown* (Ga.), 10 Am. & Eng. R. Cas., N. S., 107; *Hardison v. Atlantic & N. C. R. Co.* (N. Car.), 11 Am. & Eng. R. Cas., N. S., 848; *Alabama Midland Ry. Co. v. McGill* (Ala.), 14 Am. & Eng. R. Cas., N. S., 20 (rate of speed); *Southern Ry. Co. v. Shirley* (Ala.), 21 Am. & Eng. R. Cas., N. S., 61; *Southern Ry. Co. v. Watson* (Ga.), 23 Am. & Eng. R. Cas., N. S., 509; *Illinois Cent. R. Co. v. Abernathy* (Tenn.), 22 Am. & Eng. R. Cas., N. S., 206.

RICHMOND, F. & P. R. CO. v. MARTIN'S ADM'R.

(Supreme Court of Appeals of Virginia, Dec. 9, 1903.)

[45 S. E. Rep. 894.]

Action for Death of Child—Contributory Negligence.*

Where a father, through his agent, the custodian of child, is guilty of negligence contributing to cause its death, he cannot recover damages for its death in an action for his own benefit, under Code 1887, §§ 2903, 2905.

Error to Circuit Court, Stafford County.

Action by Patrick Martin, administrator of Alice Martin, deceased, against the Richmond, Fredericksburg & Potomac Railroad Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

St. George Fitzhugh and Leake & Carter, for plaintiff in error.

Wm. D. Carter and A. T. Embrey, for defendant in error.

WHITTLE, J. This action was brought by the defendant in error, Patrick Martin, administrator of Alice Martin, deceased, against the plaintiff in error, the Richmond, Fredericksburg & Potomac Railroad Company, to recover damages for the negligent killing of his intestate, a daughter seven years of age, by a passenger train of the defendant company at a public crossing. The mother of the child was killed in the same collision, and the action was instituted for the sole benefit of the father, who, under the statute, is entitled to the recovery. At the trial there was a verdict for the plaintiff, upon which the judgment under review was rendered.

The defendant adduced evidence tending to prove that Patrick Martin, Jr., a minor 11 years old, and a son of the plaintiff, was put in charge of a two-horse Dayton Wagon, as driver, by his father, in which his mother and two younger sisters and a negro boy were to be driven from their home in the country to the city of Fredericksburg; that Patrick Martin, Jr., negligently drove upon and attempted to cross the

*As to the effect of contributory negligence of parents on the right to recover for injuries to their children, see *Cleveland, A. & C. Ry. Co. v. Workman* (Ohio), 4 R. R. R. 551, 27 Am. & Eng. R. Cas., N. S., 551 (action for death of son); note, 10 Am. & Eng. R. Cas., N. S., 880; *St. Louis, I. M. & S. Ry. Co. v. Dawson* (Ark.), 18 Am. & Eng. R. Cas., N. S., 30 (death of child); *Cunningham v. Los Angeles Ry. Co.* (Cal.), 7 Am. & Eng. R. Cas., N. S., 783; *Gunn v. Ohio River R. Co.* (W. Va.), 6 Am. & Eng. R. Cas., N. S., 275.

Imputable negligence of parents, see foot-note appended to *Carney v. Concord St. Ry.* (N. H.), 11 R. R. R. 307, 34 Am. & Eng. R. Cas., N. S., 307, where all the preceding authorities in this series are collected.

As to what is contributory negligence of parents, see foot-note appended to *St. Louis, I. M. & S. Ry. Co. v. Colum* (Ark.), 11 R. R. R. 807, 34 Am. & Eng. R. Cas., N. S., 807, where all the preceding authorities in this series are collected.

railway track at Falmouth crossing, in plain view of a rapidly approaching train; and that in the collision which followed is mother and two sisters, who occupied a rear seat in the vehicle, were instantly killed. Thereupon the defendant moved the court to instruct the jury that if they believed from the evidence that Patrick Martin, Jr., the son and servant of the plaintiff, attempted to cross the track under the circumstances detailed, his conduct constituted such contributory negligence as to bar a recovery. The court refused to give the instruction, which ruling presents for decision the sole question in the case, namely, whether a father, whose negligence has contributed to the death of his minor child, can, under the statute, in an action instituted by him as administrator, suing for his own benefit, recover damages for the death of the child. The statute requires such actions to be brought by and in the name of the personal representative of the deceased person, and empowers the jury to award such damages as to it may seem fair and just, not exceeding \$10,000.

The primary object of the statute in allowing an action to recover damages for death by wrongful act of another, like its prototype, Lord Campbell's act, was to compensate the family of the deceased, and as not in the interest of the general estate; the provision being that: "The amount recovered in any such action shall after the payment of costs and reasonable attorneys' fees, be paid to the wife, husband, parent, and child of the deceased, in such proportion as the jury may have directed, or, if they have not directed, according to the statute of distributions, and shall be free from all debts and liabilities of the deceased; but, if there be no wife, husband, parent, or child, the amount so received shall be assets in the hands of the personal representative, to be disposed of according to law." Code 1887, §§ 2903, 2905.

It will be observed that by the express language of the statute the damages awarded cannot become assets in the hands of the administrator, to be disposed of according to law, if the decedent is survived by a wife, husband, parent, or child; and the recovery is also made free from all debts of the decedent, thus leaving no doubt of the legislative intent to treat the recovery as wholly independent of the decedent and his estate in the event of the survival of any one of the numerated kin, and making it inure directly and personally to such next of kin by force of the statute, and not derivatively from the decedent, to whom it never belonged either as a fact or in contemplation of law.

The authorities all agree that there can be no recovery where the action is brought in the name and for the benefit of one whose negligence has contributed to the accident. Thus, if the child in this instance had been injured, instead of killed, and the father had brought a common-law action to recover damages for the injury, contributory negligence on his

Richmond, etc., R. Co. v. Martin's Adm'r

part, if established, would have constituted a bar to the action. But the contributory negligence of the father would interpose no defense to an action by the child for such injury. The rule is that the child's want of responsibility for negligence can no more be invoked to maintain the action of the negligent father than can the negligence of the latter be imputed to the child to defeat an action by him.

In this case both parties, at the time of the accident, were represented by agents—the defendant company by its employees, and the plaintiff by his son, to whose care he had confided the custody of the younger sister—and both were responsible for the acts and omissions of their respective agents. *Glassey v. Ry. Co.*, 57 Pa. 172.

In *Bellefontaine Ry. Co. v. Snyder*, 24 Ohio St. 670, the court said: "Where an infant intrusted to the care and custody of another by the father, is injured through the negligence of a railroad company, the custodian of the child also being guilty of negligence which contributed to the result, although the infant may maintain an action for such injury, the father cannot; the negligence of his agent, the custodian of the child, being in law the negligence of the father."

"When an action for negligent injury of an infant is brought by the parent, or for the parent's own benefit, it is very justly held that the contributory negligence of such parent may be shown in bar of the action, the negligence of his agent to whom he had intrusted the child having contributed to cause the injury; and such negligence, being, in contemplation of law, the parent's negligence, was held to bar the action." *Beach on Con. Neg.* § 131.

The doctrine of imputed negligence has no application to the case, but the rule that the negligent father cannot recover is founded upon the fundamental principle that no one can acquire a right of action by his own negligence. The principle involves a maxim of the law as old as the common law itself. The difference between an action by the father for injuries to the child where death does not ensue and an action by the father as administrator of his dead child, brought under the statute for his own benefit, is a difference in form merely, not in substance, and on principle there can be no more reason for permitting a recovery in the later case than in the former. In both the father is the substantial plaintiff and the sole beneficiary. To allow a recovery in either would be a violation of the policy of the law, which forbids that one shall reap a benefit from his own misconduct. Accordingly the authorities are practically unanimous to the effect that the guiding principle in both classes of cases is identical, and the contributory negligence of the beneficial plaintiff will as effectually defeat a recovery in the one case as in the other.

In *Kinthead's Com. on Torts*, § 474, the author says the rule is well settled that the negligence of a parent of a minor

Richmond, etc., R. Co. v. Martin's Adm'r

is a bar to an action by him to recover damages for an injury to the minor, and adds: "It may, however, be contended with equal force that the fact that a parent is a beneficiary in case of death, that contributory negligence on his part should be a defense to an action brought under the statutes now being considered, as well as in an action in his own name for a personal injury. The policy of the law is not to allow a recovery for the benefit of a wrongdoer, and this should be applied as well to actions in the name of another for the benefit of those who may have contributed to the wrong. What shall constitute a defense to this class of actions is not prescribed in these statutes, but is governed by the same principles applicable to personal injuries. It is considered by the majority of cases that the administrator is only a trustee or a mere nominal party, and that the action will be defeated by the contributory negligence of the beneficiaries"—citing *Booth on Street Railways*, § 391; *Strutzel v. St. Paul City Ry.*, 47 Minn. 543, 50 N. W. 690; *McMahon v. Mayor*, 33 N. Y. 642; *Schierhold v. North Beach, etc.*, R. R., 40 Cal. 447; *Chicago City Ry. v. Robinson*, 127 Ill. 9, 18 N. E. 772, 4 L. R. A. 126, 11 Am. St. Rep. 87; *Dahl v. Milwaukee City Ry. Co.*, 62 Wis. 652, 22 N. W. 755; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. E. 108; *Baltimore, etc., Ry. Co. v. State*, 24 Md. 84, 87 Am. Dec. 600.

See, to the same effect, *Baltimore, etc., Ry. Co. v. State*, 24 Md. 84, 87 Am. Dec. 600; *A. & C. A. L. Ry. Co. v. Gravitt*, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145; *Chicago City Ry. Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76; *City of Pekin v. McMahon*, 154 Ill. 153, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114; *Bellefontaine Ry. Co. v. Snyder*, 24 Ohio St. 670; *Smith v. Ry. Co.*, 92 Pa. 450, 37 Am. Rep. 705; *Pratt Coal Co. v. Brawley*, 83 Ala. 371, 3 South. 555, 3 Am. St. Rep. 751; *Bamberger v. Citizens' Street Ry. Co.*, 95 Tenn. 18, 31 S. W. 163, 28 L. R. A. 486, 49 Am. St. Rep. 909; *Ploof v. Burlington Traction Co. (Vt.)* 41 Atl. 1017, 43 L. R. A. 108; *Tiffany on Death by Wrongful Act*, § 69.

The same author, at section 475, says the doctrine last stated in the previous section is denied in Iowa and Virginia. After confessing his sympathy with the minority view, having been counsel on the losing side of the controversy in *Wolf v. Lake Erie Ry. Co.*, 55 Ohio St. 534, 45 N. E. 708, 36 L. R. A. 812, he attributes the minority decisions to a misapprehension of the applicability of the doctrine of imputed negligence to a case of this kind, and remarks: "The conclusion in these cases seems to have been reached mainly upon the rule that the negligence of the parent should not be imputed to the infant, and, following the test of the statute, if the deceased himself could, had he lived, have maintained the action, then his personal representative may, because the action is for the benefit of the estate. These decisions seem

Richmond, etc., R. Co. *v.* Martin's Adm'r

to be clearly wrong. In the first place, the doctrine of imputed negligence is not called in question here, but rather another and wholly different fundamental principle, viz., that recovery will never be allowed in favor of a wrongdoer. Again, the contention that has been made for this view that recovery under the statutes of these states is for the benefit of the estate of the deceased, and therefore different from other states, does not seem well founded. An examination of the statutes will disclose that, while the recovery is for the benefit of the estate, the statutes further name the persons for whose benefit it is, and in one of the states (Virginia) the statute provides that the amount recovered shall not go to the payment of debts due from the deceased. In this there seems to be no substantial difference in effect from other statutes."

The cases to which the author has reference are *Wymore v. Mahaska County*, 78 Iowa, 396, 43 N. W. 264, 6 L. R. A. 545, 16 Am. St. Rep. 449, and *N. & W. Ry. Co. v. Groseclose's Adm'r*, 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718. These cases are mainly relied on to sustain the contention of the defendant in error. It appears that the Iowa statute gives a right of recovery to the estate of the minor intestate, and also one to the next of kin, and the action in *Wymore v. Mahaska County*, *supra*, was for the benefit of the estate. In that case the court held that the contributory negligence of the parent could not be imputed to the minor child, so as to defeat a recovery for his estate. But the court also said that such negligence would prevent a recovery by the parents in their own right. So that in point of fact the decision is not out of line with the authorities cited. In the Virginia Case, while the language of the opinion is broad enough to sustain the contention of the defendant in error, an examination of the case shows that, before entering upon a discussion of the question here involved, the court had already ascertained as a matter of fact that the charge of contributory negligence against the parent was not sustained by the evidence. The judgment of the trial court had for that reason been affirmed. The case therefore did not call for an expression of opinion upon the hypothetical case upon which it was based, and is not to be regarded as binding authority in subsequent cases. *Griffin v. Woolford*, 100 Va. 473, 41 S. E. 949.

Lewin v. Lehigh Valley R. R. Co., 52 App. Div. 69, 65 N. Y. Supp. 49, much relied on in argument, was reviewed by the Court of Appeals of New York, which decided that in that case (as in the Virginia case) the jury were warranted upon the evidence in finding that the contributory negligence of the plaintiff was not established, and for that reason held that the effect of such negligence was not involved.

It is apparent, both from the authorities referred to and upon principle, that the trial court erred in refusing to give

Holden v. Missouri R. Co

the instruction referred to, for which error the judgment must be reversed, and the case will be remanded for a new trial to be had therein not in conflict with the views expressed in this opinion.

CARDWELL and BUCHANAN, JJ., absent.

HOLDEN v. MISSOURI R. CO.

(Supreme Court of Missouri, Division No. 2, Nov. 17, 1903.)

[76 S. W. Rep. 973.]

Accidents on Track—Contributory Negligence—Reliance on Care of Driver of Vehicle.*

A person seated by the driver of a wagon approaching a street railway crossing at a careless speed cannot rely implicitly on the care of the driver, and, if he makes no effort to have the speed diminished and his action contributes to a collision with a street car, he cannot recover for his injuries.

Same—Same—Same—Instruction.

In an action for injuries resulting from collision with a street car, an instruction relating to plaintiff's duty if the driver was approaching the street, on which cars were passing, at a careless rate of speed, should be so stated as to remove any doubt whether "careless rate of speed" referred to the driver or the cars.

Same—Care Required of Those in Charge of Cars to Avoid Collisions.†

Where the motorman on an approaching street car observed that plaintiff did not heed his signals nor give any attention to his car, it was erroneous to instruct that he had the right to assume the vehicle would be stopped when it came to the track, and could proceed at a lawful speed, and was not bound to attempt to stop the car until the vehicle was about to be placed in peril.

Accident at Crossing—Negligence—Speed—Ordinance—Instruction.

In an action for injuries resulting from collision with a street car at a crowded crossing, an instruction precluding recovery unless the defendant negligently ran its car at the time and place of the accident at a speed greater than 10 miles per hour, allowed by ordinance, is erroneous, as an ordinance regulating the speed of street cars cannot be construed as authorizing the operation of cars at a public crossing at any particular speed, regardless of conditions at the time of the crossing.

Appeal from St. Louis Circuit Court; P. R. Flitcraft, Judge.

Action by William Holden against the Missouri Railroad

*See monograph appended to *United Rys. & Electric Co. v. Biedler* (Md.), 10 R. R. R. 110, 33 Am. & Eng. R. Cas., N. S., 110.

†As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-note appended to *North Chicago St. R. Co. v. Johnson* (Ill.), 11 R. R. R. 774, 34 Am. & Eng. R. Cas., N. S., 774; foot-note appended to *South Covington & C. St. Ry. Co. v. McHugh* (Ky.), 11 R. R. R. 760, 34 Am. & Eng. R. Cas., N. S., 760; foot-note appended to *Haas v. New Orleans Rys. Co.* (La.), 11 R. R. R. 442, 34 Am. & Eng. R. Cas., N. S., 442; foot-note appended to *Coeassens v. Rapid Ry. Co.* (Mich.), 11 R. R. R. 382, 34 Am. & Eng. R. Cas., N. S., 382; *Cameron v. Jersey City, H. & P. St. Ry. Co.* (N. J.), 11 R. R. R. 226, 34 Am. & Eng. R. Cas., N. S., 226; foot-note appended to *Jett v. Central Elec. Ry. Co.* (Mo.), 11 R. R. R. 227, 34 Am. & Eng. R. Cas., N. S., 227.

Company. From an order granting plaintiff's motion for a new trial, defendant appeals. Affirmed.

Boyle, Priest & Lehmann and Lon O. Hocker, for appellant.

Richard A. Jones, for respondent.

FOX, J. In this action the plaintiff sues to recover damages on account of injuries alleged to have been sustained on the 4th day of December, 1897, through a collision between defendant's car and a wagon in which he was riding. The action was originally instituted against both the Missouri Railroad Company and the Forest Park, Laclede & Fourth Street Railway Company, but before trial a dismissal was entered as to the Forest Park, Laclede & Fourth Street Railway Company, and the action continued against the Missouri Railroad Company alone. The Missouri Railroad Company, at the time in question, operated the railway and cars of the Forest Park, Laclede & Fourth Street Railway Company on Thirteenth street, at its intersection with Pine street, in the city of St. Louis, Mo. Thirteenth street extends north and south, and Pine street east and west. There was only one tract in Thirteenth Street, which was used by north-bound cars. The plaintiff was an employee of the Wainwright Brewery. At the time of the accident, plaintiff and a man named Harry Jones, also an employee of the Wainwright Brewery, were driving a wagon, belonging to said brewery, east on Pine street.

The petition of plaintiff declares: "That on or about the 4th day of December, 1897, plaintiff was being driven east on Pine street in said city, and, while the wagon in which he was riding was crossing Thirteenth street and the tracks of defendant, a car of the defendant's, operated by their servants, came north on Thirteenth street and struck the wagon in which plaintiff was riding, and threw the plaintiff out upon the street, and severely and seriously injured him. That Pine street, at the point where it crosses said Thirteenth street, is, and was at the time of the happening of the events hereinbefore and hereinafter narrated, a public thoroughfare of said city of St. Louis, on which large numbers of vehicles and persons are almost constantly passing and crossing said Thirteenth street and the tracks of defendants, and it was the duty of the defendants and their servants in crossing the said street to use care to run their cars at such rate of speed as would permit the person in charge thereof to have them constantly under control, so that he could very quickly stop them to avoid injury to vehicles and persons at said crossing, and to keep a lookout for vehicles and persons that might be approaching the track upon which said cars are running, and to ring the bell of said cars and warn drivers of such vehicles and other persons of the approach of said cars to said crossings. That the defendants constructed

Holden v. Missouri R. Co

and maintained said track and run their cars thereon under and by virtue of authority granted and restrictions and limitations prescribed by the city of St. Louis, among such restrictions being the provisions of Ordinance No. 17,072 of said city, approved March 4, 1893, entitled, 'An ordinance authorizing Forest Park, Laclede & Fourth Street Railway Company to construct a railroad over, along and across certain streets in the city of St. Louis and in Forest Park, and to operate the same by electric power,' by the terms of which ordinance defendants are expressly restricted from running their cars along said Thirteenth street, or on any other part of said line, at a rate of speed in excess of ten miles an hour. That defendants, in the running of their cars on said Thirteenth street, are also governed by and amendable to division 4 of section 1275 of article 6 of Revised Ordinances of the City of St. Louis (1892), being in words following, to wit: 'Fourth. The conductor, motorman, gripman, driver, or any other person in charge of each car, shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and on the first appearance of danger to such persons or vehicles the car shall be stopped in the shortest time and space possible.'"

Plaintiff, by leave of court, amended petition to show acceptance by defendant of terms of ordinance of city of St. Louis, subdivision 4, section 1275, Revised Ordinances 1892, requiring person in charge of car to keep a vigilant watch for all vehicles and persons on foot, either on the track or moving towards it, and to stop, at the first appearance of danger to such persons or vehicles, in the shortest time and space possible. The petition alleges a breach of the duties aforesaid, and the consequent injury to plaintiff. Defendant's answer is, first, a general denial, and, second, a plea of negligence on the part of the plaintiff and of one Harry Jones, who was driving the wagon in which plaintiff was riding.

The evidence on the part of the plaintiff tended to show that the crossing at Pine and Thirteenth streets, where the injury occurred, was a busy one; that plaintiff and Harry Jones were driving east on Pine street in a one-horse stake wagon; that the horse was going downgrade at a trot, about five to seven miles an hour; that when the horse was within four or five feet of the track they looked south and saw a car coming rapidly, about 25 feet away; the driver turned the horse diagonally across the street towards the north, and after reaching the north crossing of Pine street, while one wheel of the wagon was on the car track, the car, which had not yet stopped, hit the rear of the wagon with such force as to precipitate both plaintiff and the driver onto the granite pavement of the street, the plaintiff striking on his head, cutting a gash about six inches long. The evidence of the plaintiff also tended to show that the car was approaching at the rate of about 15 miles an hour, and that the gong was not sounded.

Holden v. Missouri R. Co

The evidence of the defendant tended to show that the plaintiff and Harry Jones were driving the wagon east on Pine street at a rapid rate of speed; that the bell was sounded violently; that the car was going from four to seven miles an hour; that the car was stopped within 25 feet after the first application of the brakes, and that just as the car stopped the wagon struck the front step of the car and splintered it, throwing the two men from the seat of the wagon. Evidence was also introduced tending to show that a party standing 38 feet west of the west rail of the car track could see a distance in Thirteenth street of 72 feet.

No direct evidence was introduced by plaintiff tending to show that the motorman failed to stop the car within the shortest time and space possible, or within what distance the car, such as the one involved, under the conditions and surroundings existing at the time, could be stopped.

Under the instructions of the court the jury found a verdict for the defendant. Within four days after the rendering of said verdict, the plaintiff filed his motion for a new trial, setting up 12 grounds, which said motion the court sustained upon the ground that the court gave to the jury erroneous instructions, and from which order granting a new trial the defendant has appealed to this court.

The instructions given on the part of the defendant are as follows:

"(1) The court instructs the jury that although the plaintiff may not have been the driver of the wagon mentioned in the testimony, nevertheless plaintiff, situated as he was, had no right to rely implicitly upon the care and prudence of the driver on the seat beside him for his own safety, but it was his duty, if said driver was approaching said 13th street, on which cars were passing, at a careless rate of speed, to attempt to have him check his speed to a safe rate, and if the jury find that under the circumstances said wagon was approaching defendant's tracks at a careless rate of speed, and that plaintiff, situated as he was, made no effort to have said speed diminished, and that such action of the plaintiff contributed directly to said collision and his injuries, then he cannot recover, and your verdict must be for defendant.

"(2) If the jury believe from the facts and circumstances given in evidence that the plaintiff, situated as he was in the wagon, would in the exercise of ordinary care have seen the approaching car on 13th street in time to have warned the driver of its approach, and in time to have prevented the collision, then it was his duty to have done so, and if he failed to do so then he cannot recover, and your verdict must be for defendant, notwithstanding the defendant may also have been negligent.

"(3) The court instructs the jury that it is the duty of persons on public streets, whether on foot or in vehicles, to be ordinarily prudent and careful in crossing street car tracks,

Holden v. Missouri R. Co

and to both look and listen for approaching cars, and, even though the jury should find in this case that the gong of the car was not sounded, still if the plaintiff could, by exercising ordinary care with respect to the speed with which he approached the track, and in looking for the approach of cars, have caused said wagon to be stopped in time to avert the collision, then your verdict will be for the defendant.

"(4) Even though the servants of the defendant in charge of its car saw the plaintiff and his vehicle moving towards the track along which their car was moving, still they had the right to assume that the person or persons in charge of said vehicle would have regard for their own safety, and not attempt to pass in front of the said car if it was obviously dangerous to do so; and the said servants had the right to assume that said vehicle would be stopped when it came to the track, and not be driven across in front of the car if such a course was manifestly unsafe, and the said servants had the right to proceed at a lawful rate of speed, and were not bound to attempt to stop their car until the said vehicle was about to be placed in a position of peril by going upon the track or so close to it as to endanger its safety and of those therein.

"(5) The court instructs the jury that unless they believe from the greater weight of the evidence that the defendant, through its servants in charge of its car at the time and place of the accident, negligently ran its car at a speed greater than ten miles per hour, or failed to keep a vigilant watch for persons and vehicles about to be in danger of being struck thereby, or negligently failed to ring the gong, and that one or more of such acts of negligence were the cause of the accident and the plaintiff's injuries, then their verdict will be for the defendant. And even though the jury should find that the defendant, through its servants, was guilty of one or more of the acts of negligence hereinbefore stated, if they further find that the plaintiff was himself guilty of negligence which directly contributed to the bringing about of the accident, then their verdict must be for the defendant.

"By the term 'ordinary care,' as used in these instructions, is meant that degree of care which would be used by a person of ordinary prudence under the same or similar circumstances."

It will be observed that the court sustained the motion for a new trial in this cause upon the ground of erroneous instructions given to the jury. From the action of the court upon such motion, this cause is now presented to this court for review. We have given due attention to the testimony in this cause, as disclosed in the record, and have reached the conclusion that the court was warranted in submitting it to the jury. Hence the only question left for investigation is the correctness or incorrectness of the declarations of law. Appellant insists that the declarations of law were appropriate to the facts developed in this cause, and were in all respects in proper form.

The issues tendered by the petition, in this suit, may be briefly stated: First, that the injury occurred at a crossing of a public thoroughfare in the city of St. Louis—Thirteenth and Pine streets. That at said point vehicles and persons are almost constantly passing and crossing; that it was the duty of appellant, in the management and operation of its railway, to run its cars at that point at such rate of speed and with such care as to avoid injury to vehicles and persons; and that the injury complained of resulted from such neglect of duty in operating its cars at a negligent rate of speed. Second. That the car was run in excess of 10 miles an hour, in violation of Ordinance No. 17,072, and also in violation of the provisions of section 1275 of article 6, Revised Ordinances of the City of St. Louis, which last-mentioned ordinance provided: "Fourth. The conductor, motor-man, gripman, driver, or any other person in charge of each car, shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and on the first appearance of danger to such persons or vehicles, the car shall be stopped in the shortest time and space possible." It is made apparent, from an examination of the petition, that the recovery sought in this cause is not confined to a violation of the ordinances of the city, but includes a sufficient charge of negligence in the operation of the cars at a careless and negligent rate of speed, under the conditions and circumstances, at the point where the injury was inflicted.

Treating of the instructions in the order as numbered, we find instruction No. 1 substantially correct; the error consists in the failure to give due attention to punctuation. (This is frankly conceded by learned counsel for appellant.) This omission may have tended to mislead the jury in the application of the facts to this declaration. Properly understood, as doubtless the trial court intended it to be interpreted and correctly punctuated, the "careless rate of speed" designated in the instruction refers to the driver of the wagon in approaching the crossing; but a disregard in this respect might have a tendency to mislead the jury and incline them to apply the terms "careless rate of speed" to the cars. This is the only criticism to which this instruction is subject. To enable the jury intelligently to apply the facts to the law as declared by the court, such declarations should be clear and unambiguous. Upon the retrial of this cause, it is suggested that such terms be employed in the instruction as will remove all doubt as to whom the terms "careless rate of speed" are applicable.

Instruction No. 4 finds support in *Boyd v. Ry. Co.*, 105 Mo. 371, 16 S. W. 909. Upon the facts in that case, this court approved of the following declaration: "That it was the duty of deceased to look and listen, if he could see or hear the train, for the purpose of avoiding injury by it, and,

if at any time he might have stopped his progress and avoided injury, then he was guilty of contributory negligence;" and "if the servants of defendant in charge of its train saw the deceased approaching the track, then they had the right to presume that he would not attempt to cross the track immediately in front of the train, and to proceed without abating the speed of the train." It may be conceded, predicated upon a state of facts which would warrant such an instruction, that the rule announced is the correct one. It is fundamental that all declarations must be based upon the particular facts developed in the cause. The correctness of instruction No. 4 must be determined from the testimony upon which it purports to be based. The motorman, William A. Colson, at the time of this injury, testified partly as follows: "They were coming down at a very rapid rate of speed, and as we crossed, coming across 13th street, I heard the rumbling, which attracted my attention as I approached, and I saw the teams coming down the street, rang my bell very violently, and the parties didn't seem to pay any attention or notice me." It will be observed that this instruction, in guiding the jury to a verdict, told them, in respect as to what the servants of the defendant had the right to assume: "And the said servants had the right to assume that said vehicle would be stopped when it came to the track and not be driven across in front of the car if such a course was manifestly unsafe, and the said servants had the right to proceed at a lawful rate of speed, and were not bound to attempt to stop their car until the said vehicle was about to be placed in a position of peril by going upon the track or so close to it as to endanger its safety and of those therein." This assumption of the servants that the vehicle of persons in approaching a crossing will stop before a perilous position is reached is based upon the right of the servants to presume that the persons and vehicle will approach the crossing with care and caution, and they have done their duty in the way of looking out for an approaching car; but if, on the other hand, as the motorman says, they were negligent, and that he saw them, and they were not heeding his signals and seemed to pay no attention to the car, does the rule announced in the instruction, that the servant had the right to assume that they would stop, apply? The servant cannot assume a certain course of conduct and at the same time say that he knew that course of conduct was not being pursued. We take it that if the motorman discovered that the vehicle was approaching this crossing at a negligent rate of speed, and that he further observed that they were negligent in not looking out for the approach of the car, then, notwithstanding the negligence of the plaintiff, it was the duty of the motorman to so regulate the speed of his car, if in his power, to avoid the infliction of any injury. In other words, the mere negligence of the plaintiff in approaching and crossing

the track would not justify the infliction of an injury, if by the exercise of reasonable care and caution it could be avoided. The servant will not be permitted to assume that a person is aware of the approach of the car and will stop in due time to avoid injury, and at the same time admit that he knows that the person was not performing his duty in that respect, in ignoring the violent ringing of the bell, giving no attention or notice to the approach of the car. It will be noted that this instruction tells the jury, in effect, that, notwithstanding the motorman says he violently rang the bell and that plaintiff and the driver gave it no attention or notice, it was proper to continue the movement of the car at a lawful rate of speed. The motorman further testifies that, upon observing the conduct of the plaintiff and driver in their efforts to make the crossing, he stopped the speed of the car as soon as possible. If the motorman did that, the defendant was not liable for the injury; but the instruction under discussion does not proceed upon that theory. It practically states the law to be that, notwithstanding the surroundings at the time, he had the right to proceed at a lawful rate of speed. What was the lawful rate of speed as contemplated by the instruction? Was it 10 miles an hour, as fixed by the ordinance? There is no law to which our attention has been directed fixing a legal rate of speed. The ordinance simply undertakes to limit and regulate the speed, but it by no means, by such limitation, determines a legal rate of speed at a busy public crossing in the very heart of a populous city. The rate of speed at a public crossing, where vehicles and persons are constantly passing, is fixed alone by the conditions and circumstances surrounding the street at the time the car is making the crossing. In our opinion, the terms "lawful rate of speed" has no place in that instruction. They are misleading, and too apt to be construed by the jury as being the rate as fixed by the ordinance. If warranted under the facts in assuming that plaintiff and driver would stop before reaching a perilous position, yet such care and watchfulness should be exercised in the movement of the car at that point as the conditions and circumstances would dictate to a reasonably careful and prudent man.

In *Bunyan v. Ry. Co.*, 127 Mo., loc. cit. 12, 29 S. W. 842, the views as herein expressed upon this instruction are fully supported. This court said in that case: "The testimony of the gripman shows that he discovered that deceased was staggering, and did not know what he was doing, when at least five or six feet from the track. It was his duty under these circumstances to have at once taken precautions to prevent the collision. He should not have deferred action until the deceased had placed himself in a dangerous position, when it was manifest to him that he was heedlessly staggering into it. This principle, dictated as it is by common humanity, was recognized by the gripman, for he says

Holden v. Missouri R. Co

that on seeing that deceased was paying no attention, and did not seem to know what he was doing, he immediately warned him of the danger, and used all possible efforts to avoid injuring him. Now, it will be seen that the instruction, which only required the gripman to attempt to avoid injuring deceased 'after he had put himself in danger,' fell short of declaring the whole duty required of him in the circumstances. The primary object of this instruction was evidently to inform the jury as to the care required by deceased himself. So far as the instruction was confined to this purpose the law was correctly given, but it did not declare the duty of the gripman as hereinbefore announced. The jury could have drawn no other conclusion from the instructions than that the gripman, though seeing that deceased was staggering, was paying no attention, and was not going to stop, was still under no obligation to attempt to avoid striking him until 'after he had put himself in danger.' * * * The first instruction was clearly misleading, and in conflict with other instructions given. It undertook to dispose of the whole case, and in effect directed a verdict for defendant, if deceased was himself negligent, unless the gripman failed in his duties after deceased had put himself in a position of danger. It wholly ignored the evidence of the gripman, and his duty to prevent the injury as soon as he saw that deceased was carelessly walking onto the track. The petition charged negligence in failing to stop the car in time to prevent the accident. This averment was sufficient to authorize the admission of evidence that the gripman knew that deceased was not going to stop, especially when no objection was made to it when offered. Indeed, this evidence was introduced by defendant itself. We are of the opinion that error was committed in giving this instruction."

Instruction No. 4, upon the facts as disclosed by the record in this cause, was erroneous.

This leads us to the only remaining question, in respect to the correctness of instruction No. 5. This instruction clearly confines the right of recovery, so far as rate of speed is concerned, to a rate of speed in excess of 10 miles an hour. This, in our opinion, is a misconception of the law in the operation of railways across busy public streets in a large, populous city. As before stated, in the discussion of instruction No. 4, this ordinance limiting and regulating the speed of cars on street railways cannot be construed as authorizing the operation of cars at a public crossing at any particular rate of speed, regardless of conditions at the time of the crossing. The rate of speed at such points must be regulated alone by the conditions and circumstances that confront the operator or motorman at the time. Operating a car at a rate of speed in excess of 10 miles an hour, from which an injury resulted, would be negligence, because in violation of the ordinance under which the railway assumed to operate its

cars. Operating a car across a public street at the rate of 5 miles per hour, from which an injury resulted, if the conditions and circumstances were such as to prompt a reasonable and careful operator to lessen the speed and thereby avoid the injury, would be equally negligent, and the city of St. Louis cannot, by ordinance, absolve the railway company from liability, for want of care and caution in operating its cars across the public streets, by limiting and regulating their speed. This rule is clearly announced in numerous cases by this court:

In *Vannatta v. Ry. Co.*, 133 Mo. 13, 34 S. W. 505, Burgess, J., speaking for the court, said: "What constitutes negligence in any given case must necessarily depend upon the facts connected with the accident which is claimed to have been occasioned thereby, and the place where it occurred. What would be a negligent rate of speed for an electric street car in one locality would not necessarily be so in another part of the same city or the same street. Plaintiff's right to the use of the street where the accident occurred was concurrent with that of defendant company. It happened under circumstances where and when the law required of those in charge of the car the exercise of such care and watchfulness, including its rate of speed, as the circumstances of the case and the place where the accident occurred demanded. Under the facts and circumstances in evidence the court would not have been justified in declaring, as a matter of law, that the car was not moving at a rapid rate of speed at the time of the accident. There was sufficient evidence on this question to justify giving the instruction."

In *Hicks v. Ry. Co.*, 64 Mo., loc. cit. 439, in discussing this subject, this court very forcibly announced the duties of a railway company to the public: "The care and caution required of railroad companies in running their trains are commensurate with the danger to persons and property incident to that mode of transporting freight and passengers, and at some points on the road greater care is exacted than at others. In running through towns and cities, and over public crossings, they are expected to be more careful than at other places where not so likely to injure persons or property. In approaching stopping places where people are in the habit, for business or pleasure, of congregating, they must exercise the care and prudence which a proper regard for human life dictates; and to hold that a railroad company is only liable for wanton injury in such a case as we are considering would encourage recklessness in the running and managing of trains, which would be intolerable. These companies not only owe a duty to passengers and others lawfully on their tracks and platforms, but a duty to the public to exercise the rights conferred upon them, with a due regard to the safety of all persons and property."

We find, also, in *Burger v. Ry. Co.*, 112 Mo., loc. cit. 246,

Holden v. Missouri R. Co

20 S. W. 439, 34 Am. St. Rep. 379, a very clear expression and approval of the well-settled rule in respect to the duties of railroad companies to the public. MacFarlane, J., in announcing the opinion of the court, said: "We do not think it follows, from the fact that the statute only enjoins these crossing signals, that no others are required under any circumstances. Our courts have declared, over and over again, that the greatest diligence, watchfulness, and care should be observed by those running and operating trains in towns and cities, especially on and over streets and other public places therein. These duties they owe to every one who has the right to use such public places in common with them."

To the same effect is the case of *Frick v. Ry. Co.*, 75 Mo., loc. cit. 609. The court said in that case: "A less degree of vigilance will ordinarily be required between the streets of a town or city than will be required at the street crossing, or when running longitudinally in a street; but, undoubtedly, some vigilance is required even between the streets, and the degree required will necessarily vary with the attendant circumstances. In any case the requisite degree of vigilance may be properly designated by the words 'ordinary care,' that is, such care as would be ordinarily used by prudent persons performing a like service under similar circumstances."

Thus we find the charge of negligence as to rate of speed in operating cars, from which an injury results, is always one to be determined from the attendant conditions and circumstances. This unbroken line of expression as to the subject being discussed is emphasized in the dissenting opinion of Sherwood, J., in *Lamb v. Ry. Co.*, 147 Mo., loc. cit. 204, 48 S. W. 659, 51 S. W. 81. While their views are expressed in a dissenting opinion, it is apparent from the majority opinion that in the expression herein quoted there was no disagreement. The clear announcement of the doctrine by that able and distinguished judge is pertinent to the question involved in instruction No. 5 given in this cause, and fully supports the views as herein expressed. He said: "Outside of the statute, and under the principles of the common law, a railroad corporation would not perform its full duty of ordinary care unless those employed on a switching engine, engaged in its customary avocation, should ring its bell, or, if necessary, take any other precaution adapted to the exigency of the situation. It is this exigency which, like the mercury in the thermometer, determines to what degree prudence shall rise in order to reach the mark of ordinary care."

The petition in this cause is broad enough to include the charge of a negligent rate of speed at the public crossing of Thirteenth and Pine streets, and that question should not have been ignored in the declarations of law. We have reached the conclusion that instruction No. 5, as given by

Dubiver v. City & Suburban Ry. Co

the trial court at the request of the defendant, was erroneous in limiting plaintiff's right of recovery to the violation of the city ordinance.

The action of the trial court in sustaining motion for new trial is affirmed. All concur, except BURGESS, J., absent.

DUBIVER v. CITY & SUBURBAN RY. CO.

(Supreme Court of Oregon, Jan. 11, 1904.)

[74 Pac. Rep. 915.]

Instructions.

Where, in an action for injuries to plaintiff's minor son, while driving a light express wagon, in a collision with defendant's street car, all the instructions pertaining to defendant's negligence were unexceptional, and not objected to, defendant could not object to instructions on contributory negligence limiting plaintiff's duty to the care a reasonably prudent minor of his age would be expected to exercise, on the ground that defendant had no knowledge that the driver of the wagon was a minor, and that its liability could not be made to depend on the driver's capacity from considerations of his age.

Care Required of Minor—Question for Jury.*

In an action for injuries to plaintiff's minor son, 15 years of age, caused by collision with a street car as he was driving a delivery wagon across the tracks, it could not be said, as a matter of law, that he had arrived at man's estate, in judgment, prudence, and forethought, so as to be liable for the exercise of the same degree of care as an adult.

Same—Collision between Other Vehicle and Street Car.

In an action for injuries to plaintiff's minor son in a collision between a delivery wagon which he was driving and a street car, the evidence as to his acts just prior to the collision was conflicting; defendant claiming that after the horse and all the wagon except the hind wheels, had crossed the tracks, the driver suddenly stopped and turned the horse to the right, so that a collision occurred before the car could be stopped, while the driver testified that before attempting to cross he stopped, and looked and listened for a car, and, seeing none, started to cross the track at a slow walk, and that, before the hind wheels of the wagon got across, it was struck by a car approaching at a high rate of speed: *held*, that it was proper for the court to submit the driver's contributory negligence to the jury under instructions limiting the degree of care required of him to such care as a minor of his age, capacity, and understanding would usually exercise under the same circumstances.

Appeal from Circuit Court, Multnomah County; M. C. George, Judge.

Action by David Dubiver, as guardian ad litem of William Dubiver, against the City & Suburban Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

*As to the degree of care required of minors for their own protection, see foot-note appended to *Parker v. Washington Electric St. Ry. Co.* (Pa.), 11 R. R. R. 610, 34 Am. & Eng. R. Cas., N. S., 610; foot-note appended to *Cleveland, etc., Ry. Co. v. Miles (Ind.)*, 11 R. R. R. 536, 34 Am. & Eng. R. Cas., N. S., 536, where all the preceding authorities in this series are collected or referred to.

Dubiver v. City & Suburban Ry. Co

The defendant operates an electric street railway, with double tracks, upon First street, in the city of Portland. David Dubiver, the father and guardian ad litem of William Dubiver, a minor, was on November 21, 1902, occupying a store on the southeast corner of First and Jefferson streets, and William was engaged in delivering goods for him about the city with a light, one-horse, goose-neck express wagon, and had been so employed for more than a year. At the date indicated, about 5:30 o'clock in the evening, William drove south on Second street to Jefferson; thence east upon the latter, near the center thereof, to First street, continuing across the first and second tracks of the defendant's railway until the hind wheels of his wagon reached the east rail of the second or east track, when it was struck by a moving car of the defendant company going north, and William was thrown from the seat of the wagon, which he was then occupying, and injured; and this action was instituted to recover damages arising on account of such injuries. William was at the time 15 years of age. Referring to the bill of exceptions, plaintiff's testimony tended to show that, when William arrived at the west crossing on First street, he stopped his horse, and looked both ways for any approaching car, and, seeing none, drove forward in a slow walk toward the east; that when the wagon had passed over both tracks, except the hind wheels, which had just reached the east rail of the east track, the defendant's car running north at a high rate of speed came in contact with it, and, further, that William took the care and precaution ordinarily used in driving a wagon across the track of an electric railway, and exercised all the usual and ordinary diligence required to cross such a track in safety; that the motorman had no headlight on his car, although it was dusk, and that he failed to ring any gong or to give other warning, or to slow up his car, as it approached the crossing. The defendant's evidence tended to show that, as the car came down First street, it was moving at a high rate of speed; that the motorman in charge saw the express wagon as it was about to cross the tracks at Jefferson street, but at such a distance away that, at the rate it was moving, it would have ample time to clear the tracks before the car reached that street, but at once put the car under control; that after the horse and all the wagon had crossed the tracks, except the hind wheels, which were just at the east rail of the eastern track, and when far enough in front of the car for the wheels to have passed over, and entirely out of reach thereof, the driver suddenly stopped and turned the horse to the right, and that before the car could possibly be checked it came in contact with the wheels of the wagon so situated, and pushed them off the track; and that at the time of the collision the driver had turned the horse and fore wheels of the wagon to the south, so that they stood parallel with the track. It does not appear

Dubiver v. City & Suburban Ry. Co

that the motorman took note of the driver of the wagon prior to the accident—whether he appeared to be a man grown or a youth—and the record is silent upon the subject from his standpoint. The plaintiff having recovered judgment, the defendant appeals.

Rufus Mallory, for appellant.

Alex. Bernstein, for respondent.

WOLVERTON, J. (after stating the facts). The trial court, after instructing the jury as to the law relative to contributory negligence, proceeded to say: "But in the case of children the court cannot say this as a matter of law. In such cases it is more or less a mixed question of law and fact"—and further instructed as follows: "The evidence shows that plaintiff's minor was at the time a minor somewhere about 15 years of age. This fact, however, does not excuse him from the obligation to exercise care according to his knowledge and capacity to understand danger, as boys of that age ordinarily are, and to use ordinary care to avoid it; and, if you find from the evidence in this case that plaintiff's minor had sufficient capacity to understand the danger of crossing a railroad track in such a situation, it was his duty to use ordinary care in crossing the track, so as to avoid getting in the way of moving cars; and if he failed to use such care, and because of such failure was injured, he was guilty of contributory negligence, and cannot recover in this action. A child would not be expected to use the same degree of care and prudence that a person of older years and larger discretion would use; but you are to take into consideration the age of the plaintiff's minor, and his character, and all the circumstances and facts—all the evidence throwing light upon the manner in which any injury may have occurred—and then determine whether he used the care which an ordinarily prudent boy of his age, under those circumstances, should have used. If he did use such care, he was not guilty of contributory negligence. If he failed to use such care, then he was guilty of contributory negligence, and the plaintiff cannot recover."

To these instructions, exceptions were taken and reserved, and the sole assignment of error contained in the record is relative thereto. Counsel for appellant insist that the instructions are erroneous (1) because the defendant had no knowledge or notice that the person in charge of the horse and wagon was a minor; that the occupation in which he was engaged was one for an adult, and not for an infant, and the defendant's liability could not in any way be made to depend upon the driver's capacity from considerations of his age; and (2) because the undisputed evidence conclusively shows that the person injured, although a minor, thoroughly understood the situation, the condition of the business in which he was engaged, the risks and hazards

Dubiver v. City & Suburban Ry. Co

attending it, and especially of crossing the tracks of a street railway upon which were cars propelled by electricity, and therefore assumed all the hazards of the position, from which it follows that his infancy was wholly immaterial, and unavailable to limit his liability, or to enlarge that of the defendant.

The first reason advanced as a basis of counsel's position is manifestly without relevancy, under the conditions in which the case comes here. All the instructions pertaining to the negligence of the defendant are admittedly unexceptionable, and no objections were made or exceptions saved thereto in any form, so that the case had passed from the point where plaintiff had the laboring oar. The instructions complained of relate solely to the defense of contributory negligence—a matter devolving upon the defendant to establish—which is entirely distinct, and altogether another phase of the trial procedure. The plaintiff's case had become a closed book, the record unexceptionable. Not so upon the other hand. The defendant was not satisfied with the manner in which its separate and special defense was submitted to the jury; hence its exceptions, and these exceptions raise the sole and only question with which we can deal. In other words, the record shows that plaintiff's case was properly submitted, while the manner in which the defendant's case was submitted is alone questioned, so that the first reason advanced as a basis of counsel's position is without potency now.

The second reason is forceful and cogent, and the problem presented is not a little difficult of solution. The doctrine of the assumption of risks and hazards incident to the occupation in which a person has engaged does not apply otherwise than as between master and servant, but no such relation existed between the defendant and the plaintiff's minor herein. Counsel urge, however, that as the plaintiff's minor presented the same proofs of the exercise of care in crossing defendant's tracks as if he had been of full age, and took the same precautions that an adult would have done, using ordinary care and prudence (that is, by looking both ways as he approached the defendant's tracks, to ascertain if any cars were in sight, and then proceeding across them), and that, as he understood and appreciated the situation and the business in which he was engaged, and all the risks and hazards pertaining to it, and especially of crossing the tracks of a street railway, therefore the same rule would apply to him as to an adult, and the fact of his infancy was wholly immaterial, and could be of no avail to limit his responsibility. This, it seems to us, does not include the whole case. The very point of dispute centers about the boy driving off the tracks after he had entered upon them. His testimony tended to show that he was proceeding straight ahead in a walk, and at the rate in which he had crossed all the tracks

Dubiver v. City & Suburban Ry. Co

but one, while the defendant's evidence was to the effect that he stopped, or nearly so, with the hind wheels of his wagon upon the east or last track before he had cleared it enough to let the car pass, which action on his part, defendant claims, was the proximate cause of the collision resulting in the injury. Here is involved a question of fact as to what he really did, and it may then be inquired, did he in this particular respect exercise the care and caution that an adult would have used? If he did, and was hurt, the defendant, if negligent, was clearly liable. But it is denied that he did, and asserted that he should have so acted, and this constitutes the very ground for the alleged contributory negligence which would exonerate the defendant. Because the minor exercised the care of an adult in looking before he started to cross the tracks, it does not follow that he exercised or ought to have exercised the care of an adult in crossing and clearing the tracks of the defendant. As to his understanding and appreciating all the risks and hazards of the business in which he was engaged, that is a fact in a measure assumed, when compared with the understanding and appreciation of an adult under like circumstances and conditions. The real question involved is whether the court should say, as a matter of law, under the testimony, that the minor was, to all intents and purposes, an adult, and should have been held to like care, foresight, and responsibility. There are cases, properly decided, too, where the courts have said, as a matter of law, that the minor, considered as yet immature, was guilty of such contributory carelessness and negligence that he ought not to recover. Such is the case of *Dietrich v. Balto. & Hall's Springs Railway Co.*, 58 Md. 347, where a minor attempted to board a moving street car by the front platform, having one of the steps broken off, when there was a safe way of entry by the rear platform, affording ready and easy access. In this case Mr. Justice Alvey, in his opinion, says: "Now, conceding that there was negligence on the part of the defendant in running the car with a broken or an insufficient step to the front platform, and that there was fault in the driver in not stopping the car upon the approach of the plaintiff, the question is, did the plaintiff so directly contribute to the happening of the accident by his own want of ordinary and reasonable care as to preclude the right of recovery for the injury suffered? This is not a question that arises upon conflicting evidence, or where inferences might be drawn from the proof of indirect circumstances, in which cases the question would be exclusively for the jury. * * *

His want of caution, and his reckless disregard of the danger in attempting to board the car while in motion, would clearly appear to have been the direct cause of the accident. He was old enough to know and understand the risk that he incurred, and, if he had used his eyes, he could not have failed to perceive that the step had been broken

Dubiver v. City & Suburban Ry. Co

from the platform. Under such circumstances, neither he nor his father can have any right of action against the defendant." Another case grounded upon the same principle is *Thompson v. Buffalo Ry. Co.* (N. Y.) 39 N. E. 709. The plaintiff's minor was a girl of 14 years, and the court, in rendering its opinion, says: "Although a minor, no claim is made that Alcy was not *sui juris*. While she may not have possessed the judgment, caution, and prudence of persons of more mature years, she was expected and required to exercise the measure of care and caution that is common and usual in one of her age." But the case was taken from the jury on a motion for nonsuit. Another case that has come under our observation is *Nagle v. Allegheny Valley Railroad Co.*, 88 Pa. 35, 32 Am. Rep. 413. Here the case was taken from the jury by invoking the presumption that a child of 14 years had sufficient capacity to be sensible of danger and to have the power to avoid it, which presumption, it was said, would stand until overthrown by clear proof of the absence of such discretion as is usual with infants of that age. This case, although the opinion was rendered by Mr. Justice Paxson, a jurist of eminence and ability, does not seem to have been followed subsequently in the same state or elsewhere, so far as our research has extended. The doctrine of the two cases preceding the last cited was invoked in *Cooper v. Lake Shore, etc., Ry. Co.*, 66 Mich. 261, 33 N. W. 306, 11 Am. St. Rep. 482, but the court refused to apply it; saying, in effect, that many cases are cited in which children have been held accountable for contributory negligence, but that the case under consideration was not one of them, the evidence being conflicting upon the very point in dispute. But a case of distinct analogy to the one at bar is *Wright, Administrator, v. Detroit, etc., Ry. Co.*, 77 Mich. 123, 43 N. W. 765. There the plaintiff's intestate, a boy under 15 years, while riding on a sleigh driven by another boy of the same age, was struck by defendant's train and killed. There was a conflict in the testimony relative to the defendant's negligence, and that part of the case was, as here, properly submitted to the jury. The trial court, as was shown by its charge, held the boy who was killed to the same degree of diligence in his efforts to avoid the accident which overtook him as would be required of an adult, and the exception in the Supreme Court was directed to this holding; but, in deciding the case, the Supreme Court, speaking through Mr. Chief Justice Sherwood, says: "The rule is this: 'That the care and discretion to be used by children, and for which they must be held chargeable, must be proportioned to their age and capacity; and, while it must be ordinary care, it is not the ordinary care required of an adult under the same circumstances.'" And after alluding to some of the authorities, the learned chief justice continues: "I think the law may be regarded as well settled in this state that, in deter-

Dubiver v. City & Suburban Ry. Co

ining the question of contributory negligence, not the same degree of caution is required of an infant as in the case of an adult, and, when such negligence is sought to be charged against a lad of less than 15 years of age, the rule clearly applies; and the charge of the court is erroneously defective, which fails to state the rule, and challenge the attention of the jury to it, in applying the law to the facts and circumstances such as are disclosed by the evidence in this case." There was a dissenting opinion by Mr. Justice Campbell, in which he says: "There are, no doubt, cases where peculiar knowledge is an element to be considered, aside from ordinary sense and ordinary experience, and where the lack of such knowledge is more likely to exist in minors or youths than in persons of experience, but the particular risk in this case was one which would be as palpable to a boy of 15 as to a man. A much younger boy would comprehend the danger of slowly crossing a railroad when a train is approaching or likely to approach." This, however, concedes the rule as announced in the main opinion, but denies its application in that case. Mr. Justice Hunt, in *Railroad Company v. Gladmon*, 15 Wall. 401, 408, 21 L. Ed. 114, says: "Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case." The rule was subsequently applied by the same eminent jurist in the turntable case of *Railroad Company v. Stout*, 17 Wall. 657, 21 L. Ed. 745. This court has spoken to the same effect in *Cassida v. O. R. & N. Co.*, 14 Or. 551, 13 Pac. 438, and *Schleiger v. Northern Ter. Co. (Or.)* 72 Pac. 324. So, in *Haycroft v. Lake Shore, etc., R. Co.*, 2 Hun, 489, where the party injured was a girl of 16 years, the court said with reference to the controversy: "Now, if there is any allowance to be made, in measuring the degree of care which this young girl was bound to use, for her youth, her inexperience, for the tendency of persons of her age to allow their attention to be given to objects of interest in their immediate view, and to overlook dangers from causes not immediately in view, then it was for the jury to say whether this young girl did not, under all the circumstances, use all the care and diligence to guard against danger that could be reasonably required from one of her age." The trial court took the case from the jury, but it was reversed upon that account; the Fourth Department of the General Term of the Supreme Court, in passing upon the case, using the language above quoted. This case was affirmed on appeal to the Court of Appeals. See s. c., 64 N. Y. 636. So, also, in the case of *Daniels v. Clegg*, 28 Mich. 32, which was that the trial court was cor-

Dubiver v. City & Suburban Ry. Co

rect in charging that "the jury should consider the age of the daughter [she being the person injured, and about the age of 20 years], and the fact that she was a woman," and "that she would not be guilty of negligence if she used that degree of care that a person of her age and sex would ordinarily use." The principle is of unquestioned soundness, and has been applied in many cases. See *Cooper v. Lake Shore, etc., Ry. Co.*, supra; *East Saginaw City Railway Co. v. Bohn*, 27 Mich. 503; *Quill v. Southern Pacific Co.* (Cal.) 73 Pac. 991; *Hassenyer v. Michigan Central Railroad Co.*, 48 Mich. 205, 12 N. W. 155, 42 Am. Rep. 470; *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645; *Traction Co. v. Scott*, 58 N. J. Law, 682, 34 Atl. 1094, 33 L. R. A. 122, 55 Am. St. Rep. 620; *Kerr v. Forgue*, 54 Ill. 482, 5 Am. Rep. 146; *Bridger v. Railroad Co.*, 25 S. C. 24; *Kline v. Central Pacific Railroad Co.*, 37 Cal. 400, 99 Am. Dec. 282; *McGuire v. Chicago, M. & St. P. Ry. Co.* (C. C.) 37 Fed. 54.

In the case at bar the instruction incorporating the principle was proper, unless the minor had arrived at man's estate in judgment, prudence, and forethought; and, in order to declare that it was improper, we should be able to say, as a matter of law, that such was the case. This we are impressed we cannot do. Just at what period in a child's advancement in years he is to be considered to have arrived at maturity, and to have assumed all the responsibilities of a man, as distinguished from a child, is an indeterminate quantity. But if, as in the case of *Wright, Administrator, v. Detroit, etc., Ry. Co.*, supra, the instruction was proper where the child was just under 15, and in *Haycroft v. Lake Shore, etc., R. Co.*, supra, where the girl was 16, and in *Daniels v. Clegg*, supra, where she was 20, there can be no reason for believing that it was improper in this case. It could not be so, as the comparative ages will not warrant it. Whether a boy of the capacity of the plaintiff's minor was able to apprehend the danger involved, and had sufficient sagacity to avoid it successfully, and yet, notwithstanding his minority, he was negligent, is a question that would properly arise upon a motion for nonsuit; but it could not be insisted on in this case, as the bill of exceptions shows there was a conflict in the testimony relative to whether he was negligent in that respect or not.

The judgment of the trial court will be affirmed, and it is so ordered.

MAYSVILLE & B. S. R. CO. v. McCABE.

(Court of Appeals of Kentucky, Sept. 27, 1904.)

[82 S. W. Rep. 233.]

Railroads—Injury to Trespasser.*

One while asleep on a railroad track, where he has alighted after stealing a ride on a train, is a trespasser, to whom the company owes no other duty than to use reasonable diligence to prevent injuring him after his peril is discovered, so that it is not liable for injury to him from a train, the employees on which did not see him.

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Action by Elmer McCabe, by, etc., against the Maysville & Big Sandy Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

W. H. Wardsworth and L. J. Crawford, for appellant.
Jas. C. & B. A. Wright and Geo. Veitch, for appellee.

BARKER, J. The appellee, a lad of 15 years, and two other boys about the same age, secretly boarded appellant's passenger train, called in the record "The Fast Flyer," at Newport, Ky., and stole a ride to Maysville, Ky., where they disembarked in the yard of appellant at about 11 o'clock p. m., and sat down on the railroad track, smoked cigarettes, and finally fell asleep. At 12:40 o'clock a. m., one of appellant's freight trains came along, ran over the sleeping boys, killing his companions, and cutting off appellee's leg and foot. To recover damages for this injury, this action was instituted. A trial resulted in a verdict for \$3,000 in appellee's favor. The evidence shows beyond a doubt that the boys were asleep on the track in appellant's private yard, and they were therefore trespassers. Appellant owed them no duty, save to use reasonable diligence to prevent injuring them after their peril was discovered. The case of Dugan's Adm'r v. C. & O. Railway Co., 24 Ky. Law Rep. 1754, 72 S. W. 291, is in all substantial respects similar to the case at bar, and is conclusive of it. There was no evidence that appellant's servants saw appellee prior to his injury; on the contrary, it was shown that they did not see him at all, and did not know until some minutes after the catastrophe that any one had been hurt. The court should have awarded the peremptory instruction asked by appellant.

The judgment is reversed for proceedings consistent herewith.

*See foot-note appended to Chesapeake & O. Ry. Co. v. See's Adm'r (Ky.), 11 R. R. R. 342, 34 Am. & Eng. R. Cas., N. S., 342.

GARLICH v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Eighth Circuit, August 3, 1904.)

[131 Fed. Rep. 837.]

Witnesses—Cross Examination—Scope.

It is no objection to the cross-examination of a plaintiff's witness that it discloses facts tending to constitute a defense, where such facts relate directly to matters about which he testified on his direct examination.

Evidence—Private Statutes—Necessity of Pleading.

Neither a private statute nor a city ordinance is admissible in evidence to establish a defendant's negligence in the running of a railroad train, unless pleaded.

Railroads—Injury to Person on Track—Contributory Negligence.

The law recognizes the track of an operated railroad as a place of danger, of which danger a view of the track conveys notice; and when a person goes upon such track, or so near it as to be within the overhang of the cars or engine, ordinary care requires that he be alert in the use of his senses of sight and hearing to guard himself from harm, and no reliance on the exercise of care by persons in control of trains will excuse his failure to exercise such care. If the use of these senses is interfered with by obstructions or by noises, ordinary reasonable care calls for proportionately increased vigilance.

Same—Failure to Look and Listen.

Plaintiff, without occasion therefor, was walking near a city station in the space between railroad tracks and a river bank, used as a pathway, and ranging in width from 5 to 25 feet. A freight train was moving in the opposite direction on the second track from him, making the usual noise; and, after looking back along the nearest track, which could be seen for about 500 feet, and seeing no train thereon, plaintiff walked on about 150 feet, without again looking back, when he was struck and injured by the end of the pilot beam on the engine of one of defendant's trains which came from behind him. The space between the track and river bank was there 11 feet wide, and plaintiff was walking at a safe distance from the track until just before he was struck, when he made a side step towards the track: *held* that, without regard to the question of defendant's negligence, plaintiff was guilty of such contributory negligence as precluded his recovery for the injury as matter of law.

Same—Violation of Speed Ordinance.*

The fact that a railroad train at the time it struck and injured a plaintiff was being run in violation of a city ordinance limiting the speed of trains, while it may be evidence of the company's negligence, does not affect the defense of contributory negligence in an action for the injury, the plaintiff having no right to omit the exercise of ordinary and reasonable care for his own protection in reliance on such ordinance.

In Error to the Circuit Court of the United States for the District of Minnesota.

Entering the city of St. Paul from the west, the roadbed and tracks, side by side, and near together, of the Chicago, Milwaukee & St. Paul Railway and the Chicago, St. Paul, Minneapolis & Omaha Railway pass along the bank of the Mississippi river upon a narrow bench of land between the bank of the river (which is 10 feet or more above the water)

*See foot-note appended to *Mathiesen v. Omaha St. Ry. Co.* (Neb.) 11 R. R. R. 777, 34 Am. & Eng. R. Cas., N. S., 777.

and the foot of a high, steep bluff reaching the general level of the city in that vicinity. This narrow bench of land extends from some distance east of the line of Robert street westward beyond the line of Wabasha street, and both of said streets are continued as thoroughfares upon bridges from the top of the bluff, over, and more than 30 feet above, said railroad tracks, and across the river. The whole of this narrow bench of land between the line of the said two streets and for a distance on either side has been for many years, and still is, occupied by said railroad tracks, and used for railroad purposes, and not for road vehicles. But between the margin of the river bank and the nearest railroad track is a narrow strip of land varying from about 5 feet in width near the Wabasha Street Bridge to 25 feet in width near the Robert Street Bridge, used as a footpath by persons having occasion to pass there. When the city was platted, long before there were railroads in the country, this narrow bench was platted as a public street, or levee, and was so used for a time, but was long ago abandoned to the use of railroads. On August 14, 1902, the plaintiff, without any special occasion or object, walked westward from the Union Depot, along the river bank and upon said pathway beyond the Robert Street Bridge and nearly to the Wabasha Street Bridge, where he turned, and retraced his way along the same path. A freight train going westward was then passing with its usual noise on the second track from him. Plaintiff turned, and looked back along the track nearest him, which was visible for about 500 feet, when further view was cut off by a curve and obstructions. Seeing no train or engine on this track, plaintiff proceeded eastward on said path at an ordinary walk for about 50 paces, when, having come within about 100 feet of the Robert Street Bridge without having taken any further precaution, at a place where said pathway was 11 feet wide, he was struck on the left side by the end of the pilot beam of defendant's engine, which, with a passenger train, was coming from the west on said nearest track at a speed of about 15 miles an hour; and was seriously injured. The engineer, who was called by plaintiff, testified that when he came around the curve and saw the plaintiff the latter was on the path 6 or 8 feet from the track, and that when the engine came near plaintiff made a side step towards the track, bringing himself so near that he was struck by the end of the pilot beam; and that when plaintiff, by such side-stepping, suddenly came dangerously near to said track, the engine had so nearly reached the place of collision that it could not be stopped before striking the plaintiff. No bell had been rung or whistle blown on the engine as it approached. There was no contradiction in the testimony, and at the close of plaintiff's evidence the defendant moved that the court direct the jury to render their verdict in favor of the defendant, on the ground that, even if

Garlich v. Northern Pac. Ry. Co

the defendant was negligent, the plaintiff was guilty of such contributory negligence as barred his right to recover in the action. The court granted the motion, and by its direction such verdict was rendered.

C. N. Dohs and E. R. Wakefield (D. A. Haggard, on the brief), for plaintiff in error.

L. T. Chamberlain (C. W. Bunn, on the brief), for defendant in error.

Before VAN DEVANTER and HOOK, Circuit Judges, and LOCHREN, District Judge.

LOCHREN, District Judge, after stating the case as above, delivered the opinion of the court.

1. The cross-examination of the witness Root was not extended beyond the particular circumstances of the facts about which he had been examined by plaintiff's counsel. If the disclosure of such circumstances, explanatory of the very matters about which he had testified on his direct examination, also tended to establish a defense to the action, such tendency constituted no valid objection to the cross-examination. *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.* (C. C. A.) 129 Fed. 668.

2. The Minnesota statute offered in evidence is a private act; and neither it nor the ordinances of the city of St. Paul, also offered in evidence, had been pleaded, and they were rightly excluded. 1 Chitty's Pl. 238; 20 Encyc. Pl. & Prac. 596, and notes; Gen. St. Minn. 1894, §§ 5251, 5252. Besides, this proposed evidence had no bearing on the question of contributory negligence, upon which the case was disposed of.

3. The other assignments of error challenge the ruling of the court that upon the uncontroverted facts shown by the evidence, the plaintiff was guilty of such contributory negligence, directly resulting in the injury which he sustained, as precluded all right of recovery, even though the defendant was chargeable with negligence which was also a proximate cause of the injury.

The ruling was right. The law recognizes the track of an operated railroad as a place of danger, of which danger a view of the track conveys notice; and that when a person goes upon such track, or so near as to be within the overhang of the cars or engine, ordinary care requires that he be alert in the use of his senses of sight and hearing to guard himself from harm. And no reliance on the exercise of care by persons in control of the movement of trains or engines will excuse any lack of the exercise of such care by persons going upon such tracks. If the use of these senses is interfered with by obstructions or by noises, ordinary, reasonable care calls for proportionally increased vigilance. *Blount v. Grand Trunk Ry. Co.*, 61 Fed. 375, 9 C. C. A. 526; *Pyle v.*

Garlich v. Northern Pac. Ry. Co

Clark, 79 Fed. 744, 25 C. C. A. 190; C., St. P., M. & O. Ry. Co. v. Rossow, 117 Fed. 491, 54 C. C. A. 313; C. & N. W. Ry. Co. v. Andrews (C. C. A.) 130 Fed. 65. The three cases last cited were decided by this court, and pages of citations of cases from this court and all the courts of the country to the same effect might be added. In this case, if the path between the railroad tracks and the river was a dangerous place, the danger was obvious, and the risk was voluntarily and needlessly assumed by plaintiff, who went there for an idle stroll. When, after turning in his walk, he looked back along the nearest track, his view of it extended but a short distance, when it was cut off by a curve and obstructions. Yet, without looking again, or bestowing further attention to the situation, he walked along at an ordinary gait about 50 paces, or 150 feet; and, though the path was there 11 feet wide, just as the engine was nearly opposite him, he blundered, and came by a side step, from a safe distance away, so close to the track that he was immediately struck by the end of the pilot beam. That he was grossly negligent, and that his negligence was a proximate cause of his injury, is manifest.

Since the argument counsel have called our attention to the decision by the Supreme Court of Iowa of the case of *Camp v. Chicago Great Western Ry. Co.* (recently filed) 99 N. W. 735. An employee of the company, after clearing snow from a switch in the company's Marshalltown yard, started along the track to a toolhouse 182 feet distant; having looked back along the track without seeing any engine. When within 25 feet of the toolhouse, and walking on the ends of the ties, he was struck by an engine which came up on the track behind him faster than 6 miles an hour, which is the limit of speed fixed by a Marshalltown ordinance. Though the switchman had taken no other precaution, the conclusion was arrived at that he would have reached the toolhouse before being so overtaken had the engine not exceeded 6 miles an hour. The Iowa court held that the switchman had the right to rely confidently on the belief that no engine would be run on that track faster than the Marshalltown ordinance prescribed, and that reasonable care did not require that he should again look back, or walk beyond the reach of passing engines. We do not find this decision persuasive, or in harmony with the settled law on the subject. Such ordinances are intended to prevent collisions and accidents in urban communities. The limit of speed fixed is a designation by the municipal council of the degree of care which shall be exercised in the operation of railroads within the municipality. To exceed the rate of speed so fixed as proper and safe may be some evidence of negligence; but, as between the railroad company and a person injured or put in danger, it is unlawful only in the sense in which any act of negligence which injures or

Alabama & V. R. Co. v. Livingston

endangers another is unlawful. And the doctrine of contributory negligence is just as applicable to cases of negligence in respect to ordained rates of speed as to any other species of negligence chargeable to a railroad company. In *Pyle v. Clark*, decided by this court, and already cited, the opinion states that the train which struck the plaintiff's team was running at about 15 miles an hour, in violation of a municipal ordinance which prohibited a speed of more than 8 miles an hour, yet the plaintiff was held guilty of contributory negligence, because, after looking along the track, he allowed a full minute to elapse before driving upon the track without a again looking. And in *Blount v. Grand Trunk Ry. Co.*, also above cited, gates at the crossing were established by law to warn travelers, but it was held that the fact that the gates were open when a train was approaching did not excuse a person crossing the tracks for failing to look and listen. The well-settled rule of law is that no reliance upon the exercise of care by a railroad company will excuse a lack of the exercise of proper care by a person going upon a railroad track, or so near as to be in danger from passing trains.

The only other case which we find that seems to hold that running faster than the rate of speed allowed by a municipal ordinance has any bearing upon the matter of contributory negligence is the case of *Smith v. St. Paul City Ry. Co.*, 79 Minn. 254, 82 N. W. 577, where damages were recovered for running over and killing a dog by defendant's trolley car running 20 miles an hour, in violation of a city ordinance limiting the speed to 10 miles. The court conceded that ordinarily the motorman need not stop for dogs, who should care for themselves, and get out of the way of the car, yet held that the jury might properly determine whether, but for this improper rate of speed, in violation of the ordinance, the dog would not in that instance probably have escaped. Without further comment on these cases, it is sufficient to say that we adhere to the prior decisions of this court.

Affirmed.

ALABAMA & V. R. CO. v. LIVINGSTON.

(Supreme Court of Mississippi, April 4, 1904.)

[36 So. Rep. 256.]

Passengers—Freight Trains.*

One who boarded a freight train believing that he had a right to ride on it because he had been erroneously informed by the railroad's track superintendent that he could ride on the train was not a passenger under an implied contract.

*As to the liability of railroad companies for the malicious acts of their employees, see foot-note appended to *Louisville & N. R. Co. v. Rountt* (Ky.), 10 R. R. R. 344, 33 Am. & Eng. R. Cas., N. S., 344; foot-note appended to *Riser v. Southern Ry. Co.* (S. Car.), 10 R. R. R. 244, 33 Am. & Eng. R. Cas., N. S., 244.

Alabama & V. R. Co. v. Livingston

Trespassers.

One boarding a freight train on which he had no right to ride, believing that he had a right so to do because the track superintendent of the railroad had told him that he might ride on the train, while a trespasser, was not a willful trespasser.

Ejection of Trespasser—Abusive Language—Liability.

A railroad company is liable for the conduct of the conductor of the freight train in cursing and abusing a trespasser on ejecting him from the train.

Same—Excessive Verdict.

Where plaintiff boarded a freight train believing that he had a right to travel thereon, and was expelled by the conductor with abuse and cursing after an offer to pay his fare, between stations, on a stormy night, a judgment for \$2,000 in favor of plaintiff was excessive, and will be reversed unless \$1,000 is remitted.

Appeal from Circuit Court, Scott County; Jno. R. Enochs, Judge.

Action by Dave Livingston against the Alabama & Vicksburg Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed on condition that plaintiff remit \$1,000 of the verdict rendered in his favor; otherwise reversed.

The evidence for plaintiff was that plaintiff and a companion were at Forest, a station on defendant's road, and desired to take the passenger train going east late that night to go to Meridian, Miss. About 8 or 9 o'clock that night they were in a barber shop in Forest, and there, in a conversation with a Mr. Bustin, who was track superintendent of defendant's road, said something about the lateness of the time for the arrival of the passenger train, when Bustin told them that they could go on the through freight train. That they in a short time then got on the through freight, and the conductor came around and asked them if there were some cattle to go on the train, to which they replied they did not know. The conductor then went about his business, and in 15 or 20 minutes the train left Forest, and when about half way to the next station the conductor came around, and told them they could not ride on that train, and that he would put them off at the station Lake. When the train reached Lake it did not stop, but went by three or four miles, when the train was stopped, and they were put off. Plaintiff testified that he told the conductor that Bustin told him he could ride on the train, and he would not have gotten on if he had not been told so; that he could not reason with the conductor; told him he would pay for his passage, but every time he said anything about pay the conductor would curse him, and every time he tried to reason with the conductor he would curse and abuse him; that he then offered the conductor \$10 if he would take him to the next station, and the conductor replied that: "I will not take your money; I believe you are a damned railroad spy anyhow;" that it was a cold, dark night, and it was raining, and plaintiff and his companion had to walk back to Lake three or four miles. The testi-

Southern Ry. Co. v. Yancy

mony for defendant was that Bustin did not tell plaintiff and his companion that they could ride on the through freight train; that the conductor never saw them until the train left Forest, and that he told them between Forest and Lake that they could not go on that train, and that he would put them off at Lake; that when they reached Lake it was raining, and the smoke was so heavy the signal could not be given, and the train ran through about a mile, when it stopped, and they were then put off without insult; that Bustin had no authority to give any one permission to ride on the freight train; and that the train was not authorized to carry passengers except when they were with cattle. Defendant's motion for a new trial was overruled, and it appeals.

McWillie & Thompson, for appellant.

McLaurin & McLaurin and Green & Green, for appellee.

WHITFIELD, C. J. We do not think there was any implied contract to carry appellee as a passenger. He must be treated as a trespasser, but not as a willful trespasser. He must be regarded as having boarded the train believing that Bustin had authority to allow him to travel on a freight train. But the evidence makes it equally clear that he was put off under circumstances of insult and outrage, and that, too, by the conductor acting in the line of his duty. The conductor had a right to put him off under proper circumstances and at a proper place and time (*Hudson v. Lynn & B. R.*, 178 Mass., at page 67, 59 N. E. 647; *Louisville, etc., R. v. Sullivan*, 81 Ky. 634, 50 Am. Rep. 186); but it was his duty, even towards this trespasser, not to willfully and maliciously wrong him by insulting and abusing him when he put him off. Because of the mode in which he was ejected, to wit, because of the cursing and abuse on the part of the conductor, we think the company is liable in punitive damages.

My Brethren think, however, that the damages are too large, and that \$1,000 only should be allowed. I would prefer to allow the full amount to stand, speaking for myself, under all the circumstances of this case; but my conviction is not strong enough to warrant dissent about a mere matter of damages. If, therefore, the appellee will remit \$1000, the judgment will be affirmed; otherwise the cause will be reversed and remanded.

SOUTHERN RY. CO. v. YANCY.

(Supreme Court of Alabama, July 21, 1904.)

[37 So. Rep. 341.]

Accident on Track—Willfulness and Wantonness—Variance.

A count averring that defendant willfully and wantonly ran its train against plaintiff is in trespass, and is not supported by evidence that

Southern Ry. Co. v. Yancy

the injury was inflicted by defendant's servants in charge of the train.
Same—Same—Action on the Case.

A count relying on the willful acts of defendant's servants, as distinguished from its acts, is in case.

Same—Same—Contributory Negligence.*

Contributory negligence is no defense to a count in case for the willful or wanton acts of defendant's servants.

Appeal—Review.

Refusal of requested written charges cannot be reviewed, unless they are in the bill of exceptions, though they are in the record.

Appeal from City Court of Birmingham; W. W. Wilkerson, Judge.

Action by W. E. Yancy against the Southern Railway Company for personal injuries from being run over by a locomotive operated by defendant on its railroad. Judgment for plaintiff. Defendant appeals. Reversed.

The complaint, as amended, contained 13 counts. A demurrer was sustained to the second count, and after the introduction of all the evidence the court, at the written request of the defendant, gave the general affirmative charge in its favor as to counts 3, 4, 5, 6, 7, 8, and 9. Therefore the

*See *Alabama Great Southern R. Co. v. Guest* (Ala.), 9 R. R. R. 441, 32 Am. & Eng. R. Cas., N. S., 441 (company liable where willful killing of trespasser guilty of contributory negligence); *Birmingham Southern R. Co. v. Powell* (Ala.), 7 R. R. R. 806, 30 Am. & Eng. R. Cas., N. S., 806 (wantonness and contributory negligence); *Labarge v. Pere Marquette R. Co.* (Mich.), 8 R. R. R. 456, 31 Am. & Eng. R. Cas., N. S., 456 (effect of gross negligence where subsequent or concurrent contributory negligence); *King v. Illinois Cent. R. Co.* (C. C. A.), 3 R. R. R. 875, 26 Am. & Eng. R. Cas., N. S., 875 (sufficiency of evidence of such wanton and gross negligence as will render unavailable a plea of contributory negligence, in action for killing person on track in railroad yard); *Sego v. Southern Pac. Co.* (Cal.), 5 R. R. R. 32, 28 Am. & Eng. R. Cas., N. S., 32 (willfulness and wantonness in running train at excessive speed and contributory negligence in attempting to cross in front of train); *Chicago Terminal Transfer R. Co. v. Gruss* (Ill.), 5 R. R. R. 704, 28 Am. & Eng. R. Cas., N. S., 704 (contributory negligence no defense in action for injury to trespasser, where there was wantonness and willfulness); *Central of Georgia Ry. Co. v. Forshee* (Ala.), 18 Am. & Eng. R. Cas., N. S., 467 (contributory negligence no defense where willfulness and wantonness is charged); *Elgin, etc., Ry. Co. v. Duffy* (Ill.), 23 Am. & Eng. R. Cas., N. S., 361 (contributory negligence no defense where injury at crossing was willfully and maliciously inflicted); *Illinois Cent. R. Co. v. King* (Ill.), 13 Am. & Eng. R. Cas., N. S., 829 (contributory negligence not a defense to action by trespasser for injuries caused by willful negligence in ejecting him); *Conner v. Citizens' St. R. Co.* (Ind.), 7 Am. & Eng. R. Cas., N. S., 287 (to entitle one to recover for an injury without showing his own freedom from contributory negligence, the injurious act or omission must have been purposely or intentionally committed, with a design to produce injury, or under such circumstances as that its natural and reasonable consequence would be to injure others of whose situations the actor knows); *Kreuzer v. Pittsburg, C. C. & St. L. Ry. Co.* (Ind.), 12 Am. & Eng. R. Cas., N. S., 343 (child injured while sleeping on track at crossing cannot recover although company was negligent, unless such negligence was willful or wanton); *Bolin v. Chicago, etc., Ry. Co.* (Wis.), 19 Am. & Eng. R. Cas., N. S., 735 (gross negligence towards trespasser gives right of recovery notwithstanding contributory negligence).

Southern Ry. Co. v. Yancy

cause was submitted to the jury only upon counts 1, 10, 11, 12, and 13. The first count of the complaint was in words and figures as follows: "First Count. The plaintiff claims of the defendant, a corporation, the sum of twenty thousand dollars as damages, for that heretofore, to wit, on the 7th day of June, 1896, the defendant was operating a railroad and running trains and locomotive engines thereon propelled by steam power, among other places to, in, and through the town of Oakman, in Walker county, Alabama, and that on said day the said defendant willfully, wantonly, and recklessly ran one of its said locomotive engines which it was then and there running and operating along, over, and upon its said railroad upon and against the plaintiff, breaking his left leg, bruising and lacerating his flesh, breaking his ribs, perforating his lungs, and otherwise permanently injuring him, and he was thereby made to suffer great physical and mental pain, and rendered permanently less able to earn or provide a sustenance for himself and his family; and plaintiff avers that by reason of said injuries he was prevented from performing work or labor of any kind for a long time, his physical stamina was greatly and permanently impaired, and he was made to expend large sums of money and to incur great indebtedness and expense in an effort to preserve and save his life and effect his cure; all to his damage aforesaid. Wherefore he sues." The eleventh count, as far as is necessary to be here set out, were in words and figures as follows: "Eleventh Count. The plaintiff claims of the defendant, a corporation, engaged in the business of a common carrier of freight and passengers for hire and reward, the sum of twenty thousand dollars as damages for that heretofore, to wit, on the 7th day of June, 1896, the plaintiff was passing along and upon the defendant's railroad track within the corporate limits of the town of Oakman, in Walker county, Alabama, proceeding from Coal Valley, in said county, to the defendant's depot or stopping place for its trains within said town of Oakman, for the purpose of becoming a passenger upon the defendant's east-bound passenger train then soon to be due; and the plaintiff avers that when he was at a point upon the defendant's said railroad track within the corporate limits of said town of Oakman about seventy-five yards west of the defendant's depot or stopping place for its said trains in said town, as aforesaid, and while proceeding along said track to the defendant's said depot or stopping place for its said trains, as aforesaid, he was run upon and against by one of the defendant's locomotive engines which approached him from the rear, whereby the plaintiff sustained the damage and injuries enumerated and mentioned in the first, second, third, fourth, fifth, and sixth counts of the original complaint in this cause. And the plaintiff avers that his said injuries were caused by reason of the willful or wanton misconduct of the defendant,

Southern Ry. Co. v. Yancy

its servants, agents, and employees upon said locomotive engine and train, in this," etc. The tenth, twelfth, and thirteenth counts of the complaint sought to recover damages for willful wrongs of, or wanton acts of, the servants or agents of the defendant; but it is not necessary to set these counts out at length. The defendant pleaded the general issue, and by several pleas set up the contributory negligence of the complaint. The evidence introduced by the plaintiff tended to show negligence on the part of the servants or employees of the defendant. There was verdict and judgment for the plaintiff, assessing his damages at \$2,000. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved. There was also a cross-appeal on the part of the plaintiff, but under the opinion it is not necessary to make a further statement in reference thereto.

Smith & Weatherly, for appellant.

John F. Martin and John T. Glover, for appellee.

TYSON, J. Counts 1 and 11 of the complaint are in trespass, and not in case. They count upon the willful and wanton act of defendant corporation, and not upon the wrongs committed by its servants. Their averments are not supported by evidence showing that the injury complained of was inflicted by the servants of defendant in charge of the train that struck plaintiff, even if it be assumed that their acts were willful or wanton. Written charges requested by defendant that the jury cannot find a verdict for plaintiff under these counts should, therefore, have been given. *Southern Bell Tel. Co. v. Francis*, 109 Ala. 224, 19 South. 1, 31 L. R. A. 193, 55 Am. St. Rep. 930; *City Delivery Co. v. Henry* (Ala.) 34 South. 389. Counts 10, 12, and 13 each count upon the willful or wanton acts of the agents or servants of defendant, as distinguished from defendant's acts, and are, therefore, in case. Cases cited supra. Contributory negligence is obviously no defense to these counts, and, if relied upon as a defense, should be eliminated by demurrer.

There are also errors assigned by plaintiff as upon a cross-appeal. These assignments are predicated solely upon the refusal of certain written charges requested by him. These charges, while shown by the record, do not appear in the bill of exceptions. The action of the court in refusing them cannot be reviewed. *Alabama Construction Co. v. Wagnon*, 137 Ala. 388, 34 South. 352. It follows, therefore, that plaintiff takes nothing by his appeal.

Reversed and remanded.

ROENFELDT *v.* ST. LOUIS & S. RY. CO.

(Supreme Court of Missouri, Division No. 1, March 17, 1904.)

[79 S. W. Rep. 706.]

Verdict by Nine Jurors—Statute—Constitutionality—Vested Rights.

Though an action was begun and the issues joined prior to the adoption of the law authorizing nine of the jury in a civil case to render a verdict, a verdict so rendered was valid, as no one has a vested right in modes of procedure.

Accident at Street Railway Crossing—Contributory Negligence.*

Plaintiff was driving down a grade of 3 per cent. approaching a street railroad crossing, his horse going at a slow walk, when he saw a street car approaching at about nine miles an hour. There was no brake on plaintiff's wagon, and he drove on the tracks without stopping or attempting to turn out, and a collision ensued. The crossing was level, and when plaintiff first saw the car it was about 250 feet from the point of contact: *held*, that he was guilty of contributory negligence.

Same—Discovered Peril—Sufficiency of Evidence.

The evidence as to the distance the car was from plaintiff at the time he drove onto the tracks being conflicting, and ranging between 50 and 108 feet, defendant could not be held liable under the doctrine of discovered peril.

Appeal from Circuit Court, St. Louis County; Jno. W. McElhinney, Judge.

*As to whether there can be a recovery for injuries sustained in an attempt to cross railroad tracks in front of an approaching train which is seen by the highway traveler to be approaching when he makes the attempt, see *Reed v. Queen Anne's R. Co.* (Del.), 11 R. R. R. 332, 34 Am. & Eng. R. Cas., N. S., 332; *Robinette v. Alabama Great Southern R. Co.* (Ala.), 1 R. R. R. 236, 24 Am. & Eng. R. Cas., N. S., 236; *Schwanewede v. North Hudson County Ry. Co.* (N. J.), 4 R. R. R. 191, 27 Am. & Eng. R. Cas., N. S., 191 (if it appears that a trolley car motorman is not going to respect your rights to cross street first, you must wait, or you are guilty of contributory negligence); *Louisville & N. R. Co. v. Mitchell* (Ala.), 4 R. R. R. 425, 27 Am. & Eng. R. Cas., N. S., 425; *McNab v. United Rys. & Electric Co.* (Md.), 2 R. R. R. 39, 25 Am. & Eng. R. Cas., N. S., 39 (attempting to cross tracks in front of electric car); *Coleman v. Lowell, etc., St. Ry. Co.* (Mass.), 7 R. R. R. 680, 30 Am. & Eng. R. Cas., N. S., 680; note, 10 Am. & Eng. R. Cas., N. S., 471, 484 (attempting to cross tracks in front of approaching train); *Blaney v. Electric Traction Co.* (Pa.), 10 Am. & Eng. R. Cas., N. S., 560 (street cars); *Helm v. Louisville & N. R. Co.* (Ky.), 3 Am. & Eng. R. Cas., N. S., 440 (trains); *Huntress v. Boston, etc., R. Co.* (N. H.), 4 Am. & Eng. R. Cas., N. S., 257; *McDivitt v. Des Moines St. R. Co.* (Iowa), 6 Am. & Eng. R. Cas., N. S., 106; *Green v. Erie R. Co.* (N. J.), 19 Am. & Eng. R. Cas., N. S., 308; *Mott v. Detroit, G. H. & M. Ry. Co.* (Mich.), 15 Am. & Eng. R. Cas., N. S., 113; *Hanson v. Penn. R. Co.* (N. J.), 12 Am. & Eng. R. Cas., N. S., 404; *Watson v. Mound City Street Ry. Co.* (Mo.), 3 Am. & Eng. R. Cas., N. S., 385; *New York, S. & W. R. Co. v. Moore* (C. C. A.), 21 Am. & Eng. R. Cas., N. S., 462; *Ring v. Chicago, St. P. & K. C. Ry. Co.* (Iowa), 12 Am. & Eng. R. Cas., N. S., 452 (contributory negligence as matter of law); *Schneider v. Market St. Ry. Co.* (Cal.), 23 Am. & Eng. R. Cas., N. S., 692 (not contributory negligence as matter of law, to cross tracks in front of approaching street car); *Chicago & W. I. R. Co. v. Ptacek* (Ill.), 10 Am. & Eng. R. Cas., N. S., 481 (whether crossing before moving train is negligence per se); *O'Connell v. St. Paul City R. Co.* (Minn.), 4 Am. & Eng. R. Cas., N. S., 60; *Henderson v. Detroit Citizens' St. Ry. Co.* (Mich.), 10 Am. & Eng. R. Cas., N. S., 812; *Perry v. Macon Consol. St. R. Co.* (Ga.), 10 Am. & Eng. R. Cas., N. S., 819.

Roefeldt v. St. Louis & S. Ry. Co

Action by Henry R. Roefeldt against the St. Louis & Suburban Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

McKeighan & Watts and Robt. A. Holland, Jr., for appellant.

Wm. R. Gentry, for respondent.

VALLIANT, J. Plaintiff was driving in a wagon along Twentieth street, crossing the tracks of defendant's street railroad at the intersection of Twentieth and Wash streets, when his wagon was struck by a car of defendant, and he was thrown out and received injuries. This suit is to recover damages for these injuries. The petition alleges that the defendant negligently caused its car to collide with the wagon, and that the defendant's servants in charge of the car saw, or by the exercise of ordinary care could have seen, "the plaintiff as he was crossing Wash street, and as he approached said track, and after he drove the horses on the track, and saw, or by the exercise of ordinary care could have seen, the plaintiff after he was in a position of peril, and by the exercise of ordinary care could have avoided striking said wagon and injuring plaintiff after his position of peril was known to defendant by its agents and servants in charge of said car, or could by the exercise of ordinary care have been known," etc., yet they failed to exercise such care, and that failure contributed to cause the injuries of which the plaintiff complains. The petition then sets out the city ordinance requiring that the servant of a street railroad company in charge of a car "shall keep a vigilant watch for all vehicles and persons on foot, especially children, either on its track or moving towards it, and on the first appearance of danger to such persons or vehicles the car shall be stopped in the shortest time and space possible"; and states that the servants of the defendant on this occasion failed to perform the duty required by that ordinance, and that that failure contributed to the injury complained of. The answer was a general denial and a plea that the plaintiff himself was guilty of negligence which directly contributed to his injuries. Reply, general denial.

The testimony on the part of the plaintiff tended to show as follows: Twentieth street runs north and south. Wash street crosses it running east and west. Defendant maintains a double track street railroad on Wash street. The north track is for defendant's west-bound cars, the south track for the cars east-bound. The plaintiff was driving a two horse team to a wagon loaded with barley. His course was north on Twentieth street. The grade on Twentieth street from south to north is a decline of 3.3 per cent. for a distance beginning 45 feet south of defendant's south track to that track; then it is level across the two tracks; thence north it is a slight upgrade. Going west on Wash street from

Roenfeldt v. St. Louis & S. Ry. Co

Nineteenth to Twentieth (as the car in question was going) there was an upgrade of 1.3 per cent. Twentieth street at its intersection with Wash is 36.4 feet wide from curb to curb. The sidewalk on the east side is 12 feet wide. There is a building in which is a saloon on the northeast corner of these streets, which measures 46 feet 9 inches along the north line of Wash street. The distance between the two tracks is 5 feet 9 inches. Each track is 4 feet 10 inches wide. From the south curb line on Wash street to the south rail of the south track is 10 feet 3 inches. At the southeast corner is a two-story brick house, which is set back 21 feet from the south curb. The tracks run straight on Wash street east and west. The plaintiff was familiar with the situation, he had been driving across those tracks at that point several times a day for several months, and knew how the cars usually ran there. The account that the plaintiff himself gave of the accident was as follows: As he approached Wash street he looked to the east, and saw the car coming. It was then 250 feet away, and was coming very rapidly—30 miles an hour, and increasing in speed until at the moment of the collision it was going 60 miles an hour. He was driving in a slow walk, not to exceed three miles an hour. When his horses' heads were about to go over the north track, the car was 50 or 60 feet from him, he drove steadily along, and had almost cleared the track when the car struck the hind wheels of his wagon and turned it over. "Q. As this car came along, you saw it two hundred and fifty feet away from you, and you kept right along towards the track, seeing the car coming toward you? A. Yes, sir. Q. Why didn't you stop, and let the car go by? A. I couldn't stop. I was going downhill, and he was going uphill. Q. And you thought the car would stop, and therefore you took your chances? A. Yes, sir. Q. Was the car stopping? A. No, sir. Q. You thought it might stop? A. Yes, sir. Q. And still you say the car was coming faster and faster? A. Yes, sir. Q. And yet you crossed in front of it? A. Yes, sir. Q. And when your horses' heads entered on that west-bound track the car was fifty or sixty feet away? A. Yes, sir. Q. When you got to this first track, when you saw that this car was going faster and faster, why didn't you stop, and let it go by, not drive right in front of it? A. I couldn't stop it any more. Q. Why didn't you drive it in such a way that when you saw a car coming you could stop it? A. There was no brake on the wagon. Q. Why didn't you drive your wagon so that when you saw a car you could stop? A. I couldn't stop it any more. Q. In other words, whenever you drove down there you had to take your chances? A. I'd been across if they had slacked up anyways, but they still came faster. Q. When you got down here to this crossing, and saw this car, you could have stopped your wagon then? A. It was near the crossing when I saw it. Q. When you got near the crossing, you could

Roefeldt v. St. Louis & S. Ry. Co

have stopped it then? A. Yes, sir. Q. When you saw this car coming sixty miles an hour, why didn't you stop? A. I thought I could get across easy enough. I could have if it slowed up. Q. You thought you could get across? A. Yes, sir. Q. Did you have a brake for that wagon? A. No, sir. Q. When you got to the first track the grade is even? A. Yes, the tracks are about level. Q. And when you get across the tracks the grade goes up? A. Yes, sir." The testimony of the other witnesses in plaintiff's behalf was to the effect that the car was going at the rate of 9 or 10 miles an hour. It was admitted by the parties that it was lawful for defendant to run its car at a rate not to exceed 10 miles an hour. The testimony for defendant also was that the car was running at the rate of 9 or 10 miles an hour, and that that was the usual speed of defendant's cars on that part of the city. The plaintiff's witnesses differed in their several estimates as to the distance the car was from the point of contact when the horses of plaintiff stepped on the north track. The estimates ranged from 50 to 108 feet. Nathan Daly saw the collision from the northwest corner of the streets. He said that when the horses reached the south crossing—that is, the crossway from the southeast to the northwest corner—the car was at Nineteenth street, and when the horses reached the north track the car was 35 feet east of the east crossing. He also said that at that time there were two men on the front platform—one the motorman, and the other a man who was being taught to be a motorman. When he first saw them, the motorman was standing behind the one who was being instructed, and when the car got within 35 feet of the east crossing the front man turned around, and the two began talking, and neither looked to the front. John A. Long, who was a passenger in the car, and was noticing the wagon, estimated that at the moment the plaintiff started to drive over the south track the car was 250 feet distant. When the horses stepped on the north track the car was 50 or 75 feet away. "Q. Don't you know that you felt, when the horses went on the track, that there would be a collision? A. Most decidedly. We were all expecting it. Q. You were all expecting it as soon as you saw the horses enter on the track? A. As soon as we saw the horses enter on the track and the car coming at that rate. Q. You knew, when the horses went on the track, that there would be a collision? A. Yes, sir, certainly, at the rate the car was going." Stahl was standing in the saloon, and witnessed the accident. According to his testimony the horses went upon the north track just as the car had passed the east end of the saloon. Hackett was standing on the northeast corner of the streets; was aiming to cross Wash street, but, seeing the car approaching, waited for it to pass. He said that when he saw the plaintiff approach the crossing from the other side the car was about 200 feet distant, and when the horses were

about to step on the north track the car was 108 feet away. He felt sure of this distance, because, after the accident, thinking he might be called to testify, he measured the distance by stepping. Sanders witnessed the accident from inside the house on the northwest corner. He estimated that when the horses were on the north track the car was 20 feet east of the crossing. The car, after striking the wagon, stopped in Twentieth street. Speckmann saw the accident from a point on the northeast corner, and was of the opinion that when the plaintiff reached the south crossing of Wash street the car was 250 feet away, and when the horses' feet got on the north track it was 100 feet away. Whelan, who was the conductor of the car, but was plaintiff's witness, testified that the car approached Twentieth street at its usual rate—about 10 miles an hour; that he was standing on the rear platform; that there were 64 or 65 passengers in the car; that about midway between Nineteenth and Twentieth he heard the gong sound, and felt the reverse applied. He then looked out on the north side, and saw the wagon crossing the track. Plaintiff's testimony also tended to show that a car under the given conditions going at the rate of 9 or 10 miles an hour could be stopped by the reverse in 40 to 50 feet, and by the brake in 60 to 75 feet. If it was going faster, the distance in which it could be stopped would be proportionately greater. At 12 miles it could be stopped by the reverse in 75 feet. At 15, 100 feet, etc., and by use of the brake a proportionately longer space. Plaintiff also introduced in evidence the city ordinance pleaded in the petition, and evidence that the defendant had accepted and agreed to be bound by it.

On the part of defendant the testimony tended to show: That, in addition to the regular motorman in charge of the car was a man named Black, who had served as motorman for a company in Illinois, but was being instructed in regard to the streets and grades with a view to being qualified to take charge of a car on this line. He had been thus engaged six days, and was ready to take a car. When the car was about 100 feet east of Twentieth street, the plaintiff was driving slowly towards the tracks, and Black sounded the gong. As the team approached the north track, and before entering it, the car was 35 or 40 feet distant. Black then applied the brakes, and the regular motorman reversed the current. The car slid against the wagon, and stopped just where it struck it. The car was about 35 feet long, and weighed 14 or 15 tons. There were about 60 passengers aboard. Some of the passengers testified that they heard the violent sounding of the gong, felt the effect of the brakes and the reverse applied, which "threw the people every way"; that the wheels slid on the rails, and there was a perceptible slacking of the speed before the car came in contact with the wagon. The car, under the conditions named, could not have been stopped in a shorter space than 75 or 85 feet.

At the close of the plaintiff's evidence, and again at the close of all the evidence, the defendant asked an instruction in the nature of a demurrer to the evidence, which the court refused, and exceptions were duly preserved. The cause was submitted to the jury under instructions to the effect that if the jury should find from the evidence that, if the motorman had kept a vigilant watch for vehicles, he would have seen the horses and wagon on the track in danger of being struck by the car, and that if, after so seeing the horses, and seeing the plaintiff in that position of peril, the motorman could, by stopping the car in the shortest time and space possible under the circumstances, have averted the accident, yet failed to do so, the verdict should be for the plaintiff, provided the jury should also find that the plaintiff was himself at the time exercising ordinary care; and that, even though the jury should find that the plaintiff was guilty of negligence in driving on the railroad track as he did, yet if the motorman saw the plaintiff's perilous condition, or by the exercise of ordinary care would have seen it, and knew, or by the exercise of ordinary care would have known, that the plaintiff was in danger of being injured unless the car was stopped or slackened in speed, yet the motorman failed to stop or slacken the speed of the car in the shortest time and space possible, still the defendant was liable if the jury also believed from the evidence that the defendant had accepted and agreed to be bound by the ordinance in evidence. The court, of its own motion, instructed the jury that nine or more of their number might render a verdict. We deem it unnecessary to set out the instructions given for defendant, or those refused which defendant requested. There was a verdict for plaintiff by eleven of the jurors for \$5,000. When the court came to consider the defendant's motion for a new trial, it announced that the motion would be sustained unless the plaintiff should remit \$1,665 of the verdict. The plaintiff entered the remittitur. The motion was then overruled, and judgment entered for the plaintiff for \$3,335, from which the defendant appeals.

1. The defendant, in its motion for a new trial, raised the question of the constitutionality of the law authorizing nine of a jury in a civil case to render a verdict, and, as the appeal was taken before this court had settled that question, the appeal was properly taken to this court. Since the decision in *Gabbert v. R. R.*, 171 Mo. 84, 70 S. W. 891, that is no longer a question in this state, but, as it was a question when this appeal was taken, the court retains its jurisdiction. The only new idea in connection with that subject that is advanced in the brief of counsel in this case is that, as this action was begun and the issues joined prior to the adoption of the constitutional amendment, the cause could be tried only under the mode of procedure existing when the suit was brought or the issues were joined, and therefore

the constitutional amendment authorizing nine of the jury to render a verdict does not apply to this case. No one has a vested right to have his cause tried by any particular mode of procedure. The state has the sovereign power to prescribe the mode of trying causes in its courts, and to alter the same from time to time as it may see fit. If the mode is prescribed by an act of the General Assembly, it may be changed by an act of the General Assembly; if it is prescribed by the Constitution, it may be changed by the power which makes the Constitution. The learned counsel for appellant have advanced no argument in support of the proposition, and for that reason we are satisfied there is no argument to support it.

2. As the plaintiff approached Wash street he looked towards the east, and saw this car coming. It was then, according to his estimate, 250 feet distant. The house on the southeast corner was 21 feet from the south curb, which gave the plaintiff an unobstructed view of the approaching car. From a point 45 feet south of the south track to that track there was a downgrade of 3 per cent.; then the road was level across the two tracks. When asked why he did not stop when he saw the car coming, he said that he had no brake on his wagon, and for that reason could not stop. A grade of 3 per cent. is not a precipitous declivity, and the course of the plaintiff shows that the grade had no influence on his movement. He said that he was going in a slow walk, not over three miles an hour. If he was able to travel at that slow gait, without a brake, down the grade, he could have stopped his horses when he came to the level, or at least he could have directed their course to the right or the left. He said that when he came to the crossing he could have stopped, but he made no effort to do so; he thought he could get across, and he drove on. He was guilty of negligence that at least contributed to the accident.

But the theory of the plaintiff's case, as shown in his petition, his evidence, and the argument in his brief, is that, admitting that the plaintiff, through his own negligence, put himself in a position of peril, yet the case falls within the exception to the rule that one cannot recover for injuries received in consequence of his own contributory negligence. The exception to the rule is that when the defendant sees (or, in some cases, when, by the exercise of ordinary care, he might see) the plaintiff in a position of peril, and with the means then at hand is able, by the exercise of ordinary care, to avert the injury, but neglects to do so, he is liable. Under those circumstances the defendant is adjudged guilty of such reckless or wanton disregard of human life or limb that he is not exonerated by showing that the plaintiff was also negligent. Is there anything in the evidence in this case to show such a reckless or wanton disregard of duty on the part of the defendant's servants in charge of this car? Is there any

evidence tending to show that, after the motorman or motormen saw the plaintiff in peril, they could have stopped the car in time to avert the catastrophe? There is no question about the motormen seeing the plaintiff. They both testified that they saw him when the car was 100 feet east of Twentieth street, and that he was driving, as he himself said, slowly towards the tracks. He was in plain view to the motormen, and the car was in plain view to him. The motormen said they rang the gong violently, but that is immaterial. The plaintiff did not need the gong to call his attention to the approaching car, for he saw it, and noticed that it was coming very rapidly, yet he drove slowly on. He says that he did not stop because he had no brake on his wagon. If that is true, it implies that, if he had had a brake, he would have stopped. This he said apparently in excuse for doing an imprudent act. The situation was such as would have suggested to any man of ordinary prudence to stop until the rapidly moving car had passed; just as the plaintiff's witness Hackett did. Mr. Long, a witness for plaintiff, who was a passenger on the car, and was a close observer of the situation, said that as soon as he saw the horses enter on the track "we all expected" the collision. It was obvious to all that the collision would occur if the man did not stop. Under those circumstances the motormen had a right to presume that the plaintiff would stop. If there was any truth in the statement that the plaintiff could not stop because there was no brake on the wagon, that fact was not known to the motormen. There was nothing to indicate to them that the plaintiff did not have control of his wagon, and they had a right to act on the presumption that he would do what common prudence dictated for his own safety. But the plaintiff's argument is that, after the horses got on the north track, and plaintiff's peril was then obvious, the motormen could have stopped the car if they had used the effort that the ordinance required. Appellant meets this argument by saying that, if the car was going as fast as the plaintiff says it was (at 30 miles an hour when he first saw it, and increased to 60 miles an hour), it was impossible, according to all the evidence, to have stopped it in time to have prevented the collision. That is so. But the car was not going 60, or even 30, miles an hour; it was going between 9 and 10 miles an hour. All the witnesses except the plaintiff himself—those for defendant as well as for plaintiff—say the rate was 9 or 10 miles an hour.

Plaintiff's witnesses do not agree as to the distance the car was from the point of collision when the horses entered the north track. Mr. Long said it was from 50 to 75 feet, and he said that when the horses got on the track the car was then going so fast that the collision was inevitable. The car was full of passengers. The law makes their safety the motorman's first care. One of plaintiff's witnesses, who was

on the car, says that before it reached Twentieth street the shock caused by the application of the brakes or the reverse of the motor was felt, and that the wheels slid on the rails. This is plaintiff's testimony, and from it or in the face of it, the jury were authorized under the instructions to find that the defendant was liable notwithstanding the plaintiff's own negligence. That was error. The plaintiff's witnesses on this point put him in this situation: If he selects the shortest distance given by any of them, his expert testimony shows that the car would not have been stopped in time within that space; if he takes the average or medium estimate, the most favorable claim he can make is that the possibility of stopping in time was doubtful (which falls far short of showing a case of reckless or wanton misconduct on the part of the motormen); and, finally, if he takes the longest distance, it leaves the motormen room to judge that the wagon would clear the track before the car could reach it. Hackett says the distance was 108 feet, and the learned counsel for respondent thinks that is the most reliable estimate. The length of the plaintiff's outfit, horses and wagon, is not given, but it would perhaps not be assuming too much if we should say it was not more than 25 feet. So that, after the horses' front feet were on the north track, they had not more than 25 feet to travel to clear the track, and while they were going that distance the car, according to Hackett, had to go 108 feet. The evidence was the horses were going 3 miles an hour and the car between 9 and 10. Thus, while the car was going three times as fast as the horses, it had more than three times the distance to travel. The plaintiff, seeing the car and the speed with which it was coming judged for himself that he could clear the track before the car reached him. If that was a reasonable judgment for the plaintiff, how can he condemn the motorman if he, viewing the same situation, should reach the same conclusion. The plaintiff was guilty of negligence which contributed to his injury, and there is nothing in the evidence tending to show that the motorman could have stopped the car in time to have prevented the collision, after the plaintiff had put himself in the position of peril. The defendant's instruction in the nature of a demurrer to the evidence should have been given.

The judgment is reversed. All concur.

HIGBY et al. v. PENNSYLVANIA R. CO. et al.

(Supreme Court of Pennsylvania, June 15, 1904.)

[58 Atl. Rep. 858.]

Trespassers on Cars—Arrest—Police Officer in Service of Railroad—Scope of Employment.*

Act May 24, 1878 (P. L. 125) § 1, as amended by Act June 11, 1879 (P. L. 152), provides that any person entering on any railroad engine or car with the intention of riding without paying fare shall be punished, and that any constable or police officer shall have authority to arrest such offender: *held*, that a special police officer in the service of a railroad company acts within his authority when he arrests a person who has jumped off a car on which he has been a trespasser and is in the act of escaping.

Appeal—Joint Judgment.

Plaintiff sued a railroad company and a special police officer in its service to recover damages sustained by plaintiff by the act of the officer in shooting plaintiff while the latter was escaping from a car on which he had trespassed. A nonsuit was entered as to the railroad company on the ground that the officer was not acting within the scope of his authority, but judgment was rendered against the officer: *held* that, as in the joint action the plaintiff has one verdict, which neither he nor defendant asks to have disturbed, the Supreme Court cannot reverse the judgment of nonsuit, though it may be of the opinion that the officer was acting within the scope of his authority.

Appeal from Court of Common Pleas, Warren County.

Action by N. S. Higby and Charles A. Higby against the Pennsylvania Railroad Company and John Gallagher. From an order refusing to take off a nonsuit, plaintiffs appeal. Affirmed.

Argued before MITCHELL, C. J., and BROWN, MES-
TREZAT, POTTER, and THOMPSON, JJ.

J. W. Dunkle and G. B. Munn, for appellants.

J. Ross Thompson, for appellees.

BROWN, J. Charles A. Higby, one of the appellants,

*As to whether railroad companies are liable on account of arrests or prosecutions made or instigated by their employees or agents, see footnote appended to *Gallegly v. Kansas City, etc., R. Co.* (Miss.), 10 R. R. R. 272, 33 Am. & Eng. R. Cas., N. S., 272 (carriers of passengers); *Tucker v. Erie Ry. Co.* (N. J.), 7 R. R. R. 774, 30 Am. & Eng. R. Cas., N. S., 774 (liability of railroad company for false arrest and malicious prosecution instituted by railway policeman); *Wikle v. Louisville & N. R. Co.* (Ga.), 6 R. R. R. 333, 29 Am. & Eng. R. Cas., N. S., 333 (insufficiency of evidence to show that station agent was acting within scope of his employment in procuring arrest of person loitering around station); *Texas & P. Ry. Co. v. Cope* (Tex.), 3 R. R. R. 906, 26 Am. & Eng. R. Cas., N. S., 906; *Texas & P. Ry. Co. v. Parker* (Tex.), 3 R. R. R. 906, 26 Am. & Eng. R. Cas., N. S., 906 (false imprisonment of person using car as refuge from weather, scope of employment); *Southern Ry. Co. v. Gresham* (Ga.), 1 R. R. R. 509, 24 Am. & Eng. R. Cas., N. S., 509 (right of conductor to cause arrest of person guilty of misdemeanor in stealing ride); notes, 12 Am. & Eng. R. Cas., N. S., 183, 20 Am. & Eng. R. Cas., N. S., 446 (liability of railroad company for illegal arrest made by employee).

Higby v. Pennsylvania R. Co

and a minor son of the other, with six or eight companions, was trespassing on a freight train belonging to the Pennsylvania Railroad Company. When it stopped at a station called "Hemlock," the boys jumped off, young Higby being the last to do so. They started to run up the track, evidently apprehensive of arrest by John Gallagher, a special police officer in the service of the railroad company. When young Higby started to run some one hallooed to him. Turning around to see who it was, he was shot by Gallagher. The latter, called by the plaintiff, as if on cross-examination, admitted that he was following Higby to arrest him. A compulsory nonsuit was entered as to the Pennsylvania Railroad Company on the ground that Gallagher was not acting within the scope of his employment when he tried to arrest Higby. The trial proceeded, and a verdict was returned against Gallagher for \$400 in favor of the father and \$2,000 in favor of the boy.

In entering the judgment of nonsuit and refusing to take it off, the learned trial judge held that, as the boy was not actually on the train, or getting on it, when the officer attempted to make the arrest, he had no authority to do so, and was therefore acting beyond the scope of his employment, which confined him to what he was authorized to do by the act of assembly. The first section of the act of May 24, 1878 (P. L. 125), as amended by the act of June 11, 1879 (P. L. 152), provides "that any person found entering, or being in or upon, any railroad engine or car, whether the same be passenger, freight, coal or other car, on any railroad in any city or county in this commonwealth, contrary to the rules of the person, or persons or corporations owning or operating the same, and with the intention of being in or upon, riding or traveling upon, such engine or car, without paying fare, or of committing larceny," etc., shall, upon a summary conviction before a magistrate, be subjected to certain penalties. The second section directs that "any constable or police officer, having knowledge or being notified of any violation of this act, shall forthwith arrest such offender and take him before any magistrate, alderman or justice of the peace, or any such magistrate, alderman or justice of the peace shall issue a warrant or capias for the arrest of any such offender, upon information duly made on oath or affirmation," and thereupon there shall be a proper hearing. Found entering or being in or upon an engine or car with the intention of not paying fare, or of doing one of the things specified in the act, is the offense for which the trespasser can be arrested and punished. When he commits it, he is not exempt from apprehension and punishment simply because he is not detected and taken by the officer while in the actual commission of it. When the offense is committed any constable or police officer having knowledge of it, or having been notified of it, may do one of two things: He may,

Higby v. Pennsylvania R. Co

without a warrant, proceed forthwith to arrest the offender while in the commission or after the commission of the act, and take him before a magistrate; or he may first go and procure his warrant, if, under the circumstances, such be the wiser course. Unless there was this alternative to arrest without a warrant, in most cases the offenders—generally tramps—would be far away from the scenes of their trespasses and depredations before they could be apprehended, and the act would be a dead letter. Literally read, however, it cannot have the interpretation put upon it by the court below—that it gives constables and police officers authority to make arrests without a warrant “only when the person is found in the act of violating the statute.” Even if it is to be so interpreted, Higby manifestly was found in the act of violating the statute when he and his companions jumped from the train and started to run away from the officer who tried to arrest them. Nothing could be clearer than the statutory authority of Gallagher to pursue and arrest him after he left the train, and that officer was, therefore, acting within the scope of his employment by the appellee when he attempted to apprehend the appellant. Though he was acting within that scope in trying to make the arrest, we need not decide whether, under the circumstances, his conduct in shooting was such as would make the appellee liable under the rule *respondeat superior*, for, as this record stands, the judgment of nonsuit cannot be reversed and a *procedendo* awarded.

The plaintiffs brought their joint action against the Pennsylvania Railroad Company, the master, and John Gallagher, its servant, as joint tortfeasors. Whether such an action can be maintained is not the question now before us. We only know from the record that the plaintiffs are attempting to hold the two defendants jointly. When the judgment of nonsuit was entered against the one, they elected to proceed against the other, and obtained a verdict, giving the father \$400 and the son \$2,000. If the defendants are jointly liable in this joint action against them, the same jury must pass upon their liability, and there can be but one verdict on which judgment can be entered against them. If the nonsuit as to the appellee was properly entered, it cannot be disturbed; and if, on the other hand, improperly entered, on the ground that there was no liability on the part of that defendant, if we reverse the judgment refusing to take it off, how can we award a *procedendo*? In this joint action the plaintiffs now have one verdict, which neither they nor the defendant ask to have disturbed, and they cannot have another in it. If there should be further proceedings directed against the appellee, which, if liable at all in this action, is jointly so with its codefendant, what might the verdict be against it? It is hardly conceivable that it would be the same in amount as the one rendered against Gallagher, and,

Sanger v. Chesapeake & Ohio Ry. Co

if different, the record would present the spectacle of a joint suit against two alleged joint tortfeasors jointly liable to the plaintiffs for but one sum, and yet there would be different judgments for different amounts against these same joint defendants. To void the anomalous record that would follow a reversal of this judgment, it will not be disturbed.

Judgment affirmed.

SANGER *v.* CHESAPEAKE & OHIO RY. CO.

(Supreme Court of Appeals of Virginia, Nov. 19, 1903.)

[45 S. E. Rep. 750.]

Jurisdiction—Amount in Controversy.

Where the claim asserted is sufficient to confer jurisdiction on the Supreme Court of Appeals, and it is not made to appear that the claim is merely colorable, that court cannot say, as a matter of law, that a part of the claim is not recoverable, but the presumption is that it is made in good faith; the right to its recovery to be determined from the facts proven.

Killing Stock—Duty to Fence—Application of Statute.

Code 1887, § 1258, requires railroad companies to erect along their lines and on both sides of their roadbeds, "through all enclosed lands or lots," lawful fences, etc. The United States Circuit Court of Appeals, in construing this section, held that it was for the protection of adjoining landowners, only, whereupon the Legislature (Acts 1897-98, c. 283) amended the section by striking out the quoted words: *held*, that the amendment extended the requirements of the statute to all lands, inclosed and uninclosed, and hence, for the neglect of the duty, a railroad is liable to a stock owner for the killing of his stock, though he owned no land on the road either at the place where the stock went on, nor at the place where they were killed.

Same—Same—Same—Exceptions.

Code 1887, §§ 1258, 1259, as amended by Acts 1897-98, cc. 250, 283, requires railroads to fence their roadbeds at all points except certain enumerated ones, among which are where a company has compensated the owner for making and keeping in repair the necessary fencing, but the burden of proving such compensation is imposed on the company: *held*, that the exception does not release a railroad from the duty of fencing its right of way, but merely gives it a defense to an action by the compensated landowner for stock killed.

Same—Same—Defenses—Trespassing Stock.

A railroad cannot defend an action against it for the death of stock on the theory that the stock were trespassing on its property, and hence that their owner could not invoke the provisions of Code 1887, c. 1258, as amended by Acts 1897-98, c. 283, requiring railroads to fence their rights of way.

Same—Same—Police Power—Constitutional Law.*

Code 1887, §§ 1258, 1259, as amended by Acts 1897-98, cc. 250, 283, requiring railroads to fence their rights of way, is a valid exercise of the police power of the state.

*See note appended to *Beckstead v. Montana Union Ry. Co.* (Mont.), 9 Am. & Eng. R. Cas., N. S., 273; *Grand Island & W. C. R. Co. v. Swinbank* (Neb.), 9 Am. & Eng. R. Cas., N. S., 870; *Terre Haute & L. Ry. Co. v. Salmon* (Ind.), 9 R. R. R. 349, 32 Am. & Eng. R. Cas., N. S., 349 (Indiana statute authorizing adjoining land owner to fence railroad track upon failure of the company to do so after thirty days' notice, and to recover expenses, including attorney's fees, from the company, is a

Sanger v. Chesapeake & Ohio Ry. Co

Error to Circuit Court, Augusta County.

Action by Samuel L. Sanger against the Chesapeake & Ohio Railway Company. There was a judgment sustaining a demurrer to the complaint, and plaintiff brings error. Reversed.

S. D. Timberlake and J. M. Perry, for appellant.

R. L. Parrish & Son, for appellee.

CARDWELL, J. This action was brought by Samuel L. Sanger to recover of the Chesapeake & Ohio Railway Company damages to the amount of \$500 alleged to have been sustained by the plaintiff by reason of the killing of three of his horses by a train of the defendant.

The declaration contains two counts, averring that the values of the animals killed are as follows: One black horse, \$130; one brown mare, \$175; one gray mare, \$150; total, \$455; and at the close of each count there is the further averment to the effect that the plaintiff is also entitled to the sum of \$45 for being deprived of the use of the horses, and the total damages claimed are \$500; the negligence alleged being the failure of the defendant to erect and maintain a fence at the point where the horses were killed.

The defendant demurred to the declaration upon two grounds: (1) That the declaration does not aver that the plaintiff was the owner or occupant of the land at the place at which the horses entered upon the defendant's railroad, and that the provisions of section 1258 of the Code of 1887, and the acts amendatory thereof, were solely and exclusively for the benefit and protection of adjoining landowners; (2) that the defendant was under no obligation to fence its track at any point where the same adjoined a public highway.

The demurrer was sustained, and to this judgment of the circuit court the case is before us upon a writ of error awarded by one of the judges of this court.

It is insisted by counsel for defendant in error that this court has no jurisdiction, as the measure of plaintiff in error's damages is \$455, with interest thereon from the date of the killing of the horses, May 20, 1902, and therefore less than \$500, since the sum of \$45, which the declaration avers he ought to have for loss of the use of the horses, cannot be recovered.

As observed, the total damages claimed by the plaintiff is \$500, the amount necessary to confer upon this court jurisdiction.

valid exercise of the police power); *Sleadd v. Southern Ry. Co.* in Kentucky (Ky.), 19 Am. & Eng. R. Cas., N. S., 131 (constitutionality of statute requiring company to pay entire cost of division fences where right of way is donated); *Kingsbury v. Missouri, etc., Ry. Co.* (Mo.), 19 Am. & Eng. R. Cas., N. S., 719 (constitutionality of statute allowing double damages for injury to stock from failure to fence).

Sanger v. Chesapeake & Ohio Ry. Co

In *Hawkins v. Gresham*, 85 Va. 34, 6 S. E. 472, it is held that the matter in controversy is that for which suit is brought or for which the judgment is rendered, and not that which may or may not come in question. And in *Cox v. Carr*, 79 Va. 28, the rule stated as controlling the determination of the question of jurisdiction where the claim sued on is a money demand is: "If the claim be merely colorable in order to give the court jurisdiction, and that was made to appear, jurisdiction would be declined, for jurisdiction can no more be conferred than it can be taken away by improper devices of parties. *Hansbrough, etc., v. Stinnett*, 22 Grat. 593."

It follows, therefore, that when the claim asserted is of amount sufficient to confer jurisdiction upon this court, and it is not made to appear that the claim is merely colorable, we are not warranted in saying, as a matter of law, that the \$45 claimed for the loss of the use of the horses killed, and as a part of the total demand made of \$500 as damages, is not recoverable; the presumption being that the claim is made in good faith, and the right to its recovery is to be determined from the facts proven. As well said by counsel for plaintiff in error, if the object in claiming the \$45 for loss of the use of the horses killed was merely to increase the amount of the damages sued for to the minimum amount necessary to confer jurisdiction upon this court, the estimated value of the horses could easily have been increased to that amount.

The question presented on the demurrer is whether or not a railroad company is liable to the owner of stock killed or injured on its track by one of its trains, who owns no land either at the point where the stock is killed or injured, or at the point where it comes onto the company's track, or the right of way on which the same is constructed, when the only negligence alleged by the plaintiff is the failure of the railroad company to fence its roadbed is required by the provisions of section 1258 of the Code of 1887, as amended by the act of February 9, 1898 (Acts 1897-98, p. 313, c. 283), qualified by section 1259 of the Code of 1887, as amended by the act of February 8, 1898 (Acts 1897-98, p. 279, c. 250), and the decision of this question turns upon the construction to be given those statutes.

Section 1258, as amended, is as follows:

"Sec 1258. To Enclose Roadbeds with Fences; Cattle Guards. Every such company shall cause to be erected along its line and on both sides of its roadbed lawful fences as defined in section two thousand and thirty-eight, which may be made of timber or wire, or both, and shall keep the same in proper repair, and with which the owners of adjoining lands may connect their fences at such places as they may deem proper. In erecting these fences the company shall, at the termini of those portions of its roadbed which it is required to fence, and on each side of all public and private crossings,

Sanger v. Chesapeake & Ohio Ry. Co

construct across its roadbed and keep in good repair sufficient cattle guards with which its fences shall be connected. Such cattle guards at private crossings may, with the consent of the owners of said crossings, be dispensed with, the company in lieu of cattle guards erecting and keeping in good order sufficient gates. But no court of this commonwealth shall have jurisdiction by writ of mandamus or otherwise to compel the erection of such fences, or building such cattle guards."

Section 1259, as amended, is as follows:

"Sec. 1259. * * * The preceding section so far as it relates to fencing shall not apply to any part of a railroad located within the corporate limits of a city or town, or *between the terminals of the switches*, either way, from the company's depots, nor to any part of a railroad at a place where there is a cut or embankment with sides sufficiently steep to prevent the passage of stock at such place; nor shall it apply to a company which has compensated the owner for making and keeping in repair the necessary fencing, but the burden of proving such compensation shall be upon the company, and no report of any commissioners shall be received as proof thereof, unless it shall plainly appear on the face of the report, or from other evidence in connection thereof, that an estimate was made by such commissioners for the fencing, and the expense of the same entered into and constituted a part of the damages reported and actually paid."

In section 1258, as originally enacted, and as adopted into the Code of 1887, c. 52, after the words "Every such company shall cause to be erected along its line and on both sides of its roadbed," the words "through all enclosed lands or lots," followed. Therefore the material change made by the amendment above set out is the omission of the words "through all enclosed lands or lots."

The only change made in section 1259 by the amendment thereof supra is in the insertion of the words italicized, viz., "or between the terminals of the switches," in lieu of "nor within an incorporated town for the distance of one-quarter of a mile" either way from the company's depots, and this amendment is not material in the consideration of this case; nor does the amendment to section 1258 of February 15, 1900 (Acts 1899-1900, p. 393, c. 373), effect the issue.

The decision of the United States Circuit Court of Appeals at Richmond, Va., in *Carper v. N. & W. R. Co.*, 78 Fed. 94, 23 C. C. A. 669, 35 L. R. A. 135, is greatly relied on by defendant in error in support of the contention that the benefit and protection conferred by section 1258 of the Code of 1887 is limited exclusively to such stock owners as are also the owners or occupants of lands adjoining a railroad's right of way; but the argument here, and that in support of the decision referred to, loses its force, since the Legislature, by the amendment of section 1258, supra, has imperatively

Sanger v. Chesapeake & Ohio Ry. Co

required railroad companies to erect and maintain fences along their lines, and on both sides of their roadbeds, except at the points mentioned in section 1259, as amended, *supra*, unless the proviso in the last-named section, that the first named shall not "apply to a company which has compensated the owner for making and keeping in repair the necessary fencing," restricts its provisions to the benefit and protection merely of the adjoining landowners.

The plain object and purpose of section 1259 is to specify what points, and what points alone, along the right of way of a railroad company, are to be excepted from the operation of section 1258; and, while section 1259 provides that section 1258 shall not apply to a company which has compensated the owner of adjoining lands "for making and keeping in repair the necessary fencing," it does not release the company from its duty to fence its right of way as required by the provisions of section 1258, but merely gives to the company the right of defense against such adjoining landowner in an action by him to recover damages for stock killed or injured upon the right of way of such railroad company. In such an action section 1259 provides that the defendant company may make the defense that it has compensated the plaintiff for making and keeping in repair the necessary fencing which the railroad company was required to erect and keep in repair under the provisions of section 1258. Such was the case of *Tonawanda R. Co. v. Munger* (N. Y.) 49 Am. Dec. 272. But such a defense cannot be availed of in an action to recover damages for stock killed or injured, brought by a plaintiff not owning the land adjoining the defendant's right of way at the point where the stock passed onto the track of the defendant, and it has neglected the duty of fencing its roadbed at that point.

Immediately following the decision in *Carper v. N. & W. R. Co.*, *supra*, which held, as we have observed, that section 1258 of the Code of 1887, as it originally stood, was for the protection of the adjoining landowners alone, the amendment of that section mentioned above was enacted by the Legislature, the effect of which, as we construe it, is to extend the requirements of the statute to all lands, inclosed and uninclosed, which adjoin a railroad's right of way. The constitutionality of the statute has never been questioned in this court, but very similar statutes have been reviewed in the courts of other states, as well as in the United States Supreme Court, and in each instance the statute has been upheld on the ground that it was an exercise of the police power of the state.

In *Mo. Pac. R. Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. E. 463, the statute of Missouri requiring railroad companies to erect fences, cattle guards, etc., and, until they did so, to pay the stock owners double the value of stock killed, came under review; and it was held not to be in con-

Sanger v. Chesapeake & Ohio Ry. Co

dict with the Constitution of the United States, on the ground that it was enacted in the exercise of the police power of the state. See, also, *Rozzelle v. Hannibal, etc., R. Co.*, 79 Mo. 349; *Ill. Cent. R. Co. v. Trowbridge*, 31 Ill. App. 190.

In *Indiana, etc., R. Co. v. Guard*, 24 Ind. 222, 87 Am. Dec. 327—a case very similar in its facts to the case at bar—it was held that an act requiring railroads to fence is in the nature of a police regulation designed to promote the security of persons and property passing over the road, and hence, though the owner of the animal be not an adjoining proprietor, and be guilty of negligence in permitting it to stray upon the land adjoining the road, he may recover, if the company has failed to comply with the requirements of the statute. In the opinion it is said: "The law requiring railroad companies to fence their tracks is a police regulation for the benefit of the public, and therefore the fact that a railroad runs alongside of a public highway would seem to require peculiar care on the part of the company in complying with the law." See, also, *New Albany, etc., R. Co. v. Tilton*, 12 Ind. 3, 74 Am. Dec. 195, and note and authorities cited at page 200.

"Where a railway's right of way runs parallel to a highway, the erection of a fence is required, unless its erection would destroy the use of the highway as such. And the company is required to erect a fence in such cases, although the entire width of the right of way cannot be inclosed, and a part of it has to be thrown into the highway." *Hannibal, etc., R. Co. v. Rutledge (Mo.)* 19 Am. & Eng. R. Cases, 669. See, also, 3 *Elliott on Railroads*, p. 1833.

"The fact that a public highway runs along the side of the railroad track does not, of itself, show a valid reason why a fence should not be maintained between the road and the track, but rather a stronger reason why the track should be fenced." 2 *Thompson's Com. on Neg.* p. 2055.

The case of *Maynard v. N. & W. R. Co. (W. Va.)* 21 S. E. 733, cited by counsel for defendant in error, holding that the West Virginia statute, identical with section 1258 of our Code of 1887, before its amendment, *supra*, applies to inclosed lands only, like the decision in *Carper v. N. & W. R. Co.*, *supra*, has no application to a case involving the construction of the statute as amended. We are also unable to see the force of the argument for defendant in error that, because the stock in this case strayed from the highway to the railroad track, it was trespassing upon the company's property, and plaintiff in error could not invoke the provisions of the statute requiring the company to fence its track. It was clearly the object of the Legislature, by the amendment to section 1258, *supra*, as we construe it, to afford protection to passengers and property passing over a railroad, and to this end to require fences wherever stock or cattle were likely to

Kansas City Southern Ry. Co. v. Prunty

stray onto the track of a railroad; the section immediately following specifying the points at which it was not deemed necessary to the object in view to fence the track. Such an enactment, being an exercise of the police power of the state for the benefit of the public, is not in conflict with any constitutional inhibition.

We are of opinion that the declaration in this case sets out a good cause of action, and that the demurrer thereto should have been overruled. Therefore the judgment of the circuit court will be reversed and annulled, the demurrer overruled, and the cause remanded, to be further proceeded with in accordance with the views expressed in this opinion.

Reversed.

BUCHANAN, J., absent.

KANSAS CITY SOUTHERN RY. CO. v. PRUNTY.

(Circuit Court of Appeals, Fifth Circuit, October 4, 1904. On Rehearing, December 3, 1904.)

[133 Fed. Rep. 13.]

Federal Courts—Jurisdiction—Duty to Examine Record.

It is the duty of a Circuit Court of Appeals of its own motion to examine the record in a cause brought before it to test its own jurisdiction and that of the court below.

Removal of Cause—Diversity of Citizenship—Sufficiency of Petition.

Where the jurisdiction of a federal court depends upon the citizenship of the parties, such citizenship, and not merely their residence, must be shown by the record; and a right of removal on the ground of diversity of citizenship is not shown by a petition therefor which does not allege the citizenship of the plaintiff, although his petition in the state court alleges him to be a resident of the state in which the action is brought.

Same—Improper Removal—Costs.

Where the judgment of a Circuit Court is reversed by the Circuit Court of Appeals on the ground that the cause was improperly removed from a state court, costs should be awarded against the removing party.

Same—Amendment of Petition in Appellate Court—Jurisdictional Averments.

A Circuit Court of Appeals may properly permit the amendment in that court of a petition for removal by supplying an averment of citizenship requisite to give jurisdiction, where it appears that its omission was inadvertent and it is shown by stipulation of the parties that the requisite diversity of citizenship in fact existed.

Master and Servant—Action for Injury of Servant—Contributory Negligence.*

Plaintiff stood on the footboard at the back of an engine to make a coupling to a car toward which the engine was moved slowly. The drawbar on the car was out of repair, and was not in line with that on the engine, and plaintiff attempted to shove the drawbar on the engine to one side with his foot, so as to meet that on the car, when the engine lurched by reason of a defect in the track, and plaintiff's foot was caught and crushed between the two drawbars. There was evi-

*See note at end of case.

Kansas City Southern Ry. Co. v. Prunty

vidence tending to show that such manner of making a coupling was customary and safe under ordinary circumstances, and that plaintiff would not have been injured if it had not been for the defect in the track; also that there was no rule of the railroad company prohibiting brakeman from going between the cars to make a coupling or requiring the engine to be stopped while the drawbars were moved: *held*, that under the evidence plaintiff could not be said as matter of law to have been chargeable with contributory negligence. Pardee, Circuit Judge, dissenting.

Same—Proximate Cause of Injury.

It is an essential element in contributory negligence to defeat a right of action for an injury that there should be a causal connection between the act charged as negligence and the injury, and when the act and the injury are not known by common experience to be naturally and usually in sequence, and the injury does not according to the ordinary course of events follow from the act, they are not sufficiently connected to make the act a proximate cause of the injury.

Instructions—Sufficiency of Exceptions.

A general exception to a charge, or to a portion thereof containing different propositions, is unavailing, if any of such propositions are correct.

In Error to the Circuit Court of the United States for the Western District of Louisiana.

Samuel W. Moore and J. D. Wilkinson (T. Alexander, on the brief), for plaintiff in error.

J. A. Thigpen, for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This suit was brought in the First Judicial District Court of Caddo parish, La., by Clark Prunty against the Kansas City Southern Railway Company to recover damages for personal injuries received by the plaintiff, who is defendant in error, while acting as a brakeman in the employ of the defendant, who is plaintiff in error. The case was removed to the Circuit Court of the United States for the Western District of Louisiana on the application of the railway company, and was tried before a jury, and verdict and judgment had against the railway company.

There are limits imposed by law to the jurisdiction of the United States courts, and it is an inflexible rule that this court of its own motion should examine the record to test its own jurisdiction and the jurisdiction of the court below. *M., C. & L. M. Ry. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; *Grace v. Amer. Cent. Ins. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932. The ground upon which it was sought to remove this case from the state to the federal court was that it is a case between citizens of different states. No other ground of federal jurisdiction is suggested. The petition for removal was filed by the defendant, the Kansas City Southern Railway Company, and the following is all that the petition contains on the question of the citizenship of the parties:

Kansas City Southern Ry. Co. v. Prunty

"While the defendant is now, and was at the date of bringing said action, and long before, and has always been, a resident and domiciled in the state of Missouri, and is not, nor has it ever been, a resident of the state of Louisiana, or domiciled therein, having only an agent, viz., T. Alexander, of your said parish and state, on whom process might be served; but your defendant was at time of filing this suit a citizen of the state of Missouri, and is still a citizen thereof, residing in the city of Kansas City, of said state of Missouri, and no other, while said plaintiff is a citizen and resident of the state of ———; and your petitioner desires to remove this suit, before the trial thereof, into the next Circuit Court of the United States to be held in the Western District of Louisiana."

A corporation created by and doing business in a state is to be deemed, for the purpose of fixing the jurisdiction, a citizen of such state. It would have been sufficient, therefore, so far as the status of the petitioner was concerned, to have averred that the petitioner was a corporation chartered or organized under the laws of Missouri. But it is not alleged that it is a corporation. It may be a joint-stock company, so far as the averments of the petition are concerned. It is at least doubtful whether the petition is sufficient to show the status of the petitioner so as to affirmatively show federal jurisdiction. In the *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451, it was held that it is not enough, in order to give jurisdiction, to say that the corporation "is a citizen of the state where the suit is brought." See, also, *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207. We do not dwell on this phase of the case, however, because in the petition filed by the plaintiff in the state court declaring his cause of action it is stated that the Kansas City Southern Railway Company is "a corporation organized under the laws of Missouri," and this averment makes the record show the status of the company, and would supply the defect in that regard of the petition to remove.

But the petition entirely fails to show the citizenship of Clark Prunty, the plaintiff suing in the state court. The only averment is that the "plaintiff is a citizen and resident of the state of ———." How the petitioner intended to fill the blank left we have no means of telling. If the petition to remove, aided by the other parts of the record, shows that the petitioner was a corporation organized under the laws of Missouri, it does not affirmatively show that Clark Prunty was not a citizen of Missouri; and if he is a citizen of Missouri the federal court has not jurisdiction of the case. We have carefully examined the record to see if any part of it would supply the defect. We find nothing to show that Clark Prunty is a citizen of a state other than Missouri. In the petition filed in the state court by him stating his cause of action he describes himself as a "resident of Caddo parish,

Kansas City Southern Ry. Co. v. Prunty

Louisiana." But this averment does not supply the defect. When the jurisdiction of a court of the United States depends on citizenship of the parties, such citizenship, and not simply their residence, must be shown by the record. *Abercrombie v. Dupuis*, 1 Cranch, 343, 2 L. Ed. 129; 1 *Rose's Notes*, 177; *Robertson v. Cease*, 97 U. S. 647, 24 L. Ed. 1057; *Mexican Central Ry. Co. v. Duthie*, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. Ed. 715; *Horne v. Hammond*, 155 U. S. 393, 15 Sup. Ct. 167, 39 L. Ed. 197; *Denny v. Pironi*, 141 U. S. 121, 11 Sup. Ct. 966, 35 L. Ed. 657. The record failing to affirmatively show the jurisdiction of the Circuit Court, that court should have remanded the case to the state court.

The cause was improperly removed to the Circuit Court. The costs should be awarded against the party wrongfully removing the cause. *M., C. & Lake M. Ry. Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462.

The judgment of the Circuit Court is reversed, with costs against the plaintiff in error, and the case is remanded to the Circuit Court, with directions to proceed according to law and in conformity to the opinion of this court; and it is so ordered.

On Application for Rehearing.

Heretofore a judgment was entered in this court, reversing the judgment of the Circuit Court, because the record did not show the facts necessary to sustain the jurisdiction of the Circuit Court. Afterwards the following petition for a rehearing and agreement of counsel was filed in this court:

"In the above entitled and numbered cause, now comes the plaintiff in error, and, with the leave of the court and with the consent of the defendant in error, shows unto the court that at the time of filing the petition for removal from the state court to the Circuit Court of the United States for the Western District of Louisiana, it was a corporation organized under the laws of the state of Missouri, and no other, and a citizen of that state, and no other, with its domicile at Kansas City, in said state, and that the defendant, Clark Prunty, was a citizen and resident of the state of Louisiana, and no other, both at the time of filing his said suit and at the time of said application to remove said cause, and still is a citizen of said state; that through an oversight the state in which said defendant had his domicile as aforesaid was left blank in the petition asking said removal, but said diverse citizenship was averred in said petition for removal, and appears from said petition of said defendant in error to the state court, in which he set forth that he was a resident of the state of Louisiana, meaning thereby that he was a citizen thereof, and that your petitioner was a corporation organized under and domiciled in the state of Missouri; and, as a fact, diversity of citizenship still exists, and your petitioner desires to amend his original pleading, so as to conform to the

Kansas City Southern Ry. Co. v. Prunty

facts as existing at the time and still existing. Premises considered, plaintiff in error prays to be permitted to amend its petition for removal herein in this court, so as to show the true facts existing, and asks in the interest of justice that this amendment be allowed in this court, and for general relief.

"J. D. Wilkinson, Attorney for Plaintiff in Error.

"Personally came and appeared J. A. Thigpen, a person to me well known, a resident of the parish of Caddo, state of Louisiana, who stated and declared to me, notary, that he is attorney for the defendant in error in the case of Kansas City Southern Railway Company v. Clark Prunty, above set forth, and that he admits all of the facts stated in the foregoing application to be true, and hereby specially consents that the court permits said amendment to be filed and considered a part of the record on appeal in said case, and he hereby consents on the part of said Clark Prunty that the court consider the merits of said cause, because he admits as a fact that the diverse citizenship of the parties to said suit did exist at the time of filing said suit and at the time of filing said petition for a removal thereof, and still exists.

"In testimony whereof, he has hereunto affixed his name in presence of the attesting competent witnesses on this, the 5th day of October, 1904.

"J. A. Thigpen, Attorney for Clark Prunty.

"E. F. Thigpen, Notary Public.

"Attest: J. C. Pugh,

"J. M. Foster.

"State of Louisiana, Parish of Caddo.

"Personally appeared J. D. Wilkinson, a person to me well known, who, being by me duly sworn, says that he is the attorney for the Kansas City Southern Railway Company, plaintiff in error in the above entitled and numbered cause; that he has read the application aforesaid, hereto attached; and that all the facts stated therein and allegations made therein are true and correct, to his own knowledge.

"Sworn to and subscribed before me this the 6th day of Oct., 1904.

"J. D. Wilkinson.

"John F. Slattery, Notary Public."

SHELBY, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

Both parties having appeared in this court and agreed in writing that the defective allegation of citizenship be amended, it is proper, we think, under the circumstances, to permit the amendment to be made. *Kennedy v. Georgia State Bank*, 8 How. 586, 12 L. Ed. 1209; *Fletcher v. Peck*, 6 Cranch, 126, 3 L. Ed. 162; *Fitchburg Railway Company v. Nichols*, 85 Fed. 869, 29 C. C. A. 464. The record being amended, so as to remove the defect pointed out in our former

Kansas City Southern Ry. Co. v. Prunty

opinion, the application for a rehearing is allowed, and the judgment heretofore rendered by this court, reversing the judgment of the Circuit Court, is set aside.

The cause has been argued orally by counsel for both parties, and also submitted on briefs, and we now proceed to examine the case on its merits. This is an action for damages for personal injuries received by Clark Prunty, the plaintiff in the court below and the defendant in error here (who will be referred to hereafter as the plaintiff), while engaged in the performance of his duty as an employee of the plaintiff in error, the Kansas City Southern Railway Company (which will be referred to hereafter as the railway company). The following excerpt from the petition briefly describes the way in which the injury occurred:

"In undertaking to couple said car to his said train, after it had been placed on the main line, the engine drawing the train on which the petitioner was employed was backed toward said car in order to make said coupling, and that your petitioner was riding on the footboard on said engine; that your petitioner, standing on the footboard of said engine as it approached said car, noticed that the drawbar on said car was not in proper position, and noticed that same would have to be moved to one side before a coupling could be made; that as the engine approached very near to said car, being at that time almost at a standstill and moving very slow, your petitioner attempted to shove said drawbar to its proper place with his foot, and that, as he was in the act of shoving the said defective drawbar to its proper place, the engine suddenly and without warning dipped or lurched to one side, causing petitioner to lose his balance, and causing his foot to be caught between said drawbar and the coupling on the engine; that, as thus caught, his foot was broken, mangled, and badly crushed."

The negligence alleged is the defective and dangerous condition of the track and the defective and dangerous condition of the drawbar. The answer of the railway company denied the allegations of negligence on its part, and averred that the accident occurred by reason of the contributory negligence of the plaintiff. The case was tried on these issues, and resulted in a verdict and judgment for the plaintiff. The assignments of error will each be considered.

The first is that the court refused to instruct the jury to find for the railway company. The plaintiff himself testified that he was on the footboard of the engine, which was moving slowly towards the car to which the coupling was to be made. Just before the engine and the car came together, he discovered that the drawbar on the engine was not in line to meet the drawbar on the car, so as to effect the coupling; that the engine and the car came together, and the coupling was not made. The car and engine then separated. Immediately the engine was pushed slowly back towards the car to

Kansas City Southern Ry. Co. v. Prunty

make the second effort to effect the coupling. The plaintiff was standing up, holding with one hand to steady himself, and in the other hand he had the brake lever, and he was in the act of pushing the drawbar on the engine so as to put it in line to meet the drawbar on the car, when the engine ran on a defective place, or a low place in the track, and the lurch came which made him lose his balance, and his right foot was crushed between the cars. His evidence is to the effect that, but for the defect in the track, he could have easily made the coupling without danger to himself; and, except for the defect in the drawbar, causing it to hang to one side, so as not to be in alignment with the other drawbar, the coupling would have been made without his interference when the engine and car first came together. The plaintiff's evidence as to the defective condition of the track and the drawbar is strongly corroborated by several witnesses. There could be no question, therefore, about the proof being sufficient to submit the question of the railway company's negligence to the jury.

The main contention of the railway company is that the court erred in not instructing the jury to find for the defendant company because of the contributory negligence of the plaintiff. The evidence tends strongly to show that the effort that the plaintiff made to couple the cars was made in the usual way under the circumstances that existed, and that it was the safest way; that he was in less danger to use his foot to change the position of the drawbar, than if he had lain down and used his hand. The question on the first assignment of error resolves itself into this inquiry: Was it so clearly the duty of the plaintiff to stop the car and adjust the drawbar that the court as a matter of law should instruct the jury that he was guilty of contributory negligence? The question of negligence is usually one for the jury. It is well settled, however, that the court may direct a verdict for the plaintiff or the defendant on the question of negligence, where the evidence is undisputed and is of such conclusive character as to the inferences to be drawn that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. But can it be said that this case is of that kind? The evidence tends to show that the car was moving very slowly, and that the act of the plaintiff alleged to be negligent would have been safe, except for the defect in the roadbed. The manner in which the plaintiff was endeavoring to perform his duty was the usual way under the circumstances. The fact that it was the usual way does not, of course, remove the stamp of negligence, if that way was dangerous, and there was another way to safely perform the same duty; but, when the evidence shows, as it does here, that the brakeman had for many years performed the duty in the way in question without injury or apparent danger, it tends strongly to show that the

Kansas City Southern Ry. Co. v. Prunty

mode, if the roadbed was in good condition, was not dangerous in the sense that would make the plaintiff guilty of contributory negligence.

There was no rule of the railway company, as there was in some of the cases cited by counsel, that required the train to be stopped to couple the cars, or that forbade the brakemen going between the cars to couple them. A witness for the plaintiff testified on cross-examination that there was such a rule, but no such rule was produced, by the railway company, and at a later period of the trial the "defendant" offered in evidence the rules of the company as to the duties of brakemen to show that there was no rule on the subject. The custom of the brakemen to couple the cars while the trains were in motion, which custom was proved without objection, was not, therefore, shown to be in conflict with the rules of the company. The record would not justify the court in assuming that the plaintiff was guilty of contributory negligence upon the theory that he violated a rule of the company. The position of the railway company may be best stated in the words of its distinguished counsel:

"Upon the undisputed testimony the court should have directed a verdict for the defendant, upon the theory that, where there is a safe way and a more dangerous way known to the servant by which he may discharge his duty, it is negligence for him to select the more dangerous method, and he thereby assumes all risk of injury therefrom."

The meaning of this position appears from what follows: "If he had stopped the engine," etc., then there would have been no danger. It is true that, when there is a comparatively safe and a more dangerous way known to a servant by means of which he may discharge his duty, it is negligence for him to select the more dangerous method, and he thereby assumes the risk of the injury it entails. But is this principle applicable to this case? The duty the plaintiff was attempting to perform was to couple the moving engine to the car. If he carefully and without negligence attempted to perform that duty, does it charge him with negligence as matter of law to show that he would not have been hurt if the engine had been stopped? If a conductor were going from one car to another in the performance of his duty, and was injured by reason of a defect in the car or in the roadbed, would it be a defense to his action for damages to say that he would not have been injured if he had stopped the cars before he attempted to pass from one car to the other? We think not, because such delay would be impracticable; and it is his duty to pass from one car to the other, and he is not expected to stop the train for that purpose. The evidence abundantly shows that neither the railway company nor its employees considered it the duty of the brakeman to stop the cars to couple them. The fact is apparent, without evidence, that cars apart must be moved together to be coupled.

Kansas City Southern Ry. Co. v. Prunty

The record shows that it was not unusual for the drawheads to get out of line, and a witness was asked:

"What was the rule with brakemen? Would they stop the engine, and shove it over, rather than use their foot?"

He answered:

"I never stop them; been railroading twenty years. If we stopped them every time for that, we could not get freight over the road."

It seems evident that when a drawhead is out of line by reason of defects, causing it to swing loose, lower, or to one side, if the engine is stopped to adjust it, the subsequent movement of the car, or probably gravity alone, would cause it to resume its original position out of line, and that the coupling at last could only be made by adjusting it as the car and the engine come together. The act of coupling or uncoupling cars while in motion, by going between them, though attended with more or less danger, has been often held, under the circumstances of the particular case, not to constitute negligence as matter of law. *Snow v. Housatonic R. R. Co.*, 8 Allen (Mass.) 441, 85 Am. Dec. 720, cited and approved in *Gardner v. M. C. R. R. Co.*, 58 Mich. 584, 592, 26 N. W. 301; *Eastman v. Railway Co.*, 101 Mich. 597, 60 N. W. 309; *Ashman v. Railroad Co.*, 90 Mich. 567, 51 N. S. 645; *Porter v. Railroad Co.*, 71 Mo. 66, 36 Am. Rep. 454; *Preston v. Central R. R. & Banking Co.*, 84 Ga. 588, 11 S. E. 143; *Curtis v. Railway Co.*, 95 Wis. 460, 70 N. W. 665. See, also, *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485.

There are two essential elements in contributory negligence—a want of ordinary care, and a causal connection between the act and the injury complained of. *Beach on Cont. Neg.* (2d Ed.) §§ 7, 19. As to the first, the question is: Should we hold as a matter of law that the plaintiff was negligent; that he did something which a prudent and reasonable man, under the circumstances proved, would not do? The evidence tends to show that the act which is charged to be contributory negligence was not unusual and was generally safe; that the plaintiff was not a trespasser or interloper, but was at the place to which his employment called him; and that he was violating no rule of the railway company, but, on the contrary, was pursuing the course usual with others engaged in its service. But if the plaintiff's act was one showing a want of ordinary care, before it could be deemed contributory negligence to defeat his action, it must appear to be a proximate cause (not the sole proximate cause) of the injury; that is, there must be a causal connection between the act and the injury. *Beach on Cont. Neg.* (2d Ed.) §§ 25, 26. Can the plaintiff's act be so considered? As has been said, the act was not unusual and was generally safe; and some of the evidence tended to show that under the circumstances he pursued the safest way to effect the

coupling. When the act and the injury are not known by common experience to be naturally and usually in sequence, and the injury does not, according to the ordinary course of events, follow from the act, then the act and the injury are not sufficiently connected to make the act the proximate cause of the injury. Cooley on Torts (2d Ed.) 73; Beach on Cont. Neg. 32. We do not think the trial court erred in refusing to direct a verdict for the defendant on the ground that the plaintiff was guilty of contributory negligence.

The second assignment of error is in these words:

"The court erred in charging the jury as follows:

"If you find the method or way he was using to make the coupling was one of the ways frequently or ordinarily used by brakemen under such conditions, and that he was at the time under the circumstances prudently using that way, he was not guilty of contributory negligence."

"And again:

"It is contended on the part of the defendants that the weather and frequent rains had caused such defects, if there was any; that is, if there were any defects in the condition of the track, the rainy weather was the cause of such defects, and the defendant is excusable. On this issue, there being no evidence one way or the other as to directly show when the defects in the track occurred, or how they were caused, or what was done to avoid such defects, I charge in the case presented you should not consider any excuse along that line offered by defendant."

This excerpt from the charge is excepted to and assigned as a whole as error, without specifying the part of it to which objection is made. The last paragraph of the charge is simply to the effect that a contention of the railway company, which there is no evidence to support, need not be considered by the jury. This is so clearly correct that we need not further comment on it. This, in fact, disposes of the whole assignment; for an objection to an entire charge, consisting of several propositions, some of which are right, should not be sustained, even if the charge contained errors not specifically pointed out. *Lincoln v. Claffin*, 7 Wall. 132, 19 L. Ed. 106; *Anthony v. L. & N. R. R. Co.*, 132 U. S. 172, 10 Sup. Ct. 53, 33 L. Ed. 301.

But we find no error in the first paragraph of the charge, when construed with other portions of the general charge. Immediately preceding the paragraph in question, the court had instructed the jury:

"Now, considering the case, I suggest that you apply the evidence as to these issues. Was the plaintiff, under all the circumstances surrounding the time and place he was hurt, endeavoring with prudence and due care to effect the coupling? If you find favorable to him on this issue, it will follow that he was not guilty of contributory negligence."

Note

And further, on the subject of contributory negligence, the court said:

"I charge you that if you find that the plaintiff, in attempting to effect a coupling of the engine to the car, assumed a dangerous position to do so, and there was any other practicable and safer way in which he might have made the coupling, he would then be guilty of contributory negligence, and would be debarred from a recovery."

We do not think that the charge, taken as a whole, asserts the objectionable doctrine that the habitual negligence of others would excuse the negligence of the plaintiff; and, however that may be, the language on which it is now sought to place that construction was not separately excepted to, nor is it specifically assigned as error.

The third assignment is that the trial court erred in refusing to grant a new trial. The granting or refusing of such motion, as has been frequently decided by this court, was within the discretion of the lower court, and is not the proper subject of an assignment of error here.

The fourth assignment of error is in effect that the court erred in refusing to give 14 special charges requested by the railway company. The railway company was not entitled to have all these charges given to the jury, because we find by an inspection of the several bills of exception that many of them were properly refused, as shown by the record, for the reason that they were covered by the general charge. *Anthony v. L. & N. R. R. Co.*, 132 U. S. 172, 10 Sup. Ct. 53, 33 L. Ed. 301.

The fifth assignment is that the court erred in entering a judgment in favor of the plaintiff. There was, of course, no error in entering a judgment on the verdict.

We are of the opinion that the record, as now amended by consent, contains no reversible error. The judgment of the Circuit Court is therefore affirmed.

NOTE.

COUPLING CARS—CONTRIBUTORY NEGLIGENCE.

I. In General.

- A. General Rule.
- B. Impossibility of Avoiding Injury after Occurrence of Emergency Not the Test.
- C. Employers' Liability Act.
- D. Proximate Cause.
 - 1. General Rule.
 - 2. Contributory Negligence the Proximate Cause.
 - a. General Rule.
 - b. Brakeman's Failure to Check Speed.
 - c. Drawbars of Different Height—Contributory Negligence and Negligence in Using Defective Car.
 - d. Defective Automatic Coupler—Kicking Bumper of Approaching Car in Place.
 - e. Stumbling on Track—Defective Drawbar.
 - f. Staying between Cars with Knowledge That Speed Has Not Been Slackened.

Note

- g. Failure of First Attempt—Remaining between Cars after They Are Set in Motion.
 - h. Cars Moving Too Fast—Knowledge That Signal Has Not Been Observed—Negligence of Fireman.
 - i. Moving Cars—Defective Roadbed—Knowledge of Absence of Handhold.
 - j. Rushing between Cars in Rapid Motion—Negligence in Operating Train.
 - k. Violation of Rules.
 - (1) Stepping in Front of Moving Cars—Negligence in Leaving Grade Stake on Track.
 - (2) Remaining between Cars after They Are Set in Motion—Tight Pin—Fall into Cattleguard.
 - (3) Dangerous Condition of Coupling—Obvious Defect—Going between Moving Cars.
 - (4) Uncoupling by Hand—Defective Pin.
 - (5) Short Drawbars—Failure to Examine.
 - 3. Contributory Negligence Not the Proximate Cause.
 - a. General Rule.
 - b. Cars Moving Fifteen Miles an Hour—Negligence in Managing Engine.
 - c. Failure to Use Coupling Stick.
 - d. Failure to Use Stick with Knowledge of Engineer.
 - e. Going between Moving Cars—Negligence of Employer.
 - f. Going between Cars in Spite of Warning—Negligence after Knowledge of Plaintiff's Peril.
 - g. Contributory Negligence in Adjusting Coupling and Negligence after Knowledge of Peril.
 - h. Method of Doing Work—Injury from Another Cause.
 - i. Uncoupling Cars in Motion in Obedience to Order—Injury from Company's Neglect of Duty.
 - 4. Question for Jury.
 - a. Failure to Use Coupling Stick.
 - b. Coupling by Hand after Returning Stick to Company's Agents.
- II. What Is, and Is Not, Contributory Negligence.**
- A. Coupling Cars.**
- 1. What Is Contributory Negligence.
 - a. Absence of Mind.
 - b. Choosing Dangerous Method of Doing Work.
 - (1) Failure to Follow Instructions.
 - (2) Cars of Unequal Height—Failure to Use Crooked Link.
 - (3) Coupling by Hand—Effect of Conductor's Instructions.
 - (4) Coupling with Short Shackle—Failure to Use Stick.
 - (5) Reaching over Drawheads to Raise Link.
 - (6) Knowledge That Couplings Are Mismatched—Remaining between Cars without Necessity.
 - c. Occupying Perilous Position.
 - (1) Absence of Necessity, and Violation of Orders.
 - (2) Cars Moving Too Fast—Going between Cars to Couple by Hand.
 - (3) Going between Cars in Motion without Necessity.
 - (4) Going between Cars again to Adjust Pin after They Had Stopped in Supposed Obedience to His Signal.
 - (5) Standing with Back towards Moving Car at Night—Absence of Necessity—Knowledge of Double Bumpers.
 - (6) Moving Cars—Disregarding Warnings of Bystanders.
 - (7) Knowledge That Speed Has Not Been Slackened—Staying between Cars.

Note

- (8) Standing on Narrow Rim around Pilot of Moving Engine.
- (9) Facing Drawbar.
- d. Unusual Construction of Cars and Appliances.
 - (1) Drawheads of Different Heights—Opportunity to Observe.
 - (2) Projecting Aprons—Opportunity to See—Express Warning.
 - (3) Projecting Aprons—Attempting to Couple on Inside of Curve in Track—Disregard of Instructions.
 - (4) Proximity of Side Sills—Familiarity with Such Construction.
- e. Defective Appliances.
 - (1) Absence of Drawbar—Going in Front of Moving Car with Knowledge of Defect.
 - (2) Defect in Drawbar Seen in Time.
 - (3) Drawheads of Different Heights—Coupling Link without Play—Knowledge of Defects.
 - (4) Couplings Slipping Past Each Other—Knowledge.
 - (5) Failure to Examine Drawheads—Movements of Engine Controlled by Injured Switchman.
 - (6) Defective Car—Failure to Heed Warning.
 - (7) Knowledge of Defective Drawbar—Opportunity to Stop Train.
 - (8) Violent Collision—Struck by Detached Coupling Pin—Knowledge of Defective Brake.
- f. Injuries from Condition of Track and Roadbed.
 - (1) Coupling upon Side Track—Knowledge of Absence of Ballast—Jumping upon Track from Moving Train.
 - (2) Curves in Track in Yard—Care Required.
 - (3) Failure to Signal to Engineer to Slacken Speed and Failure to Look for Obstructions on Track.
 - (4) Going in Front of Approaching Car to Insert Coupling Link—Slipping upon Snow.
 - (5) Knowledge That Engine Was Uncontrollable and of Dangerous Condition of Roadbed.
 - (6) Stepping into Cattleguard at Familiar Point—Coupling in Daytime.
 - (7) Unblocked Frog—Inability to Extricate Foot the Second Time.
- g. Projecting Loads.
 - (1) Knowledge of Danger.
 - (2) Opportunity to Avoid Danger.
 - (3) Necessity of Stooping—Delay in Coupling.
 - (4) Negligence and Contributory Negligence.
- 2. What Is Not Contributory Negligence.
 - a. Choosing Dangerous Method of Doing Work.
 - (1) Coupling by Hand—Absence of Rule.
 - (2) Method Required by Company.
 - b. Occupying Perilous Position.
 - (1) Brakeman Thrown from Top of Car by Violent Jerk.
 - (2) Moving Cars While Brakeman Was between Them—Right of Brakeman to Assume That Rule Would Be Observed—Failure to Stoop.
 - (3) Assuming That Signal to Stop Cars Will Be Obeyed.
 - (4) Going in Front of Approaching Train—Negligence of Coemployees.
 - (5) Standing on Crossbar of Engine from Necessity—Breaking of Pushbar—Effect of Having Previously Ridden on Pilot.
 - (6) Standing on Footboard of Engine—Curved Track—Short Drawbar and Draw.

Note

- (7) Going between Moving Cars without Seeing That Signals Are Observed.
- (8) Going between Cars on Inside of Curve—Necessity of Observing Signals.
- (9) Working from Inside of Curve—Cars Coming Too Close Together.
- c. Defective Appliances.
 - (1) Absence of Bumper—Coupling at Night.
 - (2) Defective Lantern—Right to Continue in Employment after Promise to Repair.
 - (3) Defective Coupling—Knowledge—Emergency—Danger of Collision with Passenger Train.
 - (4) Defective Lever—Coupling by Hand—Emergency—Danger of Fatal Collision.
 - (5) Knowledge of Defects—Conductor's Failure to Signal to Engineer.
 - (6) Second Attempt—Drawbar again Becoming Immovable.
- d. Injuries from Condition of Track and Roadbed.
 - (1) Hole in Track—Choice of Place to Make Coupling.
 - (2) Moving Cars—Ballasting Washed from between Ties—Working at Night—Necessity of Acting Promptly.
 - (3) Switchman Slipping on Small Incline, between Track and Sidewalk, Covered with Snow.
 - (4) Knowledge of Gutter in Yard—Working at Night—Ashes and Snow.
 - (5) Prior Knowledge of Trench—Coupling at Night—Ground Covered with Snow.
- e. Projecting Loads.
 - (1) Attention Occupied with Giving Signals.
 - (2) Pre-Empty Order—Standing on Footboard of Moving Tender—Working by Lantern Light.
 - (3) Raising Head after Stumbling into Ditch—Absence of Knowledge.
- f. Inexperienced Employee—Order of Dispatcher.
- 3. Question for Jury.
 - a. Emergency—Order of Superior.
 - b. Stepping upon Track without Seeing That Signal Is Observed.
 - c. Relying upon Conductor to Slacken Speed.
 - d. Bumpers of Different Heights of Foreign Cars—Danger Discovered Too Late.
 - e. Cars of Different Heights—Absence of Knowledge of Other Defects—Necessity of Going between Cars.
 - f. Mismatched Couplings—Defective Link Pin—Train Backed without Signal from Injured Brakeman—View of Engineer Obstructed.
 - g. Brakeman Removing Defective Coupling Rod—Relying on Promise of Conductor to Keep Watch—Negligence of Conductor in Moving Cars without Warning.
 - h. Signaling from Wrong Side—View of Engineer Obstructed by Reason of Curve.
 - i. Walking over Frog without Necessity—Danger Not Apparent.
 - j. Projecting Load.
 - k. Projecting Loads—Coupling by Lantern Light—Warned Too Late.
- B. Uncoupling Cars.
 - 1. What Is Contributory Negligence.
 - a. Choosing Dangerous Method of Doing Work.
 - (1) Moving Trains.
 - (2) Going between Moving Cars—Absence of Rule and Necessity.

Note

- (3) Uncoupling Moving Cars without Necessity.
- (4) Going between Moving Cars Instead of Using Lever on Other Side.
- (5) Going between Moving Cars without Necessity—Uncoupling at Night—Dangerous Condition of Track.
- (6) Going between Cars in Motion without Necessity—Failure to Ballast Side Track—Knowledge of Danger.
- (7) Going between Moving Cars without Signaling and without Necessity—Unblocked Rails.
- (8) Effect of Custom.
- (9) Uncoupling Cars in Motion without Necessity—Effect of Foreman's Order.
- (10) Unblocked Frog—Going between Moving Cars—Disobedience of Orders.
- (11) Going between Moving Cars—Custom—Brakeman Estopped.
- b. Occupying Dangerous Position.
 - (1) Standing on Ledge at End of Car—Absence of Handholds.
 - (2) Kneeling Down on End of Car, Instead of Lying Down, to Pull Coupling Pin—Sudden Start of Engine.
 - (3) Standing with Foot on Bumper of Each Car—Pin Already Withdrawn.
- c. Absence of Drawhead—Moving Cars.
- d. Collision While Uncoupling—Tight Pin—Knowledge of Danger.
- e. Going between Moving Cars without Signaling to Engineer.
- f. Signaling for Train to Move Faster before He Had Succeeded in Withdrawing Pin.
- g. Pushing Uncoupled Car Along Track without Observing an Engine—Obstructed View.
- h. Failure to Ballast Side Track—Prior Opportunity to Observe—Going between Moving Cars.
- i. Moving Cars—Knowledge of "Split Switch."
2. What Is Not Contributory Negligence.
 - a. Dangerous Methods.
 - (1) Going between Moving Cars—Opportunity to Uncouple While Cars Were Standing—Rule Limiting Time for Unloading.
 - (2) Failure to Use Safe Method—Lack of Time.
 - (3) Uncoupling by Hand from Necessity—Sudden Movement of Cars.
 - b. Occupying Dangerous Position.
 - (1) Mounting Cars.
 - (2) Going between Moving Cars after Signaling to Slacken Speed.
 - (3) Picking Coupling Pin from Track after Signaling to Fireman.
 - (4) Going between Moving Cars—Ditch in Track—Absence of Knowledge.
 - (5) Alighting between Rails Because of Condition of Track outside.
3. Question for Jury.
 - a. Uncoupling Flat Oil Tank Car from Box Car—Unusual Construction—Inexperience—Sudden Jerk.
 - b. Uncoupling by Hand after Attempting to Use Lever—Unblocked Guard Rails.
 - c. Hole under Switchrod Unusually Large—Absence of Knowledge—Going between Rails.

Note

- d. Moving Cars—Unblocked Frog—Absence of Knowledge—Presumptions.

C. Duty to Look Out for Defects and Obstructions.

1. In General.

- a. Obvious Defects in Couplings.
2. Absence of Ladders, Steps, and Handles—Failure to Examine—Coupling Moving Cars.
3. Peculiar Bumper of Foreign Car.
4. Curves in Track—Drawbars Passing Each Other.
5. Failure to Examine Brakes and Report Defects.
6. Defects in Coupling Appliances—Plaintiff's Knowledge—Burden of Proof.
7. Bumpers of Different Heights—Failure to Use Crooked Link—Right to Assume That Master's Duty Has Been Performed.
8. Defective Track and Cattleguard—Attention Absorbed by Duties.
9. Knowledge of Defect—Right of Brakeman to Rely on Judgment of Conductor.
10. Coupling Irons of Different Height.
11. Flat Cars with "Aprons"—Failure to Examine—Coupling at Night.
12. Unaccustomed Use of "Gooseneck."
13. Unblocked Frogs and Guard Rails—Failure to Look Out for.
14. Defective Coupling Link—Patent Defect—Sufficiency of Petition.
15. Right to Assume That Track Is in Safe Condition—Opportunity to Examine by Lantern Light.

D. Violation of Rules.

1. In General.

- a. General Rule.
- b. Assuming That Signals Will Be Obeyed—Right of Employee to Substitute His Judgment in Place of Rule.
- c. Failure to Examine Appliances.
- d. Mismatched Couplings of Foreign Cars—"Placing Cars in Train"—Application of Rule.
- e. Going between Cars—Injured While on Footboard of Engine—Application of Rule.
- f. Starting from between Car after Discovery of Defects—Struck by Detached Sliver—Application of Rule.
- g. Going between Cars to Uncouple by Hand—Application of Rule.
- h. Violation of Alleged Unreasonable Rule.
2. What Is Contributory Negligence.
 - a. Failure to Use Coupling Stick.
 - b. Failure to Use Coupling Stick—Disobedience of Order.
 - c. Going between Cars to Uncouple.
 - d. Going in Front of Moving Car—Displacement of Load.
 - e. Going between Cars to Couple by Hand—Absence of Gross Negligence.
 - f. Failure to Use Stick.
 - g. Coupling by Hand—Custom to Disregard Rule—Abrogation.
 - h. Going between Moving Cars to Couple by Hand—Dangerous Frog—Chargeable with Notice—Failure to Examine Track.
 - i. Failure to Use Coupling Stick.
 - j. Going between Moving Cars.
 - k. Going between Moving Cars—Fall on Track.
 - l. Going between Moving Cars.
 - m. Making Three Link Couplings.
 - n. Uncoupling Moving Train.
3. What Is Not Contributory Negligence.
 - a. Not Chargeable with Notice of Existence of Rule.

Note

- (1) Going between Cars to Couple by Hand in Ignorance of Rule.
- (2) Failure to Examine Appliances—Knowledge of Rule—Pleading.
- (3) Coupling by Hand—Ignorance of Rule and Defect in Coupling Spring.
- (4) Notice of Rule—Information from Coemployees.
- (5) Failure to Use Stick—Violation of Rule or Custom—Notice from Observation.

b. Impracticable Rules.

- (1) Method Prescribed by Company.
- (2) Going between Cars in Motion—Coupling Sticks Too Short.

3. Going between Cars—Impossibility of Using Stick—Custom.

E. Waiver of Rules.

1. Disregard of Rule—Custom—Acquiescence of Division Superintendent.
2. Going between Moving Cars—Fulfilling Expectations of Superiors.
3. Failure to Use Coupling Stick—Custom to Disregard Rule.
4. Obeying Orders of Conductor—Violation of Rule—Defects Discovered Too Late.
5. Going between Moving Cars—Custom.
6. Uncoupling Moving Cars—Custom to Disregard Rule.
7. Evidence—Custom to Go in Front of Moving Cars.
8. Mode of Coupling at Certain Point—Custom of Other Employees.
9. Coupling by Hand—Order of Conductor—Subsequent Violation of Rule.

F. Acting outside Scope of Employment.

1. Conductor Uncoupling in Absence of Emergency—Knowledge of Defects.
2. Conductor Coupling Cars—Absence of Emergency.
3. Conductor Coupling Cars—Emergency.
4. Conductor Coupling Cars—Emergency—Delay—Burden on Conductor to Show Absence of Negligence on His Part.
5. Switchman Uncoupling Moving Cars—Violation of Positive Orders—Defect in Track.
6. Voluntary Assumption of Duty—Custom Not Objected to by Officers.

I. IN GENERAL.

A. GENERAL RULE.

The common-law rule that a servant cannot recover against his master for injuries to himself, if they resulted merely from his failure to use ordinary care, under the circumstances, for his own protection, in the absence of statute law, applies to employees engaged in the hazardous work of coupling and uncoupling cars.

United States.—Alabama G. S. R. Co. v. Carroll (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 759; Gleason v. Detroit, G. H. & M. Ry. Co. (C. C. A.), 73 Fed. 647; Henry v. Bond (C. C.), 34 Fed. 101; Hodges v. Kimball (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 755; Lake Erie & W. R. Co. v. Craig (C. C. A.), 80 Fed. 488; Russell v. Richmond & D. R. Co. (C. C.), 47 Fed. 204; Southern Pac. Co. v. Seley, 152 U. S. 145; Tuttle v. Detroit, G. H. & M. Ry., 122 U. S. 189, 31 Am. & Eng. R. Cas. 217.

Alabama.—Alabama G. S. R. Co. v. Richie, 111 Ala. 297, 20 So. 49; George v. Mobile & O. R. Co., 109 Ala. 245, 19 So. 784; Davis v. Western Ry. of Alabama, 107 Ala. 626, 18 So. 173; Louisville & N. R. Co. v. Watson, 90 Ala. 68, 8 So. 249; Pryor v. Louisville & N. R. R. Co., 90 Ala. 32, 8 So. 55; Rome & D. R. Co. v. Chasteen, 88 Ala. 591, 7 So. 94; Shorter v. Southern Ry. Co. (Ala.), 18 Am. & Eng. R. Cas., N. S., 761; Southern Ry. Co. v. Arnold (Ala.), 21 So. 954, 11 Am. & Eng. R. Cas., N. S., 864.

Note

Arkansas.—St. L., I. M. & S. Ry. v. Rice, 51 Ark. 467, 11 S. W. 699.
California.—Long v. Cornado R. R. Co., 96 Cal. 269, 31 Pac. 170;
 Martin v. California Cent. Ry. Co., 94 Cal. 326, 29 Pac. 645.

Georgia.—Central Railroad v. Sears, 61 Ga. 279; Marsh v. South Carolina R. Co., 56 Ga. 274; Mayfield v. Savannah, G. & N. A. R. Co., 87 Ga. 374, 13 S. E. 459; Nelson v. Central R. & B. Co., 88 Ga. 225; Rome v. Carrollton Const. Co. v. Dempsey, 86 Ga. 499, 12 S. E. 882; Sloan v. Georgia Pac. Ry. Co., 86 Ga. 15, 12 S. E. 179; Whitton v. South Carolina & G. R. Co., 106 Ga. 796, 32 S. E. 857.

Illinois.—Chicago & A. R. Co. v. Bragonier, 119 Ill. 51, 7 N. E. 688; Ohio & M. Ry. Co. v. Bass, 36 Ill. App. 126; Pennsylvania Co. v. Hankey, 93 Ill. 580; Peoria, D. & E. Ry. Co. v. Puckett, 52 Ill. App. 222; Toledo, W. & W. Ry. Co. v. Asbury, 84 Ill. 429.

Indiana.—Chicago & E. R. Co. v. Wagner 17 Ind. App. 22, 45 N. E. 76; Lake Shore & M. S. R. W. Co. v. McCormick, 74 Ind. 440; Pennsylvania Co. v. Whitcomb, 111 Ind. 212, 12 N. E. 380.

Iowa.—Muldowney v. Illinois Cent. R. Co., 39 Iowa 615; Rebelaky v. Chicago & N. W. Ry. Co., 79 Iowa 55, 44 N. E. 536; Sedgwick v. Illinois Cent. Ry. Co., 76 Iowa 340, 41 N. E. 35.

Kansas.—Carrier v. Union Pac. Ry. Co. (Kan.), 17 Am. & Eng. R. Cas., N. S., 513.

Kentucky.—Brown's Adm'r v. Louisville, H. & St. L. Ry. Co. (Ky.), 23 Am. & Eng. R. Cas., N. S., 883, 65 S. W. 588.

Massachusetts.—Browne v. New York & N. E. R. Co., 158 Mass. 247, 33 N. E. 650; Burns v. Boston & L. R. Co., 101 Mass. 50; Nihill v. New York, etc., R. Co., 167 Mass. 52, 44 N. E. 1075.

Michigan.—Brennan v. Michigan Cent. R. Co., 93 Mich. 156, 53 N. W. 358; Brewer v. Flint & P. M. Ry. Co., 56 Mich. 620, 23 N. W. 440; Day v. Toledo, C. S. & D. Ry. Co., 42 Mich. 523, 4 N. W. 203; Fuller v. Lake Shore & M. S. Ry. Co. 108 Mich. 693, 66 N. W. 593; Gardner v. Michigan C. R. Co., 58 Mich. 584, 26 N. W. 301; Grand v. Michigan Cent. R. Co., 83 Mich. 564, 47 N. W. 837; Karrer v. Railroad Co., 76 Mich. 400, 43 N. W. 370; Lorange v. Lake Shore & M. S. Ry. Co., 104 Mich. 80, 62 N. W. 137; Ragon v. Toledo, A. A. & N. M. Ry. Co., 97 Mich. 265, 56 N. W. 612; Secord v. Chicago & M. L. S. R. Co., 107 Mich. 540, 65 N. W. 550; Stanley v. Chicago & W. M. R. Co., 101 Mich. 202, 59 N. W. 393.

Mississippi.—Illinois Cent. R. Co. v. Bowles, 71 Miss. 1003, 15 So. 138.

Missouri.—Hulett v. St. Louis, K. C. & N. Ry. Co., 67 Mo. 239; Moore v. Kansas City, etc., Ry. Co. (Mo.), 12 Am. & Eng. R. Cas., N. S., 580; Schaub v. Hannibal & St. J. Ry. Co., 106 Mo. 74, 16 S. W. 924; Towner v. Missouri Ry. Co., 52 Mo. App. 648.

New York.—Arnold v. Delaware & H. C. Co., 6 N. Y. S. R. 368; Beaudin v. Central R. Co., 14 N. Y. Supp. 700; Goodrich v. New York Cent. & H. R. R. Co., 3 N. Y. S. R. 774.

North Carolina.—Crutchfield v. Richmond & Danville R. Co., 78 N. Car. 300; Elmore v. Seaboard Air Line Ry. Co. (N. Car.), 8 R. R. R. 663, 31 Am. & Eng. R. Cas., N. S., 663, 44 S. E. 620.

North Dakota.—Bennett v. Northern Pac. R. Co., 48 Am. & Eng. R. Cas. 182, 2 N. Dak. 112, 49 N. W. 408.

Pennsylvania.—Dooner v. Delaware & H. C. Co., 171 Pa. 581, 33 Atl. 415; Schlemmer v. Buffalo, R. & P. Ry. Co. (Pa.), 10 R. R. R. 240, 33 Am. & Eng. R. Cas., N. S., 240, 56 Atl. 417.

Virginia.—C. & O. R. v. Lee, 84 Va. 642, 5 S. E. 579; Darracott v. Chesapeake & O. R. Co., 83 Va. 288, 2 S. E. 511; Norfolk & W. R. Co. v. Briggs (Va.), 14 S. E. 750; Norfolk & W. R. Co. v. Cottrell, 83 Va. 512, 3 S. E. 123; Norfolk & W. R. R. Co. v. McDonald's Adm'r, 88 Va. 352, 13 S. E. 706; Richmond & Danville R. Co. v. Pannill, 89 Va. 552, 16 S. E. 748; Richmond & Danville R. Co. v. Risdon's Adm'r, 87 Va. 335, 12 S. E. 786.

West Virginia.—Young v. West Virginia C. & P. Ry. Co. (W. Va.), 4 Am. & Eng. R. Cas., N. S., 134.

Wisconsin.—Kennedy v. Lake Superior T. & T. Co., 87 Wis. 28, 57 N.

Note

W. 976; *Lockwood v. Chicago & N. W. Ry. Co.*, 55 Wis. 50, 12 N. W. 50.

B. IMPOSSIBILITY OF AVOIDING INJURY AFTER OCCURRENCE OF EMERGENCY NOT THE TEST.

In a suit by an employee who was coupling cars, brought against his company for an injury to his hand, it was error to charge that plaintiff could not recover, unless it was impossible for him to extricate his hand without injury, when the emergency was upon him, the rule being that he could not recover if by ordinary care he could have avoided the injury. So held in *Savannah, F. & W. Ry. v. Barber*, 71 Ga. 644.

C. EMPLOYERS' LIABILITY ACT.

In *Nihill v. New York, etc., R. Co.*, 167 Mass. 52, 44 N. E. 1075, it is held, in an action under the employers' liability act of Massachusetts, St. 1887, c. 270, for personal injuries sustained by a car inspector while coupling cars, that even if it is assumed that the fireman who backed the train was a person in charge or control of it, and that the inspector's foreman who gave the signal to back was acting as superintendent, the action could not be maintained, if the inspector was not in the exercise of due care.

D. PROXIMATE CAUSE.

1. General Rule.

In this class of cases, as in other negligence cases, of course, contributory negligence on the part of the injured car coupler does not preclude recovery unless it was the proximate cause of his injury.

United States.—*Cincinnati, etc., R. Co. v. Mealer*, 50 Fed. 725; *Gleason v. Detroit, G. H. & M. Ry. Co. (C. C. A.)*, 73 Fed. 647.

Alabama.—*Louisville, etc., R. Co. v. Watson*, 90 Ala. 68, 8 So. 249; *Shorter v. Southern Ry. Co. (Ala.)*, 18 Am. & Eng. R. Cas., N. S., 761.

Georgia.—*Marsh v. South Carolina R. Co.*, 56 Ga. 274; *Rebb v. East Tennessee, etc., R. Co.*, 87 Ga. 631, 13 S. E. 566; *Western, etc., R. Co. v. Esslinger*, 95 Ga. 734, 22 S. E. 580.

Illinois.—*Ohio & M. Ry. Co. v. Bass*, 36 Ill. App. 126.

Iowa.—*Brown v. Burlington, etc., R. Co.*, 92 Iowa 408, 60 N. W. 779; *Horan v. Chicago, etc., R. Co.*, 89 Iowa 328, 56 N. W. 507; *Muldowney v. Illinois Cent. R. Co.*, 39 Iowa 615; *Neville v. Chicago, etc., R. Co.*, 79 Iowa 232, 44 N. W. 367; *Nichols v. Chicago, etc., R. Co.*, 69 Iowa 154, 29 N. W. 571; *Reed v. Burlington, etc., R. Co.*, 72 Iowa 166, 33 N. W. 451; *Romick v. Chicago, etc., R. Co.*, 62 Iowa 167, 17 N. W. 458; *Sedgwick v. Illinois Cent. Ry. Co.*, 76 Iowa 340, 41 N. E. 35.

Kentucky.—*Louisville, etc., R. Co. v. Bryant*, 15 Ky. L. Rep. 181, 22 S. W. 606.

Michigan.—*Brewer v. Flint & P. M. Ry. Co.*, 56 Mich. 620, 23 N. W. 440; *McDonald v. Michigan Cent. R. Co.*, 108 Mich. 7, 65 N. W. 597.

Mississippi.—*White v. Louisville, N. O. & T. Ry. Co.*, 72 Miss. 12, 16 So. 248.

Nebraska.—*O'Neill v. Chicago, R. I. & P. R. Co. (Neb.)*, 86 N. W. 1098, 22 Am. & Eng. R. Cas., N. S., 578.

New York.—*Goodrich v. New York Cent. & H. R. R. Co.*, 3 N. Y. S. R. 774.

North Carolina.—*Elmore v. Seaboard Air Line Ry. Co. (N. Car.)*, 8 R. R. R. 663, 31 Am. & Eng. R. Cas., N. S., 663.

North Dakota.—*Bennett v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 182, 2 N. Dak. 112, 49 N. W. 408.

Texas.—*Ft. Worth & R. G. Ry. Co. v. Bowen (Tex.)*, 2 R. R. R. 315, 25 Am. & Eng. R. Cas., N. S., 215, 67 S. W. 408.

Virginia.—*Darracott v. Railroad Co.*, 83 Va. 288, 2 S. E. 511; *Norfolk, etc., R. Co. v. Ampey (Va.)*, 5 Am. & Eng. R. Cas., N. S., 706, 26 S. E. 226; *Richmond, etc., R. Co. v. Rudd*, 88 Va. 648, 14 S. E. 361; *Richmond & D. R. Co. v. Pannill*, 89 Va. 552, 16 S. E. 749.

Wisconsin.—*Kennedy v. Lake Superior T. & T. Co.*, 87 Wis. 28, 57 N. W. 976.

Note

2. Contributory Negligence the Proximate Cause.**a. General Rule.**

A railroad company is not liable for injuries to one of its car couplers although it was negligent, if the proximate cause of the accident was contributory negligence on the part of the injured employee.

United States.—*Cincinnati, etc., R. Co. v. Mealer*, 50 Fed. 725; *Gleason v. Detroit, G. H. & M. Ry. Co. (C. C. A.)*, 73 Fed. 647.

Alabama.—*Memphis & Charleston R. Co. v. Graham*, 94 Ala. 545, 10 So. 283; *Shorter v. Southern Ry. Co. (Ala.)*, 18 Am. & Eng. R. Cas., N. S., 761.

Georgia.—*Marsh v. South Carolina R. Co.*, 56 Ga. 274; *Rebb v. East Tennessee, etc., R. Co.*, 87 Ga. 631, 13 S. E. 566; *Western, etc., R. Co. v. Easlinger*, 95 Ga. 734, 22 S. E. 580.

Illinois.—*Ohio & M. Ry. Co. v. Bass*, 36 Ill. App. 126.

Iowa.—*Horan v. C. St. P. M. Ry. Co.*, 89 Iowa 328, 56 N. W. 507; *Muldowney v. Illinois Cent. R. Co.*, 39 Iowa 615; *Nichols v. Chicago, etc., R. Co.*, 69 Iowa 154, 29 N. W. 571; *Reed v. Burlington, etc., Ry. Co.*, 72 Iowa 166, 33 N. W. 451; *Romick v. Chicago, etc., R. Co.*, 62 Iowa 167, 17 N. W. 458; *Sedgwick v. Illinois Cent. Ry. Co.*, 76 Iowa 340, 41 N. E. 35.

Kentucky.—*Louisville, etc., R. Co. v. Bryant* 15 Ky. L. Rep. 181, 22 S. W. 606.

Michigan.—*Brewer v. Flint & P. M. Ry. Co.*, 56 Mich. 620, 23 N. W. 440; *McDonald v. Michigan Cent. R. Co.*, 108 Mich. 7, 65 N. W. 597.

Mississippi.—*White v. Louisville, N. O. & T. Ry. Co.*, 72 Miss. 12, 16 So. 248.

Nebraska.—*O'Neill v. Chicago, R. I. & P. R. Co. (Neb.)*, 86 N. W. 1098, 22 Am. & Eng. R. Cas., N. S., 578.

New York.—*Goodrich v. New York Cent. & H. R. R. Co.*, 3 N. Y. S. R. 774.

North Carolina.—*Elmore v. Seaboard Air Line Ry. Co. (N. Car.)*, 8 R. R. R. 663, 31 Am. & Eng. R. Cas., N. S., 663.

North Dakota.—*Bennett v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 182, 2 N. Dak. 112, 49 N. W. 408.

Virginia.—*Darracott v. Railroad Co.*, 83 Va. 288, 2 S. E. 511; *Richmond & D. R. Co. v. Pannill*, 89 Va. 552, 16 S. E. 748.

Wisconsin.—*Kennedy v. Lake Superior T. & T. R. Co.*, 87 Wis. 28, 57 N. W. 976.

b. Brakeman's Failure to Check Speed.

A brakeman who, when about to couple cars, by the exercise of ordinary care, had the power to regulate the speed of approaching cars, cannot recover for an accident of which his failure to check such speed was wholly or in part the proximate cause. So held in *Muldowney v. Illinois Cent. R. Co.*, 39 Iowa 615.

c. Drawbars of Different Height—Contributory Negligence and Negligence in Using Defective Car.

In *Brewer v. Flint & P. M. Ry. Co.*, 56 Mich. 620, 23 N. W. 440, it appeared that a brakeman, whose business it was to couple cars, had his arm injured in trying to couple to another car a caboose, the drawbar of which was about six inches below that of the other car and of cars generally. The caboose had been in that condition for a month, as the brakeman himself knew, and it had been reported for repairs, but the fact that the drawbars were not on the same level must have been apparent to anyone attempting to couple the cars, if he used his eyes. It was held he could not recover against the railroad company, because if the company was negligent in continuing the use of the car on its lines, the brakeman was equally, at least, negligent in exposing himself to a risk against which the ordinary use of his eyesight would have protected him.

d. Defective Automatic Coupler—Kicking Bumper of Approaching Car in Place.

A self coupler was defective, in that a link was missing. A brakeman opened the lip of the coupler, which restored it to its usefulness,

Note

and then, just as the cars were coming together, kicked the bumper of the approaching car, which had a lateral play, and was not in the center, and which he testified he had to kick to make the coupling. It was held that the injury to his foot, crushed between the couplers, was not caused by a defective coupler, but by his contributory negligence. *Elmore v. Seaboard Air Line Ry. Co.* 131 N. Car. 569, 42 S. E. 989, 6 R. R. R. 410, 29 Am. & Eng. R. Cas., N. S., 410.

e. Stumbling on Track—Defective Drawbar.

A switchman, while coupling cars, was injured by stumbling and getting his hand between the bumpers. It was held that the stumbling was the proximate cause of the accident, and, therefore, whether or not the drawbar was defective was immaterial. *Cincinnati, etc., R. Co. v. Mealer*, 50 Fed. 725.

f. Staying between Cars with Knowledge That Speed Has Not Been Slackened—Negligent Speed.

In *Kennedy v. Lake Superior T. & T. Co.*, 87 Wis. 28, 57 N. W. 976, it appeared that a switchman who was injured while attempting to make a coupling knew that his signal to slow up and to stop the train had not been obeyed and that it was moving at a dangerous rate of speed when within a few feet of the car to which it was to be coupled. It was held that in remaining between the cars to make the coupling he was guilty of contributory negligence which would prevent a recovery on account of any negligence of the engineer in moving the train too fast.

g. Failure of First Attempt—Remaining between Cars after They Are Set in Motion.

In an action for injuries to a brakeman, who in attempting to couple cars failed to do so at the first attempt, and, instead of stepping out from between them, as he might have done, continued the attempt as the cars moved on, and caught his foot in a frog, whereby he was injured, it was held that although the company failed to furnish cars which coupled readily, such failure was not the proximate cause of the accident. So held in *Williams v. Central R. R. of Iowa*, 43 Iowa 396.

h. Cars Moving Too Fast—Knowledge That Signal Has Not Been Observed—Negligence of Fireman.

Plaintiff's contributory negligence in attempting to couple a car when he knows it is moving too fast, and after he has seen the fireman has not observed his signal to slow up, will preclude recovery, even though the fireman was negligent. So held in *Nichols v. Chicago, etc., R. Co.*, 69 Iowa 154, 29 N. W. 571.

i. Moving Cars—Defective Roadbed—Knowledge of Absence of Handhold.

In an action against a railroad company for personal injuries received by a brakeman while uncoupling cars, by reason of a defective roadbed and lack of a handhold on the car, it was held that plaintiff's negligence in attempting to uncouple the cars while in motion, knowing of the absence of the handhold, released the company from liability. *Ohio & M. Ry. Co. v. Bass*, 36 Ill. App. 126.

j. Rushing between Cars in Rapid Motion—Negligence in Operating Train.

An employee, who seeing that a train does not stop for him to uncouple, rushes in and attempts to uncouple cars in rapid motion, cannot recover for injuries thereby sustained, on account of the negligence of another employee in operating the train. So held in *Marsh v. South Carolina R. Co.*, 56 Ga. 274.

k. Violation of Rules.

(l) Stepping in Front of Moving Cars—Negligence in Leaving Grade Stake on Track.

In *Gleason v. Detroit, G. H. & M. Ry. Co. (C. C. A.)*, 73 Fed. 647, it appeared that plaintiff was a brakeman on a freight train of the defendant company; that in order to cut out five cars from the train and leave them on a siding, such five cars, with the two between them and

Note

the engine, were uncoupled from the remainder of the train, drawn forward, and backed down upon the siding. Plaintiff then uncoupled the second car from the first of the five cars which were to be left behind, the coupling on the second car being an automatic one, but attached to the other car by a link and a pin; gave the signal to the engineer to go ahead; and rode on the drawbar of the second car to the switch leading to the siding. He there dismounted, closed the switch, gave the signal to the engineer to back down to the remainder of the train, and, as the engine and cars approached the switch, stepped out on the track, and attempted to remove the link and pin from the second car, while walking in front of the moving train, in order that the automatic coupling might connect with a similar one on the next car. While so walking in front of the moving car, he tripped on a grade stake between the ties and was run over and injured. The rules of the company forbade employees to step in front of moving cars. Plaintiff might have removed the link and pin either before the engine and cars began to back, by walking a short distance up the track, or before coupling them to the remainder of the train, by giving the engineer the signal to stop before reaching the standing cars. The track was covered with snow, and, at the point where he stepped upon it, was obstructed by the rails leading into the switch. There was evidence that the rule forbidding employees to step before moving cars was often disregarded, but no evidence that officers of the company had any notice of such disregard, and it was shown that the course adopted by plaintiff was considered by the employees generally as dangerous. It was held that contributory negligence prevented recovery, even if the presence of the grade stake constituted negligence.

(2) Remaining between Cars after They Are Set in Motion—Tight Pin—Fall into Cattleguard.

In *Sedgwick v. Illinois Cent. Ry. Co.*, 76 Iowa 340, 41 N. E. 35, it is held that where it is the duty of an employee to uncouple cars, and he has agreed to obey a rule of the company strictly forbidding all attempts to uncouple cars while in motion, and he goes between standing cars for the purpose of uncoupling them, but is unable to do so at once because the pin is tight, and while he is making the effort the cars are put in motion without a signal, and he, thinking that the motion of the cars may loosen the pin, remains between them and continues his efforts, in violation of the rule, and, moving along with the cars, he falls into a cattleguard, of which he has knowledge but at the time does not think of, and thus is injured, he is guilty, as matter of law, of contributory negligence, and cannot recover against his company for its negligence in moving the cars without a signal.

(8) Dangerous Condition of Coupling—Obvious Defect—Going between Moving Cars.

In *Darracott v. Railroad Co.*, 83 Va. 288, 2 S. E. 511, it is said in the opinion: "At all events the evidence shows that the dangerous condition of the coupling was obvious, and that the plaintiff, in violation of the rules of the company, voluntarily put himself in a position of danger, in consequence of which he was injured. Under these circumstances, in the eye of the law, he was the author of his own misfortune; that is to say his negligence, or, what is the same thing, his failure to use reasonable care and caution, was the proximate cause of the injury complained of. The action is not therefore maintainable."

(4) Uncoupling by Hand—Defective Pin.

In *Richmond & Danville R. Co. v. Pannill*, 89 Va. 552, 16 S. E. 748, it appeared that plaintiff, a brakeman, who knew that the rules of his company forbade the coupling or uncoupling of cars except with a stick, went between cars with engine attached to uncouple them with a stick, which proved inefficient for that purpose because the coupling pin was tight and short. Another brakeman, without the former's knowledge, signaled the engineer to reverse the engine so as to relieve the pressure on the coupling pin. Plaintiff's hand, which was between the bumpers, was caught and injured. It was held that there could be no recovery

Note

because plaintiff's nonobservance of the rules was the proximate cause of the accident.

(5) Short Drawbars—Failure to Examine.

In *Bennett v. Northern Pac. R. Co.*, 48 Am. & Eng. R. Cas. 182, 2 N. Dak. 112, 49 N. W. 408, it appeared that plaintiff was injured while coupling an engine to a car because there was not sufficient space for his body between them. The drawbars of the engine and of the car were unusually short, leaving a space of only about ten inches between the end of the car and of the engine when the drawbars came together, while the usual space is from twenty-four to thirty inches. The proximate cause of the accident was his failure to obey the rule of defendant that he must examine so as to know the character and condition of the coupling apparatus, the rule giving him sufficient time to make such examination in all cases. It was held there could be no recovery.

3. Contributory Negligence Not the Proximate Cause.

a. General Rule.

Contributory negligence on the part of a car coupler will not prevent recovery for his injuries or death if the negligence of the master or a vice principal was the proximate cause of the accident. *Louisville, etc., R. Co. v. Watson*, 90 Ala. 68, 8 So. 249; *Peoria, D. & E. Ry. Co. v. Puckett*, 42 Ill. App. 642; *Brown v. Burlington, etc., R. Co.*, 92 Iowa 408, 60 N. W. 779; *Neville v. Chicago, etc., R. Co.*, 79 Iowa 232, 44 N. W. 367; *Romick v. Chicago, etc., R. Co.*, 62 Iowa 167, 17 N. W. 458; *Ft. Worth & R. G. Ry. Co. v. Bowen* (Tex.), 2 R. R. R. 315, 25 Am. & Eng. R. Cas., N. S., 315, 67 S. W. 408; *Richmond, etc., R. Co. v. Rudd*, 88 Va. 648, 14 S. E. 361.

b. Cars Moving Fifteen Miles an Hour—Negligence in Managing Engine.

In *Rebb v. East Tenn., etc., R. Co.*, 87 Ga. 631, 13 S. E. 566, it is held that where the sole cause of a car coupler's injuries was negligence in manipulating the engine, the fact that he was, at the time, attempting to couple cars when the engine was moving at a speed of fifteen miles an hour will not preclude recovery for such injuries.

c. Failure to Use Coupling Stick.

The failure of a brakeman to use a coupling stick, as required by a rule of the company, will not preclude a recovery for his death sustained while coupling cars, if such failure was not the proximate cause of the injury, it being shown that even with the stick, it was necessary, in this coupling to go between the cars and that its use would not have prevented the injury. So held in *White v. Louisville, N. O. & T. Ry. Co.*, 72 Miss. 12, 16 So. 248.

d. Failure to Use Stick with Knowledge of Engineer—Negligence in Jerking Train Back.

In *Louisville, etc., R. Co. v. Watson*, 90 Ala. 68, 8 So. 249, it is held that the contributory negligence of a brakeman in failing to use a coupling stick, as required by a rule of his company, will not preclude a recovery where the engineer, knowing that he was not using a stick, negligently jerked the train back and injured the brakeman.

e. Going between Moving Cars—Negligence of Employer.

It is error to hold, as a matter of law, that a brakeman who, in the course of his employment, goes between cars moving at the rate of four or five miles an hour, to uncouple them, is guilty of such negligence as will preclude a recovery for injuries sustained by him while in that act, where such injuries result from the negligence of his employer. So held in *O'Neill v. Chicago, R. I. & P. R. Co.* (Neb.), 86 N. W. 1098, 22 Am. & Eng. R. Cas., N. S., 578.

f. Going between Cars in Spite of Warning—Negligence after Knowledge of Plaintiff's Peril.

The contributory negligence of a brakeman, about to make a coupling, in going between cars when warned of the danger, will not excuse negligence of those operating the train, if such contributory negligence was known to them, and they could have avoided the injury by the

Note

exercise of reasonable care. So held in *Romick v. Chicago, R. I. & P. Ry. Co.*, 62 Iowa 167, 17 N. W. 458.

g. Contributory Negligence in Adjusting Coupling and Negligence after Knowledge of Peril.

In an action by a railway brakeman for injuries received, an instruction that, if plaintiff was guilty of negligence in attempting to adjust the coupling as he did, yet if the conductor actually knew of plaintiff's dangerous position in time to have prevented the injury by the use of the means at his command, and failed to use all reasonable efforts to avoid the accident, and such failure on his part was the proximate cause of plaintiff's injuries, he was entitled to recover, was correct, as far as it went, and was not reversible error. *Ft. Worth & R. G. Ry. Co. v. Bowen* (Tex.), 67 S. W. 408, 2 R. R. R. 315, 25 Am. & Eng. R. Cas., N. S., 315.

h. Method of Doing Work—Injury from Another Cause.

The fact that a brakeman, in coupling cars, violates one of the company's rules in the manner of doing the work, will not prevent his recovery, for an injury caused by a defect in one of the cars, where it appears that the injury would not have been avoided had he observed the rule. So held in *Reed v. Burlington, C. R. & N. Ry. Co.*, 72 Iowa 166, 33 N. W. 451.

i. Uncoupling Cars in Motion in Obedience to Order—Injury from Company's Neglect of Duty.

If a brakeman is required to couple cars in motion, and, a safer mode might have been adopted by his employer, and while attempting to perform it with care and prudence commensurate with the increased danger of such duty, he is injured, not by some peril attendant upon the manner of doing the work, but by a danger arising from a failure of the railroad company to use reasonable care to discharge a duty incumbent by law upon it, a recovery may be had for such injury. So held in *Peoria, D. & E. Ry. Co. v. Puckett*, 42 Ill. App. 642.

4. Question for Jury.

a. Failure to Use Coupling Stick.

Where there was no evidence to show that plaintiff would not have been injured had he used a coupling stick, as the rules of the company required, and the evidence was conflicting as to whether or not a coupling stick was accessible to him at the time, the question whether his failure to use a coupling stick was the proximate cause of his injuries was for the consideration of the jury. *Louisville & N. R. Co. v. Veach* (Ky.), 11 Am. & Eng. R. Cas., N. S., 24.

b. Coupling by Hand after Returning Stick to Company's Agent.

Where a coupling was made by hand, in violation of a rule of the company that prohibited coupling by hand; and a coupling stick furnished by the company, was returned by the brakeman to the company's agents from whom it was received. It was held that it was a question for the jury whether the failure to use the coupling stick was the proximate cause of the injury, and that if the jury found that it was not, the brakeman was not chargeable with contributory negligence because of the violation of such rule. *Horan v. C. St. P. M. & O. Ry. Co.*, 89 Iowa 328, 56 N. W. 507.

II. WHAT IS, AND IS NOT, CONTRIBUTORY NEGLIGENCE.

A. COUPLING CARS.

1. What is Contributory Negligence.

a. Absence of Mind.

In an action for the death of a brakeman who was injured while attempting to couple cars, an instruction to the effect that notwithstanding deceased was engaged in a dangerous business, requiring constant and watchful care on his part to save himself from injury, still, if he did not always bear these things in mind and act upon them, and was thereby injured, he could recover, is erroneous, where there is no evi-

Note

dence showing sudden danger or emergency, and the only danger was the ever present one incident to the act of coupling cars. An injury received under such circumstances would be the direct result of contributory negligence, which would defeat a recovery. So held in *Martin v. California Cent. Ry. Co.*, 94 Cal. 326, 29 Pac. 645.

b. Choosing Dangerous Method of Doing Work.

Where a car coupler knowingly selects a dangerous method of doing his work when a safer one is apparent to him, and is thereby injured, he is guilty of contributory negligence, and cannot recover. *Moore v. Kansas City, etc., Ry. Co. (Mo.)*, 12 Am. & Eng. R. Cas., N. S., 580.

(1) Failure to Follow Instructions.

In an action to recover damages for the death of a brakeman, where the evidence showed that deceased at the time of his death was making a coupling, that immediately before the accident he was warned of the danger, and was instructed as to the method of doing it, but that he failed to follow the instructions, and was killed, a nonsuit is properly directed. So held in *Schlemmer v. Buffalo, R. & P. Ry. Co. (Pa.)*, 10 R. R. R. 240, 33 Am. & Eng. R. Cas., N. S., 240, 56 Atl. 417.

(2) Cars of Unequal Height—Failure to Use Crooked Link.

In *Hulett v. St. Louis, K. C. & N. Ry. Co.*, 67 Mo. 239, it appeared that an experienced brakeman undertook to couple together two cars of unequal height without using the ordinary crooked link adapted to preventing accidents in such cases. He knew of the inequality in height, and had the entire charge of the train. Owing to miscalculation on his part, and without any defect in the construction of either car, they came together, and he was crushed between them. It was held that he was not entitled to recover for the injuries so sustained.

In *Goodrich v. New York Cent. & H. R. R. Co.*, 3 N. Y. S. R. 774, it appeared that plaintiff was injured while coupling cars on defendants' road; that the bumpers of the cars were not on a level; that in such case it was customary to use a crooked link; that such links were on hand on this occasion, but plaintiff used the straight link instead, trusting in his ability to lift it so as to effect the connection. Not being able to do this, he let go the link, and was coming from between the cars when his hand was smashed between the deadwoods. It was held that though it be assumed that the defect was the cause of the accident, yet there could be no recovery, as plaintiff knowingly and negligently exposes himself to the danger.

(3) Coupling by Hand—Effect of Conductor's Instructions.

In *Port Royal, etc., Ry. Co. v. Davis*, 95 Ga. 292, 22 S. E. 833, it is held, in an action for injuries sustained by an employee in coupling cars, that it was error to charge that, if the employee was instructed by the conductor to couple the cars without a knife or stick, and when about to enter upon the discharge of that duty the conductor was in a position to see that he had no knife or stick and allowed him to proceed without them, and the employee was then and there injured, he was not negligent in not having such knife or stick, and was entitled to recover if injured without fault on his part, and by the negligence of the company's agents.

(4) Coupling with Short Shackle—Failure to Use Stick.

In *Norfolk & W. R. Co. v. Briggs (Va.)*, 14 S. E. 753, it is held that where a brakeman's injury was the result of attempting to couple with a "short shackle," which he was holding up with his hand, instead of using the coupling stick, as the rules of the company required, and the injury would not have happened if he had used the coupling stick, his contributory negligence prevented a recovery.

(5) Reaching over Drawheads to Raise Link.

In *Arnold v. Delaware & H. C. Co.*, 6 N. Y. S. R. 368, it is held that it is negligence for a person engaged in coupling freight cars to attempt to reach over the drawheads and raise the link, as he is in danger of being caught between the dead woods.

Note

(6) Knowledge That Couplings Are Mismatched—Remaining between Cars without Necessity.

In *Norfolk & Western R. R. Co. v. McDonald's Adm'r*, 88 Va. 352, 13 S. E. 706, it is held that a brakeman who knowing that couplings are mismatched, places the pin in a moving car, and remains between the two cars to shake pin into position, when he might safely have made the coupling by placing pin in a standing car, and letting it be shaken into position by the concussion, is guilty of contributory negligence.

c. Occupying Perilous Position.**(1) Absence of Necessity, and in Violation of Orders.**

If a brakeman, in attempting to couple cars, places himself in a position of peril, in violation of the orders of the conductor, and without necessity, and from which he cannot escape by the exercise of ordinary care, he is guilty of contributory negligence, which bars a recovery for injuries sustained in such attempt. So held in *Rome & D. R. Co. v. Chasteen*, 88 Ala. 591, 7 So. 94.

(2) Cars Moving Too Fast—Going between Cars to Couple by Hand.

In *Norfolk & W. R. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123, it appeared that the engineer was coming back at too great a rate of speed to make the coupling in safety, and when the cars were about a car length apart, plaintiff, whose duty it was to make the coupling, gave the signal to slow up, or "steady up," and when the cars were about twelve feet apart he gave the signal to stop. The engineer did neither. When they came closer together at the same speed, plaintiff stepped between the cars, and took hold of the link of the moving car with his left hand, and placed it in the drawhead of the standing car, and the train came together so violently that his hand was caught between the dead blocks and mashed. It was held that plaintiff was guilty of contributory negligence in attempting to make the coupling under such circumstances.

(3) Going between Cars in Motion without Necessity.

In *Alabama G. S. R. Co. v. Richie*, 111 Ala. 297, 20 So. 49, it is held that the danger of getting between the dead woods of cars in motion, and liable to come together, is so obvious that an employee who takes such risk, when there is ample room on either side, and when there is no necessity for such action, is guilty of such contributory negligence as to prevent his recovery of damages resulting from such negligence, and this independent of any rule of his company.

(4) Going between Cars again to Adjust Pin after They Had Stopped in Supposed Obedience to His Signal.

At the time a conductor attempted to couple cars, in course of his duty, there was occasion for haste. The engine with the flat cars attached loaded with railroad ties, stood on a curve, and was to be attached to a third car, farther back on the curve. He, having adjusted the link and pin, stepped to the outside of the curve and gave the signal to back, which was done. He then, seeing that the pin had fallen too soon, gave the signal to stop, and the cars were stopped, as he claimed, when about one foot from the third car. He testified, however, that from this point he could not see the engineer. It would have been necessary to go around the car to do that, but he supposed the engineer would see him. At all events, the car stopped, and, being in a hurry, he jumped in to adjust the pin. As he did so the car moved again, and he was caught and injured. It was held that he was guilty of contributory negligence. *Long v. Coronado R. R. Co.*, 96 Cal. 269, 31 Pac. 170.

(5) Standing with Back towards Moving Car at Night—Absence of Necessity—Knowledge of Double Bumpers.

In *Southern Ry. Co. v. Arnold* (Ala.), 21 So. 954, 11 Am. & Eng. R. Cas., N. S., 864, it appeared that a switchman, while working at night, had his hand crushed between the bumpers of a stationary car and those of a moving car which he was attempting to couple to the stationary car. He had several years' experience, knew that the cars in question had double bumpers, and that they were more

Note

dangerous than the single bumpers, and, when injured, was standing with his back towards the moving car. There was no immediate necessity for coupling the cars at such time, for they were to remain standing on the track. It was held that he was guilty of contributory negligence.

(6) Moving Cars—Disregarding Warnings of Bystanders.

□ In *Muldowney v. Illinois Cent. R. Co.*, 39 Iowa 615, it appeared that a brakeman, while proceeding to couple cars in motion, was warned by bystanders that the attempt would be perilous to him, and, disregarding the warning, received injuries. It was held that a disregard of the warning, where circumstances showed that the duty would be one of imminent danger from causes apparent in the exercise of ordinary care, would constitute contributory negligence.

(7) Knowledge That Speed Has Not Been Slackened—Staying between Cars.

In *Kennedy v. Lake Superior T. & T. Ry. Co.*, 87 Wis. 28, 57 N. W. 976, it is held that a switchman about to make a coupling, who knows that the engineer has not, in obedience to his request, slowed up or stopped the train, when within a few feet of the car to be coupled, and who knows that the train is running at a dangerous rate of speed, is negligent in staying between the cars to make the coupling, and a finding to the contrary will be set aside.

(8) Standing on Narrow Rim around Pilot of Moving Engine.

The evidence showed that the engine was moving at the rate of four or five miles an hour; that there was a rim one and a half inches broad around the pilot; and that plaintiff undertook to mount this rim and stand on a space only an inch and a half broad, to make a coupling, while the engine was in motion at that rate of speed; and his foot slipped and he was injured. It was held that he was guilty of contributory negligence. *Mayfield v. Savannah, G. & N. A. R. Co.*, 87 Ga. 374, 13 S. E. 459.

(9) Facing Drawbar.

In *Belair v. C. & N. W. R. Co.*, 43 Iowa 662, it is held that whether or not it is negligence for a brakeman to stand facing the drawbar while making a coupling is a question of fact for the jury.

d. Unusual Construction of Cars and Appliances.

(1) Drawheads of Different Heights—Opportunity to Observe.

In *Norfolk & W. R. Co. v. Emmert*, 83 Va. 640, 3 S. E. 145, it is held that it was contributory negligence for a brakeman, who, shortly after he had uncoupled a car, and had an opportunity for observing any defects in the coupling apparatus, and reporting the same, as was his duty, to attempt to couple the same car to another without observing the disparity in the height of the drawheads and using a straight instead of a crooked link.

(2) Projecting Aprons—Opportunity to See—Express Warning.

In *Chicago & E. R. Co. v. Wagner* (Ind. App.), 45 N. E. 76, it is held that no recovery can be had for the death of a brakeman caught between cars while coupling by reason of defective aprons, which projected from the cars so as to leave but an inch of space between them after a coupling was made, it appearing that there was nothing to prevent deceased from seeing the aprons, and that his attention had been expressly directed to them, and to the necessity of keeping out from between them.

(3) Projecting Aprons—Attempting to Couple on Inside of Curve in Track—Disregard of Instructions.

Where cars were provided with projecting boards, which came so close together as to endanger the safety of switchmen, a switchman was guilty of contributory negligence in attempting to make a coupling on the inside of a curve after his attention had been called to the fact that the boards came closely together on the inside than on the outside of the curve, and had been instructed to make the coupling from the outside. So held in *Brown's Adm'x v. Louisville, H. & St. L. Ry. Co.* (Ky.), 23 Am. & Eng. R. Cas., N. S., 883, 65 S. W. 588.

Note

(4) Proximity of Side Sills—Familiarity with Such Construction.

In *Beaudin v. Central Vermont R. Co.*, 14 N. Y. Supp. 700, it appeared that plaintiff, a brakeman, was injured while coupling cars, that the cars were constructed with side sills extending beyond the ends of the cars, so that, when coupled, the bumpers kept the cars about two feet apart, while the ends of the side sills were only twelve or fourteen inches from each other. Couplings of such cars were made by the brakeman passing between the ends of the sills, and standing in the two foot space while adjusting the link and pin. There was evidence that cars so constructed were in general use, and the cars which caused the injuries had been inspected on the day of the accident, and were in good condition; and plaintiff had previously coupled such cars. While making the coupling in question, plaintiff placed one hand on the end of the side sill, with his arm in line with the same, using the other hand to insert the link, while in this position, his elbow was struck by the projecting sill of the other car, and his arm broken. It was held that a nonsuit was properly ordered.

e. Defective Appliances.**(1) Absence of Drawbar—Going in Front of Moving Car with Knowledge of Defect.**

In *Rebelsky v. Chicago & N. W. Ry. Co.*, 79 Iowa 55, 44 N. E. 536, it appeared that plaintiff, a middle brakeman on defendant's freight train, saw a car in bad order attached to the rear of the train by means of a chain, and knew it was so attached because the drawbar was gone. The absence of the drawbar permitted the bad-order car to come so near the car to which it was attached as to crush a person standing between. The bad-order car afterwards became detached from the train, and plaintiff went back to assist in attaching it again. When he passed the rear of the train it was moving slowly forward, and the bad-order car, which was about fifteen feet from the train, was being pushed along slowly to the train by another employee. Plaintiff took hold of the side of this car, at the end nearest to the train, and helped to push it along. After moving along a few steps, he went between the bad-order car and the train, which had come to a stop, to adjust the chain, and he was injured. It was held that his contributory negligence prevented a recovery.

(2) Defect in Drawbar Seen in Time.

An experience head brakeman was directed to take a car standing on a side track, and connect it with his train. The engine was moved to the side track, and backed, under his direction, and subject to his orders, so as to bring one of the cars near the one to be attached. He put a link in the drawbar of the car in motion, and walked back with it to the standing car. While attempting to make the coupling his fingers were crushed. It appeared from his own testimony that he saw the condition of the drawbar, which he claimed had dropped down because defective, the instant he looked at it, and that, if he had looked round before the cars came together, he could have stepped out from between the cars. It was held that his injury was the result of his own gross carelessness. *Karrer v. Detroit, G. H. & M. Ry. Co.*, 76 Mich. 400, 43 N. W. 370.

(3) Drawheads of Different Height—Coupling Link without Play—Knowledge of Defects.

In *St. L., I. M. & S. Ry. v. Rice*, 51 Ark. 467, 11 S. W. 699, it appeared that plaintiff had been in the employ of railroads as brakeman and yard foreman for twelve years prior to the accident, and coupling cars was one of his duties. The published rules of the company, of which he had a copy, enjoined the observance of "great care" in coupling and uncoupling cars, and forbade an attempt to make a coupling unless the drawbars and other appliances were "known to be in good order." The rules did not require employees to couple cars having uneven drawheads, with straight links or when the drawheads were defective. In making couplings it was customary and considered safer to do so with the link in the moving car. The weight of a drawhead is about

Note

two hundred pounds. The plaintiff went between a standing and a moving car to couple them. He saw that there was a link in the drawhead of each car. He tried to take the link from the standing car, but found it fast. He saw that the drawhead of that car was one and a half or two inches lower than it should have been and was twisted to one side. While the ordinary play of a link is from six to seven inches, plaintiff saw that the link in the standing car had no play, and that he could not couple with it without raising it up by extra force. He then took the link out of the approaching car and seizing the link in the standing car, which was a straight one, tried to raise it up, and his hand was caught and injured. It was held that plaintiff was guilty of gross negligence, which contributed directly to produce the injury sustained, and he was not, therefore, entitled to recover.

(4) Coupling Slipping Past Each Other—Knowledge of Defects.

Although the ends of couplings on two cars were liable to slip past each other, and thus bring the platforms together, and therefore were unsafe, yet if an employee knowing the character of such couplings, attempts to make a coupling with them, he is bound to exercise care commensurate with the danger; and if he fails to do so, and is injured, such failure will prevent a recovery against the company. So held in *Toledo, W. & W. Ry. Co. v. Asbury*, 84 Ill. 429.

(5) Failure to Examine Drawheads—Movements of Engine Controlled by Injured Switchman.

Where one of the rules of the company, which formed a part of a switchman's contract of employment, required him to inspect, and take notice of the style of the drawheads, etc., used in coupling engines and cars, and he alone directed the movements of the engine towards the car to be coupled to it, an injury resulting to him from their sudden coming together must be due to contributory negligence. So held in *Brooks v. Northern Pac. R. Co.* (C. C.), 47 Fed. 687.

(6) Defective Car—Failure to Heed Warning.

In *Barkdoll v. Pennsylvania R. Co.* (Pa.), 13 Atl. Rep. 82, it is held that where a brakeman knew, that a car was defective, and unsafe to couple; and was warned not to couple it, and was killed while attempting to do so, his company was not liable for his death.

(7) Knowledge of Defective Drawbar—Opportunity to Stop Train.

A brakeman cannot recover for injuries sustained by reason of a defective drawbar while attempting to make a coupling, where he discovered the danger when the cars were several rods apart, and might, by stopping the train and adjusting the bar, or by adjusting it in another way than that attempted, have avoided the injury. So held in *Secord v. Chicago & M. L. S. R. Co.*, 107 Mich. 540, 65 N. W. 550.

(8) Violent Collision—Struck by Detached Coupling Pin—Knowledge of Defective Brakes.

In *Nelson v. Central R. & B. Co.*, 88 Ga. 225, 14 S. E. 210, it is held that no negligence on the part of the defendant company being alleged except that "the engine, by reason of the carelessness and negligence of the defendant, struck against the freight car which plaintiff was coupling with violence so great, unnecessary and unusual as to cause the drawbar to hurl the coupling pin from its place, causing it to strike against the left side of the head of your petitioner," and the evidence of plaintiff himself showing that there was no negligence in handling the engine, and that the real cause of the injury was that the brake was not in a proper condition for safe use, and that plaintiff knew of the defect when he exposed himself to danger in attempting to make the coupling, it was no error to grant a nonsuit.

f. Injuries from Condition of Track and Roadbed.

(1) Coupling upon Side Track—Knowledge of Absence of Ballast—Jumping upon Track from Moving Tender.

In *Finnell v. Delaware, L. & W. R. Co.*, 129 N. Y. 669, 29 N. E. 825, it appeared a brakeman was upon the tender of an engine backing down slowly upon a side track used to store cars and making up trains, for

Note

the purpose of coupling it with a car standing on such track, which was ballasted like the main track, and between some of the ties there was no ballast. He was an experienced brakeman acquainted with the locality, and the condition of the track was perfectly visible. He had the entire control of the movements of the engine and could have stopped it by a motion of the hand to the engineer. He jumped from the tender into the middle of the track as it approached the car and while slowly walking backwards attempted to remove the link in the drawhead of the car, his foot caught between two ties and he was run over and injured. It was held that the brakeman was guilty of contributory negligence.

(2) Curves in Track in Yard—Care Required.

In *Tuttle v. Detroit, G. H. & M. Ry.*, 122 U. S. 189, it is held that brakemen, when coupling cars, within the freight stations and yards of their company, where curves exist in the tracks, are bound to exercise the care and caution which the perils arising from the nature of the curves demand.

(3) Failure to Signal to Engineer to Slacken Speed and Failure to Look for Obstructions on Track.

In *Loranger v. Lake Shore & M. S. Ry. Co.*, 104 Mich. 80, 62 N. W. 137, it appeared that an experienced brakeman, after turning a switch to allow an engine and tender to pass onto another track for the purpose of running out some cars, ran past the engine and tender, which was backing up about four miles an hour, and when about two car lengths from the cars, and without signaling the engineer, who was bound to obey his signals, to slacken speed, stepped in front of the tender for the purpose of reversing a crooked link, and thereby enable him to make the necessary coupling. While walking sideways upon the track, in his attempt to reverse such link, he stubbed his toe against a pile of cinders, lately dumped upon the track from a passing engine, fell, and was injured. He had passed over the track, on his way from the cars to the switch, but did not notice the cinders. The rules of the company, and his contract with it required brakemen to look before entering upon the track in front of a moving train, to see that the track was clear of obstructions. It was held that his contributory negligence prevented a recovery.

(4) Going in Front of Approaching Cars to Insert Coupling Link—Slipping upon Snow.

A brakeman engaged in coupling freight cars, went between the rails, a few feet in front of an approaching train, for the purpose of inserting a link in the drawhead of the moving car when it should reach him. There were several inches of snow upon the ground. He slipped when walking upon the track, and, falling, his leg was run over and crushed. It was held that he was guilty of negligence contributory to his injury. *Carrier v. Union Pac. Ry. Co. (Kan.)*, 17 Am. & Eng. R. Cas., N. S., 513.

(5) Knowledge That Engine Was Uncontrollable and of Dangerous Condition of Roadbed.

In *Crutchfield v. Richmond & Danville R. Co.*, 78 N. Car. 300, an action for an injury received while coupling cars, it was held error to refuse to charge the jury, that "if they believed that the plaintiff had reasonable grounds for believing that the engine used by defendant prior to the time of the injury complained of was not controllable by the engineer, and that the roadbed was in a dangerous condition, and the plaintiff was injured thereby then the plaintiff was guilty of contributory negligence and the defendant was not liable; and that this was so whether the defendant knew or was ignorant of the condition of the engine or roadbed."

(6) Stepping into Cattleguard at Familiar Point—Coupling in Day Time.

In *Fuller v. Lake Shore & M. S. Ry. Co.*, 108 Mich. 693, 66 N. W. 593, it is held that the railroad company cannot be held liable for an injury

Note

resulting to a brakeman who, in coupling cars, steps into a cattle-guard, in the day time, and at a place where he is familiar with the track.

(7) Unblocked Frog—Inability to Extricate Foot the Second Time.

In *Southern Pac. Co. v. Seley*, 152 U. S. 145, it appeared that S., after serving as a brakeman in the employ of a railroad company, became a conductor on the same road, and as such had been engaged at a depot yard at one of its stations at least once a week, and usually oftener, for seven years. While making up his train at that yard, preparatory to running out with it, after the chief brakeman had failed in an attempt to make a coupling, he tried to make it. There was an unblocked frog at the switch where the car was. He put his foot into the frog, and was told by the brakeman that he would be caught if he left it there. He took his foot out, put it in again, and being unable to extricate it when the cars came together, was thrown down and killed. It was held that he was guilty of contributory negligence; and that the company was entitled to a peremptory instruction in its favor.

g. Projecting Loads.

(1) Knowledge of Danger.

In *Brennan v. Michigan Cent. R. Co.*, 93 Mich. 156, 53 N. W. 358, it is held that a brakeman who voluntarily enters upon his employment, with notice, from a statement of a rule of the company and from his own observation, of a custom of the company to transport cars loaded with logs which project over the ends of the cars in such a manner as to make the service more or less dangerous, is guilty of such negligence as will bar a recovery for injuries received while attempting to couple two of such cars, by reason of such manner of loading.

(2) Opportunity to Avoid Danger.

In *Lothrop v. Fitchburg R. Co.*, 150 Mass. 423, 23 N. E. 227, it appeared that a brakeman was instantly killed while attempting to shackle cars from each of which sticks of lumber projected. It was daylight at the time; and the coupling might have been made safely by stooping down between the timbers, or by crossing over and making it on the other side of the car, from which no timber projected. It was held that he was not "in the exercise of due care and diligence at the time," within the meaning of those words as used in *St. Mass. 1887, c. 270, §§ 1, 2*, giving a right of action to the next of kin of an employee instantly killed as the result of the negligence of the employer.

(3) Necessity of Stooping—Delay in Coupling.

In *Day v. Toledo, C. S. & D. Ry. Co.*, 42 Mich. 523, 4 N. W. 203, it appeared that an experienced brakeman was ordered by the conductor to attach a car loaded with lumber which projected forward and compelled him to stoop in making the coupling. In doing so, he delayed a little and his fingers were caught in the coupling link and injured. It was held that he could not maintain an action against the company, as he fully understood the difficulty to be guarded against, and the conductor was not shown to have been in fault in any way.

(4) Negligence and Contributory Negligence.

Where a railroad company is in the habit of receiving from other railroads cars loaded with timber which project over the ends of the cars so as to make it dangerous for anyone except a careful, skillful and prudent person to attempt to couple them together, if it is negligence for the company to order or permit such a person, who has been in the employ of the company doing that kind of work for about five months, to attempt to make such a coupling, where the attempt is to be made in broad daylight, although it is raining at the time, it is also negligence in the employee to make such attempt. So held in *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan. 188.

2. What Is Not Contributory Negligence.

a. Choosing Dangerous Method of Doing Work.

(1) Coupling by Hand—Absence of Rule.

In the absence of a rule at least prescribing the method of coupling

Note

cars, it is competent to show the habit, custom and duty of employees in making couplings, and it cannot be affirmed that the use of the hands is outside of the line of the employee's duty. So held in *Louisville & N. R. Co. v. York (Ala.)*, 30 So. 676, 23 Am. & Eng. R. Cas., N. S., 470.

(2) Method Required by Company.

Where a brakeman undertakes to make couplings in the manner required by his company, if he executes the duty with care and caution, proportionate to such additional dangers, it cannot be said that he has failed to use ordinary care, merely because he consented to undertake the performance of the act in the manner required, when a less dangerous mode might have been adopted by the employer. So held in *Peoria, D. & E. Ry. Co. v. Puckett*, 42 Ill. App. 642.

b. Occupying Perilous Position.

(1) Brakeman Thrown from Top of Car by Violent Jerk.

In *Kansas City, Ft. S. & M. R. Co. v. Murray*, 55 Kan. 336, 40 Pac. 646, it is held that where a freight train is stopped at a station to take on cars that are standing on a siding, and the conductor leaves the train in charge of a brakeman, under whose direction the locomotive is cut off and backed in upon the siding, where it is attached to the cars thereon, and the brakeman then takes a position upon the top of the rear car, ready to give signals to the engineer, and the latter runs the engine and cars forward from the siding, and then begins backing them towards the stationary part of the train at a rate of about six miles an hour, and when about four hundred feet away from that part of the train towards which they are moving, the engineer, without any signal or necessity, applies the brake, causing a sudden stop, and a violent jerk, which throws the brakeman off and injures him, it cannot be said that the brakeman was guilty of contributory negligence.

(2) Moving Cars While Brakeman Was between Them—Right of Brakeman to Assume That Rule Would Be Observed—Failure to Stoop.

In *Central R. v. Harrison*, 73 Ga. 744, it is held that where the rule of a railroad company provided that, while a coupler was between the cars, trains should not be put in motion, a coupler so engaged had the right to assume that it would not be moved, and that he could pass between the projecting beams of the cars, which he could have done if the train had not been moved; and if, while so passing out, under a signal given by another employee, the engine backed the train, and the coupler was caught between the projecting beams, and crushed to death, recovery for his death would not be prevented by the fact that deceased might have passed under the beams in safety by stooping.

(3) Assuming That Signal to Stop Cars Will Be Obeyed.

In *Nichols v. Chicago, R. I. & Pac. Ry. Co.*, 69 Iowa 154, 28 N. W. 571, it is held that where a brakeman, about to couple cars, has given a signal for the moving cars to stop, he has a right to presume that it will be obeyed, and in acting upon such presumption he will not be guilty of contributory negligence, unless he knows, or by the exercise of ordinary care might know, that his signal has been misunderstood, or is being disobeyed, in which case he will not be justified in acting upon the presumption.

(4) Going in Front of Approaching Train—Warning—Negligence of Coemployees.

In *Bucklew v. Central Iowa Ry. Co.*, 64 Iowa 603, 21 N. W. 103, it is held that if a brakeman has to go on the track in front of an approaching train in order to couple cars, and he takes the usual and ordinary precautions for his own protection before going upon the track, it cannot be said that he is necessarily guilty of such contributory negligence as will prevent his recovering for injuries sustained by him through the carelessness of his coemployees, though he may have been informed that there was danger in so doing.

(5) Standing on Crossbar of Engine from Necessity—Breaking of Pushbar—Effect of Having Previously Ridden on Pilot.

In *McDonald v. Michigan Cent. R. Co.*, 108 Mich. 7, 65 N. W. 597, it is

Note

held that the fact that a brakeman injured by the breaking of a pushbar on an engine when he attempted to make a coupling, while standing on the crossbar of the engine, had ridden on the pilot for two miles before reaching the car to which the coupling was to be made, was not guilty of contributory negligence, it being necessary, in any event, that he should get on the crossbar to make the coupling.

(6) Standing on Footboard of Engine on Curved Track—Short Drawbar and Draw.

In *Bennett v. Northern Pac. R. Co.*, 3 N. Dak. 91, 54 N. W. 314, it appeared that the track on which a coupling was made was a curved one, and plaintiff was standing on the footboard of the engine, on the inside of the curve, at the time he was injured. There was no evidence as to the degree of the curve. It was held that he was not guilty of contributory negligence, as a matter of law, in standing in that place, notwithstanding the unusual shortness of the drawbar of the engine and the draw of the car, the former projecting six inches beyond a rim on the rear of the engine, and the latter being according to some of the evidence twelve inches long, the evidence showing that the usual play to a drawbar is from one to four inches; there being no play to the drawbar on the engine, and it being undisputed that the engine approached the car slowly to make the coupling, so that the amount of slack taken up would be but little, if everything was in proper order.

(7) Going between Moving Cars without Seeing That Signals Are Observed.

A petition alleging that plaintiff, a brakeman on defendant's freight train, gave the engineer signals to back the train for the purpose of making a coupling, and further signals indicating the distance of the car, and directing the engineer to decrease the speed of the train, in disregard of which he backed the train so fast that plaintiff, who had stepped in front of the stationary car to make the coupling, was injured. Plaintiff's action in going between the cars without waiting to see if the engineer was observing his signals was not, as a matter of law, contributory negligence. So held in *Cambron v. Omaha & St. L. R. Co.* (Mo.), 65 S. W. 745, 23 Am. & Eng. R. Cas., N. S., 634.

(8) Going between Cars on Inside of Curve—Necessity of Observing Signals.

In *Mahoney v. New York Cent. & H. R. R. Co.*, 15 N. Y. Supp. 501, it is held that a brakeman is not guilty of contributory negligence in attempting to couple cars by entering between them on the inside of a curve, when signals were being made on that side of the train which it was necessary for him to observe.

(9) Working from Inside of Curve—Cars Coming Too Close Together.

The burden of proving contributory negligence of an employee, to defeat recovery for his injury, rests on the master; and it must be shown not only that he was negligent, but that his negligence caused or contributed to the injury. The fact that a brakeman, killed while attempting to couple cars on a side track which was on a curve, was working from the inside of the curve, does not warrant an instruction that he was guilty of negligence, as a matter of law,—much less, that he was guilty of contributory negligence,—where there was evidence that, with the cars to be coupled, there was as little danger on the inside as on the outside. *Northern Pac. Ry. Co. v. Tynan* (C. C. A.), 6 R. R. R. 394, 29 Am. & Eng. R. Cas., N. S., 394.

c. Defective Appliances.

(1) Absence of Bumper—Coupling at Night.

A brakeman was killed while attempting to couple cars in the night-time, one of which was without a bumper. It was held that he was not guilty of contributory negligence. *Mahoney v. New York Cent. & H. R. R. Co.*, 15 N. Y. Supp. 501.

(2) Defective Lantern—Right to Continue in Employment after Promise to Repair.

Where the master, on being notified by its brakeman that the defect-

Note

ive condition of his lantern renders the service of coupling cars more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of a promise in that regard, without being guilty of negligence, and, if an injury results therefrom, he may recover, except when the danger is so imminent that no prudent man would undertake to use the lantern when coupling cars. So held in *Indianapolis Union Ry. Co. v. Ott*, 11 Ind. App. 564, 38 N. E. 842.

(3) Defective Coupling—Knowledge—Emergency—Danger of Collision with Passenger Train.

Knowledge that a coupling apparatus is defective is not a bar to a recovery for injuries sustained by a brakeman while using them, where he knows that a collision would ensue if the coupling was not made at once, and passengers might thereby be injured, and he acted under order from the engineer. So held in *Strong v. Iowa Cent. Ry. Co.*, 94 Iowa 380, 62 N. W. 799.

(4) Defective Lever—Coupling by Hand—Emergency—Danger of Fatal Collision.

Plaintiff, a brakeman, was directed to couple certain cars equipped with a Buckeye automatic coupler, which, when in good condition, is operated by the brakeman, standing outside the track, by a lever running across the end of the car. The coupler in question was broken, to the knowledge of the railroad company's servants, but its condition was not ascertained by plaintiff until he attempted to use it, when it was necessary to raise the pin by hand. The train was about twenty-five feet away, backing downgrade; and, after discovering the condition of the coupler, plaintiff placed one foot inside the rail, raised the iron pin, in which position his arm was caught and crushed. Behind the car which was coupled were other cars, which were being loaded with live stock, on which persons were working; and, if the coupling had not been made, such persons and stock might have been injured, and plaintiff testified that it was partly to prevent this that he attempted to make the coupling. It was held that the plaintiff was not guilty of contributory negligence, as matter of law, sufficient to preclude his recovery. *Murphy v. Baltimore & O. S. W. R. Co.* (Ky.), 7 R. R. R. 295, 30 Am. & Eng. R. Cas., N. S., 295, 71 S. W. 886.

(5) Knowledge of Defects—Conductor's Failure to Signal to Engineer.

A brakeman about to couple a car to another which was being backed to it discovered that the cars were in such a defective condition as to endanger any one who coupled them, and reported the condition to the conductor, asking him to signal the engineer to come back easily. The conductor ordered him to make the coupling, but failed to signal to the engineer, and the brakeman in making the coupling received injuries. It was held that the fact that the brakeman attempted to couple the cars after he knew of their dangerous condition did not bar him from recovering from the railway company damages for the injuries which he sustained. *Norfolk, etc., R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226, 5 Am. & Eng. R. Cas., N. S., 706.

(6) Second Attempt—Drawbar again Becoming Immovable.

In *Ousley v. Central R., etc., Co.*, 86 Ga. 538, 12 S. E. 938, it is held that a second effort on the same occasion to couple cars, the first having failed because the bar had become fixed in its position and not readily moveable, is not necessarily improper or inexcusable, where the bar had been shaken loose after the first effort and before the second was made, although the second failed for the same reason as the first and the employee was thereby injured.

d. Injuries from Condition of Track and Roadbed.

(1) Hole in Track—Choice of Place to Make Coupling.

In *Louisville & N. R. Co. v. Ward* (C. C. A.), 61 Fed. 927, it is held that the fact that a switchman, injured while coupling cars, by reason of a hole in the track, might have selected another place to make the coupling, if he desired, will not defeat his recovery for the injury, unless he knew, or should have known, of the danger incurred.

Note

(2) Moving Cars—Ballasting Washed from between Ties—Working at Night—Necessity of Acting Promptly.

In *Horan v. C., St. P., M. & O. Ry. Co.*, 89 Iowa 328, 56 N. W. 507, it appeared, in an action by a brakeman to recover for injuries sustained while he was in the act of coupling cars, that the earth between the ties, at the point where the coupling was done, had been washed to such an extent as to interfere with the duties of a brakeman at that point; that the coupling was made in the nighttime; the conductor was not familiar with the condition of the road, and that it was necessary for him to act with promptness in order to make the coupling, or allow the engine and car to come together, and then make an opening, so that he could go in slowly and do the work. It was held that the circumstances justified the brakeman in making the coupling while the cars were moving, and that he was not guilty of contributory negligence in so doing.

(3) Switchman Slipping on Small Incline, between Track and Sidewalk, Covered with Snow.

That a yard switchman has failed to notice a small incline forming a connection between an outside track and sidewalk, and which he might have often seen if his attention had been directed to it, is not conclusive evidence of contributory negligence on his part, or a waiver of negligence of the company, in an action for injuries sustained by him by reason of slipping on such incline while coupling cars, it being covered with snow. So held in *Rouse v. Ledbetter*, 56 Kan. 348, 4 Pac. 249.

(4) Knowledge of Gutter in Yard—Working at Night—Ashes and Snow.

In *Harr v. New York C. & H. R. R. Co.* (N. Y.), 21 N. E. 425, it appeared that the defendant company's yard was three-fourths of a mile long and a quarter of a mile wide, and plaintiff was employed there as a car coupler. He had been so employed for six months, when he was injured in the discharge of his duty by stepping into a gutter, which was near the track, and from four to twelve inches deep, which caused him to fall, throwing his leg on the track under a passing train. He had been employed as car coupler in the same yard some years before, and had labored for defendant in other capacities more recently, but not so as to require his presence in that part of the yard very frequently. Ashes were sometimes thrown into the gutter and removed. Snow also fell there, and there was some snow and water there at the time of the accident, which occurred in the night, plaintiff having a lantern at the time. He occasionally passed by the gutter, and therefore had opportunities to see it. He testified that he did not know of the existence of the gutter. It is held that the evidence supported the finding that he did not know of the existence of the gutter, and therefore was not guilty of contributory negligence.

(5) Prior Knowledge of Trench—Coupling at Night—Ground Covered with Snow.

Deceased, at the time of the accident, was a brakeman in defendant's employ, running upon a freight train. The train backed on to a side track to permit another train to pass. Some cars were standing on the switch, and deceased was directed by the conductor to couple them to the train, and in obeying the order he was injured. Plaintiff's evidence tended to show that, as deceased was engaged in the act of coupling, he stepped into a trench about two feet wide and deep, which ran under the tracks; it was walled up with stone and timbers laid across the tracks; in the middle of the switch track a board or plank was laid across, and some distance outside of the track a stone; otherwise the trench was left open. It was at night, and there was snow on the ground. It also appeared that the train of the deceased had been in the habit of stopping there, and that he knew of the trench. The trench had been there over ten years, in the same condition. It was held that the fact of the knowledge of deceased of the existence of the trench, was not sufficient to charge him, under the circumstances, with contrib-

Note

utory negligence, as the act in which he was engaged necessarily required his whole attention and thought; and that the act itself, of coupling cars while in motion, was not negligence, and it can scarcely be done otherwise. *Plank v. New York Cent. & H. R. R. Co.*, 60 N. Y. 607.

e. Projecting Loads.

(1) Attention Occupied with Giving Signals.

A brakeman was injured while coupling a moving train to a standing car loaded with timber projecting over its end. He did not know that the car was thus improperly loaded, and his attention was necessarily directed towards the moving train, giving signals to slow up, so that he could make the coupling. It was held that he was not guilty of contributory negligence. *Louisville & N. R. Co. v. Robinson (Ky.)*, 16 S. W. 707.

(2) Preemptory Order—Standing on Footboard of Moving Tender—Working by Lantern Light.

In *Haugh v. Chicago, R. I. & Pac. Ry. Co.*, 73 Iowa 66, 35 N. W. 116, it appeared that a car had been loaded with lumber by a certain firm for shipment over defendant's road. The car was improperly loaded, the lumber projecting too far over the end of the car. The firm had given the company notice, in accordance with its custom, that the car was ready, and deceased and another, both yardmen, were directed by the company to bring the car from a side track and couple it to the train. The order was preemptory, and was given at the last moment before the train was to move, and it was at night. Deceased was controlling the movements of the engine by signals, and when he had approached within a short distance of the car, he mounted the footboard of the tender, from which point he saw only when he approached it, by the light of the lantern. He was caught between the projecting lumber and the tender, and was so injured that he died. It was held that deceased could not be charged with contributory negligence, under the circumstances, in not thoroughly examining the car before attempting to couple it in the way he did, but that he had a right to presume that the car was properly loaded for safe handling.

(3) Raising Head after Stumbling into Ditch—Absence of Knowledge.

The evidence tended to show that a yard switchman, whose duty it was to couple cars, and who was a new man in the yard, and had but little knowledge of the same, while attempting to couple a flat car, loaded with projecting bridge timbers, and a box car, properly went in between them to couple them, and stepped into a ditch made by the railroad company, of which ditch he did not have previous knowledge, and slipped, and in recovering himself so raised his head that it came between the projecting timbers and the box car, and was injured. It was held that the evidence did not necessarily show that he was guilty of contributory negligence. *Brown v. Atchison, T. & S. F. Ry. Co.*, 31 Kan. 1, 1 Pac. 605.

f. Inexperienced Employee—Order of Dispatcher.

In *Rahman v. Minnesota & N. W. R. Co.*, 43 Minn. 42, 44 N. W. 522, an action for personal injuries by one who had been employed as a "wiper" in a round house for three months, and who had no other experience in railroading, it appearing that he had no instruction in the art of coupling cars nor had been advised as to signals used when couplings were about to be made, the fact that he was injured by the locomotive when attempting to couple it to a car, under the orders of the dispatcher, does not show contributory negligence.

8. Question for Jury.

a. Emergency—Order of Superior.

In an action by a brakeman for personal injuries sustained while coupling cars, in the discharge of his duty, occasioned by the company's negligence, the jury may in determining his contributory negligence, consider whether the service he undertook to perform was required by a superior to be done with rapidity and promptness in an

Note

emergency which required his exclusive attention. So held in *St. Louis, I. M. & S. Ry. Co. v. Higgins*, 53 Ark. 458, 14 S. W. 653.

b. Stepping upon Track without Seeing That Signal Is Observed.

In *Bucklew v. Central Iowa Ry. Co.*, 64 Iowa 603, 21 N. W. 103, it is held that it cannot be said as matter of law that a brakeman, who, after giving the proper signal for the train to stop, steps upon the track to make coupling, without waiting to see whether his signal will be obeyed or not, is guilty of contributory negligence in so doing; but the question is a proper one to be submitted to the jury with all the facts in the case. See also, *Beems v. C., R. I. & P. Ry. Co.*, 58 Iowa 150, 12 N. W. 222; *Berry v. Central Ry. Co.*, 40 Iowa 564; *Pringle v. Chicago, Rock Island & Pac. Ry. Co.*, 64 Iowa 613, 21 N. W. 108.

c. Relying upon Conductor to Slacken Speed—Opportunity to Observe.

In *Henry v. Sioux City & Pac. Ry. Co.*, 75 Iowa 84, 39 N. W. 193, it appeared that a brakeman, in obedience to his conductor's orders, mounted the front end of a train of freight cars, moving backwards at the rate of about four miles an hour, and proceeded to the rear of the train, dismounted, and made a coupling with a standing car, but in doing so was injured by reason of the speed at which the train was moving. When he first mounted the train he had reason to believe that the conductor would immediately follow him, as was the custom, and slacken the speed of the train in order that the coupling might be made in safety, but when he dismounted he might, by glancing backwards, have seen that the conductor had not mounted the train at all, and, had he noticed the train as it approached him, he might have seen that its speed had not been reduced; but he testified that he was intent upon his work, and was relying upon the conductor, and did not notice these things. It was held that it could not be said, as matter of law, that he was guilty of contributory negligence, but that it was a question for the jury.

d. Bumpers of Different Height of Foreign Cars—Danger Discovered Too Late.

While a brakeman is injured while coupling foreign cars, by reason of the difference in height of their bumpers, where he only discovers the danger at the moment of the accident, the question of contributory negligence is for the jury. So held in *Goodrich v. New York Cent. & H. R. R. Co.*, 116 N. Y. 398, 22 N. E. 397.

e. Cars of Different Height—Absence of Knowledge of Other Defects—Necessity of Going between Cars.

In an action for the death of a brakeman killed while coupling cars, where there is evidence that the cars were of different heights and had different kinds of drawheads, so that they did not come squarely together, thus making the coupling difficult; that the bumpers were broken on one car, and that the spring for holding the drawhead of the other in place had been removed, leaving it "to play loose;" that these defects were not known to deceased or readily observable; that it was necessary to go between the cars to couple, and that while deceased was coupling in the usual way, was crushed by the cars, the question of contributory negligence was for the jury. So held in *White v. Louisville, N. O. & T. Ry. Co.*, 72 Miss. 12, 16 So. 248.

f. Mismatched Couplings—Defective Link Pin—Train Backed without Signal from Injured Brakeman—View of Engineer Obstructed.

In *Southern Pac. Co. v. Burke* (C. C. A.), 60 Fed. 704, it appeared that plaintiff, a brakeman in defendant's employ, was required by its yard master to make a coupling between a caboose with an old style drawhead and a train of seven sleepers with the Miller coupling. On the train pulling out, the caboose became detached, and the train was backed to enable him to recouple it. He went between the stationary cars, but found the link pin fast, and, while hammering it out, the train, without signal from him, suddenly backed and crushed him. The engineer testified that he backed on signal from the rear of the train. The evidence showed that such couplings were not in their con-

Note

struction intended to be used together, and, in making couplings with them, there was unusual danger; that they were, however, constantly used together by defendant; that plaintiff was acquainted with defendant's rule in regard to making such couplings, and was following it when hurt; that he had been switching about two years, but had made such couplings only two or three times; that, had the caboose been coupled at the end of the train, there would have been much less danger, because the engineer could have seen and talked with the brakeman; that the pin used was a square pin, and had it been a round pin, fitting the hole, it could have been easily drawn out. It was held that the question of contributory negligence was for the jury.

g. Brakeman Removing Defective Coupling Rod—Relying on Promise of Conductor to Keep Watch—Negligence of Conductor in Moving Cars without Warning.

Where a conductor of a railway train orders a brakeman to hurry up and examine the couplings and get the train in shape, and promises the brakeman that he will keep watch, and thereafter, while the brakeman is engaged in removing a defective and unsuitable rod used in a coupling, without warning signals, orders the engineer to back other cars against the stationary ones, and thereby causes the brakeman to be run over and maimed, it is within the province of the jury to determine whether the injury is attributable to negligence on the part of the conductor or of the brakeman; and a verdict finding the conductor guilty of negligence, and assessing damages against the receivers of the company in charge of the property, will not be disturbed by this court. So held in *Walker v. Gillett* (Kan.), 10 Am. & Eng. R. Cas., N. S., 140.

h. Signaling from Wrong Side—View of Engineer Obstructed by Reason of Curve.

In *Bucklew v. Central Iowa Ry. Co.*, 64 Iowa 603, 21 N. E. 103, it is held that although the usual custom of an employee desiring to make a signal for the purpose of controlling the movements of a train, in order to couple cars, when not on a curve, is on the engineer's side; when there is evidence that the train had just passed a curve, on which a signal could not have been seen on the engineer's side, it was a question for the jury whether plaintiff was negligent in signaling, for such purpose, from the other side.

i. Walking over Frog without Necessity—Danger Not Apparent.

Plaintiff's decedent was coupling cars, and, after throwing a switch, signaled the engineer to back up. He walked several feet outside the track towards a car, which he was to couple to the train. He disappeared behind the train, and was afterwards found dead, having been run over. The accident occurred in daylight, and the road was smooth, and it was unnecessary to walk over a frog, even if it was necessary to cross the track. The car to be coupled to the train was from thirty to sixty feet beyond the frog, and the train was backing about half as fast as a man could walk. There was evidence that the frog did not appear to be one in which one's foot would be caught, and its condition could not be seen until one was near it. It was held that whether deceased was guilty of contributory negligence was for the jury. *Jones v. Flint & P. M. R. Co.* (Mich.), 21 Am. & Eng. R. Cas., N. S., 904, 86 N. W. Rep. 838.

j. Projecting Load.

In an action to recover damages caused by the alleged negligent killing of plaintiff's intestate, a brakeman upon one of defendant's freight trains, while he was coupling a flat car loaded with rails which projected over the deck of the car. It was held it was for the jury to pass upon the question of plaintiff's contributory negligence. *Corbin v. Winona & St. P. Ry. Co.*, 64 Minn. 185, 66 N. W. 271.

k. Projecting Loads—Coupling by Lantern Light—Warned Too Late.

In *Atchison, T. & S. F. R. Co. v. Wells*, 56 Kan. 222, 42 Pac. 699, it appeared that a brakeman on a freight train in which was a flat car loaded with poles, which were negligently allowed to project over the end of the car. He, with the others, started with the train in the night-

Note

time, and it appeared that his attention was not drawn to the car or its condition until about the time he was injured. He uncoupled the train from the car loaded with poles, but about ten minutes later, when he entered from the other side of the train to couple it again to the car loaded with poles, his head was caught and crushed between one of the projecting poles and the car in front of it. The accident occurred about midnight, when it was raining and very dark, but he had a lantern with him. It was held that it was a question for the jury whether he was guilty of contributory negligence.

B. UNCOUPLING CARS.**1. What Is Contributory Negligence.****a. Choosing Dangerous Method of Doing Work.****(1) Moving Trains.**

In *Hudson v. Charleston, C. & C. R. Co.* (C. C.), 55 Fed. 248, it is held that as long experience has shown that attempts to get on a moving train, or to couple or uncouple moving trains, are very dangerous, any person injured in such an attempt negligently contributes to his injury.

(2) Going between Moving Cars—Absence of Rule and Necessity.

In *Memphis & Charleston R. Co. v. Graham*, 94 Ala. 545, 10 So. 283, it is held that the act of uncoupling cars while in motion by going between them, though attended with more or less danger, does not necessarily constitute contributory negligence, in the absence of a rule prohibiting it; yet, if the coupling could be made with safety while standing on the platform of one of the cars, the act of going between them for that purpose would constitute contributory negligence.

(3) Uncoupling Moving Cars without Necessity.

In *Peoria, D. & E. Ry. Co. v. Puckett*, 42 Ill. App. 642, it is held that where an employee has the power to adopt his own method of doing work, and he voluntarily selects of two ways the more dangerous, he does so at his peril, and cannot recover for any injury resulting from such selection, as where a brakeman chose to disconnect cars while in motion when he could have done so while they were stationary.

(4) Going between Moving Cars Instead of Using Lever on Other Side.

When there is a comparatively safe and a more dangerous way known to a servant, by means of which he may discharge his duty, it is negligence for him to select the more dangerous method, and he thereby assumes the risk of the injury. A railway train was equipped with two levers,—one on each side of it,—to enable the brakeman to draw a pin between two cars without entering between them. The machinery attached to the lever on the side of the plaintiff was out of order, while that attached to the lever on the opposite side was in good condition. It was held, that the fact that the brakeman chose to, and did, step in between the cars while in motion to draw the pin, instead of using the lever on the opposite side of the train, provided for the purpose, was evidence of negligence contributing to an injury resulting from his stumbling while walking between the cars. *Morris v. Duluth, etc., Ry. Co.* (C. C. A.), 108 Fed. 747, 22 Am. & Eng. R. Cas., N. S., 45.

(5) Going between Moving Cars without Necessity—Uncoupling at Night—Dangerous Condition of Track.

In *Lake Erie & W. Ry. Co. v. Craig* (C. C. A.), 73 Fed. 642, it is held that it cannot be said, as matter of law, that it is not negligence for a switchman, who might have withdrawn the coupling pin while the cars were stationary, to wait until they have attained a speed of five miles an hour, and then step in between them, on a dark night, when the ground is frozen and likely to be slippery, with snow upon it, at a point where the tracks interlace, and the ties rise above the level of the road-bed.

(6) Going between Cars in Motion without Necessity—Failure to Bail—last Side Track—Knowledge of Danger.

In *Pennsylvania Co. v. Hankey*, 93 Ill. 580, it appeared that a brake,

Note

man was injured in attempting to change a link attached to an engine, while it was in motion over an unballasted part of a side track, the ties being above the ground, whereby he caught his foot between one of the ties and the brake beam at the rear of the tender, the engine backing to attach to empty cars; that the accident occurred in broad daylight so that he must have seen the condition of the side track, and that he did not have the engine stop before going upon the track, as he might have done, and proof failed to show that common prudence required the ballasting of such a side track, only used for standing cars. It was held that his contributory negligence prevented a recovery.

(7) Going between Moving Cars without Signaling and without Necessity—Unblocked Rails.

In *Towner v. Missouri Pac. Ry. Co.*, 52 Mo. App. 648, it appeared that in the absence of a conductor, the brakeman was in charge of a train engaged in switching near a switch head, and the train was moved on his signals. After setting the cars in motion and observing their rate of speed, he made one attempt to uncouple, and desisted, and then without ordering or signaling a slowing up, again attempted to uncouple when he knew that to do so involved the necessity of his going with the cars at their rate of speed. There was no emergency or necessity existing requiring such action. He was killed, and his body was found on one of the main rails about fifty or sixty feet from where he entered the track. It was held that he was guilty of contributory negligence such as to defeat a recovery, though there was evidence tending to show his foot was caught in the unblocked place between the guard and the main rail.

(8) Effect of Custom.

Where a switchman, in discharging the duty of uncoupling cars, has the choice of two ways of performing it, one entirely safe, the other obviously and greatly dangerous, adopts the dangerous way, and is injured, he is guilty of negligence which will bar a recovery by him in an action against the employer, based on the latter's negligence; and he cannot relieve himself of the consequences of such contributory negligence by showing that it was customary to perform the duty in the dangerous way. So held in *George v. Mobile & O. R. Co.*, 109 Ala. 246, 19 So. 784.

(9) Uncoupling Cars in Motion without Necessity—Effect of Foreman's Orders.

In *Davis v. Western Ry. of Alabama*, 107 Ala. 626, 18 So. 173, it is held that an order by a foreman, whom a brakeman was bound to obey, "to cut off one car," given when the foreman was five or six car lengths away, did not justify the brakeman in undertaking to uncouple the cars while in motion, in the absence of any emergency attending the order.

(10) Unblocked Frog—Going between Moving Cars—Disobedience of Orders.

In *Richmond & Danville R. R. Co. v. Risdon's Adm'r*, 87 Va. 335, 12 S. E. 786, it appeared that the frog in question was dangerous, and could have been made safe by blocking; but that it was a standard frog, the same used everywhere by the defendant company; that deceased had been employed in same yard, over same frog, and was familiar with its character; that on night of accident the yardmaster ordered him to uncouple cars, which were standing still, and then ride them back on a switch, but, instead of obeying orders, he signalled the engineer to back, and stepping between the moving cars to uncouple them, got his foot caught fast in the frog, and was run over and killed. It was held that deceased's disobedience of orders was contributory negligence, and the proximate cause of the injury, and there could be no recovery.

(11) Going between Moving Cars—Custom—Brakeman Estopped.

If the customary and usual way of doing the work of uncoupling cars in the yard was negligent and wrong, although permitted by the company, a head brakeman injured by reason of such mode of doing the

Note

work, being for the time in command of the train and in part responsible for the custom, cannot complain of the custom of going between cars while they were in motion. So held in *Ferguson v. Central Iowa R. Co.*, 58 Iowa 293, 12 N. W. 293.

b. Occupying Dangerous Position.

(1) Standing on Ledge at End of Car—Absence of Handholds.

In *Dooner v. Delaware & H. C. Co.*, 171 Pa. 581, 33 Atl. 415, an action by a brakeman to recover for personal injuries sustained by him while uncoupling cars, it is held that plaintiff is not entitled to recover where it appears that the accident occurred while he was uncoupling an ordinary box freight car from the tender of the engine; that there were two iron steps, a brake and a wheel upon the middle of the end of the car towards the tender, but no ladder, steps or handholds at or near the corners of the car; that cars of this description were in common use, and that there was no one standard of appliances for the use of brakemen in common use; that plaintiff after pulling out the coupling pin stood on the narrow ledge at the end of the car, with his back against the car; that he let go his hold of the iron step attached to the middle of the end of the cars, stepped to the right side of the car, gave the signal to the engineer by moving his hand up and down beyond the side of the car; then, that in endeavoring to return to the iron step, he took one step towards it, and was taking the second, when he lost his balance and fell off the car, the wheel passing over his leg and crushing it.

(2) Kneeling Down on End of Car, Instead of Lying Down, to Pull Coupling Pin—Sudden Start of Engine.

In *Stanley v. Chicago & W. M. Ry. Co.*, 101 Mich. 202, 59 N. W. 393, it is held that a brakeman who, in order to get employment, has pretended to an experience which he has not, and, being ordered onto a flat car to pull the coupling pin instead of lying down on the rear end of the car, which was the proper position, kneels down, and in that position is jerked off by the sudden start of the engine after the uncoupling, has no cause of action against the company.

(3) Standing with Foot on Bumper of Each Car—Pin Already Withdrawn.

Where a brakeman, in attempting to withdraw the coupling pin and uncouple a car from the engine and tender, stands with one foot on the bumper belonging to each car, and, with his lantern in his left hand, leans forward, and reaches with his right to withdraw the coupling pin, which has already been withdrawn by a fellow brakeman, and the cars separating cause him to fall between the cars, and to be run over and injured, he must be regarded as negligent, and his negligence must be considered the proximate cause of his injury. So held in *Young v. West Virginia C. & P. Ry. Co.* (W. Va.), 4 Am. & Eng. R. Cas., N. S., 134.

c. Absence of Drawhead—Moving Cars.

Where a switchman, in the line of his duty, dealing with a car as disabled, with a view to detaching it and transferring it from the yard to the shops, signals the engineer to back, and without examination and apparently oblivious to the imminent peril, presumably for the purpose of uncoupling, goes between the car and another to which it is chained, and is injured by the cars coming together because of the absence of a drawhead, his contributory negligence prevents a recovery. So held in *Illinois Cent. R. Co. v. Bowles*, 71 Miss. 1003, 15 So. 138.

d. Collision While Uncoupling—Tight Pin—Knowledge of Danger.

In *C. & O. R. Co. v. Lee*, 84 Va. 642, 5 S. E. 579, it appeared that plaintiff was injured while uncoupling a car from standing cars, by a pier engine and coal train running into such cars. When he went in between those cars, he saw the engine stalled on the upgrade and the train only about twenty feet from those cars. He was delayed by a tight pin. The engine gave no warning by bell or whistle, but its exhaust as it climbed the grade could be heard a long way. It was held that his contributory negligence prevented a recovery.

Note

e. Going between Moving Cars without Signaling to Engineer.

In *Davis v. Western Ry. of Alabama*, 107 Ala. 626, 18 So. 173, it is held that where a brakeman went between cars having double dead-woods to uncouple them, while they were being backed downgrade and were pulling on the engine so that the draw was taut and without first giving the signal to the engineer for the slack, as was customary, and after he went in between the cars the engineer, in a proper manner, gave the slack, and the brakeman's arm was caught in between the deadwoods, he was guilty of contributory negligence.

f. Signaling for Train to Move Faster before He Had Succeeded in Withdrawing Pin.

In *Browne v. New York & N. E. R. Co.*, 158 Mass. 247, 33 N. E. 650, it appeared that a switchman had been sent to throw the switch as a flying switch was to be made; that the engine, with its head facing the cars, was backing and pulling the train along towards the switch; that it had slackened its speed, to let the brakeman pull out the pin and thus to uncouple the caboose car from the engine; that he had hold of the chain attached to the pin but did not succeed in pulling it out, yet gave the signal for the engineer to start along; that the engineer started faster; that as soon as the engine passed the switch the switchman, without seeing that the caboose car was still coupled to it, threw the switch; and that the coupling held. The caboose car was pulled off the track and tipped over and the brakeman killed. The pin and the hole in the "stiff shackle" through which the pin dropped were in good condition; and the reason why the brakeman could not pull it out was that the engine was pulling the train and he did not succeed in getting it out at the moment when the engine slackened its speed. It was held that the giving of the signal for the engineer to start faster before the pin was pulled out contributed directly to the accident, and prevented a recovery.

g. Pushing Uncoupled Car along Track without Observing an Engine—Obstructed View.

It appeared that plaintiff uncoupled a car, and pushed it opposite to a pile of lumber, to be loaded, not knowing that there was an engine on the track; that, in uncoupling the cars, he went between them; that he pushed the car down, walking on the track; that the engine was backed upon him, and he was jammed between the bumpers of the cars and injured. It was held that his contributory negligence prevented a recovery. *Burns v. Boston & L. R. Co.*, 101 Mass. 50.

h. Failure to Ballast Side Track—Prior Opportunity to Observe—Going between Moving Cars.

In *Ragon v. Toledo, A. A. & N. M. Ry. Co.*, 97 Mich. 265, 56 N. W. 612, it appeared that plaintiff, while attempting in the day time to uncouple a moving freight car from the engine in order that the car might be left on a side track, was injured by reason of stepping into an unfilled space between the ties, near the rail, from two to four inches deep, caused by failure to ballast the side track the whole width. The side track had been in that condition during the time of plaintiff's employment, and he had passed the place of injury frequently in the discharge of his duties, but testified that he supposed the track was smooth. It was held that plaintiff was guilty of contributory negligence in venturing between the moving cars and the engine without first looking under the car to examine the roadbed.

i. Moving Cars—Knowledge of "Split Switch."

A brakeman was guilty of contributory negligence in undertaking to uncouple defendant's cars while in motion, and while passing over a "split switch" in use on its road, which he must have known could not be blocked at the place where his foot was caught. So held in *Grand v. Michigan Cent. R. Co.*, 83 Mich. 564, 47 N. W. 837.

Note

2. What Is Not Contributory Negligence.**a. Dangerous Methods.****(1) Going between Moving Cars—Opportunity to Uncouple While Cars Were Standing—Rule Limiting Time for Unloading.**

In *Lowe v. C., St. P. M. & O. Ry. Co.*, 89 Iowa 420, 56 N. W. 519, it appeared that the conductor of the train, on which deceased was employed as a brakeman, had received a telegram before reaching the station where the accident in question occurred, to set out the car uncoupled by deceased, and, after reading the same, said to the brakeman, "we will set out that head stock car." It was not the special duty of any particular member of the train crew to place cars on the side track, but upon the arrival of the train at the station the conductor and two of the brakemen proceeded to unload freight, and deceased, without special orders, proceeded with the engineer to set out the car in question, the car with five others being uncoupled from the train for that purpose. After the switch had been thrown, and the signal given to back, but while the cars were moving slowly, deceased went between the cars to uncouple the stock car. He might have uncoupled the car before he threw the switch, or after they had passed upon the side track, and in either case the cars would not have been moving, but that was not the usual way of doing, and would have required more time, and under the rules of the company, there was but nine minutes' time, after the arrival of the train at the station, in which to unload freight, set out the stock car on the side track, return with the engine to the main track, and side track the train, so as to leave the main track clear for the passenger train. It was held that a finding that deceased was not guilty of contributory negligence was warranted by the evidence.

(2) Failure to Use Safe Method—Lack of Time.

Where there is evidence that after the cars were uncoupled, and while the brakeman was laying the coupling pin on the drawhead in front, such car overtook the detached cars, and plaintiff's arm was caught between the drawheads, the request that if the plaintiff was injured by his failure to adopt the safe course, he cannot recover is well refused, if it does not appear that he had time to comprehend the safe way, and to adjust himself accordingly. So held in *Alabama G. S. R. Co. v. Richie*, 99 Ala. 346, 12 So. 612.

(8) Uncoupling by Hand from Necessity—Sudden Movement of Cars.

In *Richmond & Danville R. R. Co. v. Rudd*, 88 Va. 648, 14 S. E. 361, it appeared that defendant's rules, herewith plaintiff, a brakeman, was unacquainted, forbade the uncoupling of cars except with a stick, which, on the occasion in question could not be done. The conductor ordered plaintiff to uncouple cars. While he was pulling the coupling pin with his hand he was thrown between the cars and injured by reason of the engine being suddenly reversed at a signal from a brakeman left by the conductor to do the signaling. It was held that plaintiff was not guilty of contributory negligence in not using a stick, as it would have been ineffectual, nor in obeying the conductor.

b. Occupying Dangerous Position.**(1) Mounting Cars.**

In *Rutledge v. Missouri Pac. Ry. Co.*, 110 Mo. 312, 19 S. W. 38, it is held that where the evidence fails to show whether it is customary and prudent for switchmen to mount cars to uncouple them, it cannot be declared, as a matter of law, that a switchman is guilty of contributory negligence in so doing.

(2) Going between Moving Cars after Signaling to Slacken Speed.

The act of a brakeman in going between cars to uncouple them, while they were moving at an improper and unusual rate of speed, after having signaled the engineer to slacken speed, was not necessarily contributory negligence. So held in *Beema v. C., R. I. & P. R. Co.*, 58 Iowa 150, 12 N. E. 222.

(8) Picking Coupling Pin from Track after Signaling to Fireman.

In *Steele v. Central Railroad of Iowa*, 50 Iowa 109, it is held that where a brakeman attempted to pick a coupling pin from the track

Note

as a train was slowly backing towards him, having first signalled the fireman who was in charge of the locomotive to stop, and was injured by reason of the failure of the fireman to obey the signal, he was not guilty of contributory negligence.

Going between Cars to Repair Coupling—Order of Conductor—Conductor's Negligence in Moving Train.

Plaintiff, a brakeman, was directed by the conductor in charge of a train to go between certain cars and repair a coupling. While so engaged, and without receiving any warning, the train was moved, and he was injured. The conductor signaled the engineer to move the train, though knowing, or having a good reason to know, that plaintiff was between the cars, working as directed. It was held that the evidence warranted a finding that plaintiff was free from contributory negligence. *Bowes v. New York, N. H. & H. R. Co. (Mass.)*, 62 N. E. 949, 2 R. R. R. 292, 25 Am. & Eng. R. Cas., N. S., 292.

(4) Going between Moving Cars—Ditch in Track—Absence of Knowledge.

In *Hollenbeck v. Missouri Pac. Ry. Co. (Mo.)*, 38 S. W. 723, it is held that it is not, as matter of law, contributory negligence for a brakeman, not knowing a ditch in a railroad track, to go, for the purpose of uncoupling cars, between the cars while they are moving at a slow and safe speed, a rule of the company implying that in coupling and uncoupling cars, employees may go between them while moving, and there being evidence that the speed was safe, and this though the brakeman was in charge of the train, he having testified that he did not have time to uncouple while the train was standing still, and that the way he attempted to do it was the customary way.

(5) Alighting between Rails because of Condition of Track outside.

In an action by a brakeman on account of negligence in running an engine upon him while he was between the rails in the performance of his duty of uncoupling cars, evidence that the condition of the track was such that he could not have alighted outside the rails was competent for the purpose of showing that he was not negligent in alighting between them. So held in *Pringle v. Chicago, Rock Island & Pac. Ry. Co.*, 64 Iowa 613, 21 N. W. 108.

8. Question for Jury.

a. Uncoupling Flat Oil Tank Car from Box Car—Unusual Construction—Inexperience—Sudden Jerk.

In *Graham v. Boston & A. R. Co.*, 156 Mass. 4, 30 N. E. 359, it appeared that a brakeman employed on a freight train, while uncoupling a flat car with an oil tank on it from a box car, caught his hand and was injured. The evidence as to the train's speed was conflicting. Plaintiff testified that he had never before seen a car with a space between the tank and block designed to keep the plank in place, that he reached over with his right hand to get the pin, and that he reached back with his left hand to feel if there was a grab iron. Finding none, he put his hand over the block to hold on, when the engineer started the train with a jerk, and his hand was caught and injured. It was held that whether he was in the exercise of due care was for the jury.

b. Uncoupling by Hand after Attempting to Use Lever—Unblocked Guard Rail.

Plaintiff, a brakeman, attempted to uncouple two cars with a lever provided for the purpose; but the coupling was out of order, and he could not thus draw the pin. He attempted to draw it with his hand, and while walking between the moving cars his foot was caught between the rail and an unblocked guard rail, whereby he was injured. It was held that plaintiff's contributory negligence, or assumption of risk incident to the condition of the guard rail, was a question for the jury. *Trott v. Chicago, R. I. & P. Ry. Co. (Iowa)*, 86 N. W. 33, 21 Am. & Eng. R. Cas., N. S., 391.

c. Hole under Switchrod Unusually Large—Absence of Knowledge—Going between Rails.

In *Hannah v. Connecticut River R. Co.*, 154 Mass. 529, 28 N. E. 682,

Note

it appeared that a brakeman employed in a freight yard, while uncoupling cars, stepped into a hole in the roadbed under a switchrod, and was caught and injured. There was evidence that the hole under the rod was larger than necessary, and than under any other rod in the yard; that the hole had existed for a week without the brakeman's knowledge, and he did not notice it at the time, and it was afterwards partially filled up and made safe; that he was acting under orders of the conductor of a train he was helping to make up, and went between the cars and rails to pull the coupling pin, which stuck; and that it was customary and generally quite as safe to go between the rails under such circumstances. It was held that whether the brakeman was in the exercise of due care was for the jury.

d. Moving Cars—Unblocked Frog—Absence of Knowledge—Presumptions.

In *Spaulding v. Chicago, St. P. & K. C. Ry. Co.*, 98 Iowa 205, 67 N. W. 227, it appeared that deceased was an experienced brakeman; that his foot caught in a frog in his company's yard; that the frog had been left unblocked, and the roadbed unsurfaced near it; but that he did not know this fact. It was held that there was no presumption of contributory negligence because he was uncoupling the cars while they were in motion, but it was a question for the jury whether, under the circumstances, he was negligent.

C. DUTY TO LOOK OUT FOR DEFECTS AND OBSTRUCTIONS.

1. In General.

In *Smith v. Potter*, 46 Mich. 258, 9 N. W. 273, it is said in the opinion: "When a brakeman handles any car, he knows there is at least a possibility that he may be injured unless he examines it carefully. It may not always be legal negligence in him to rely with some assurance on the accuracy of the persons who should have examined it before it comes to him. But he is bound to know that omissions of such care are possible, and are dangerous if they occur, and he is also bound to know, as all men know, that it is impossible for employers to completely guard against it."

Where an employee is injured while coupling cars through the absence of a proper appliance, he cannot recover if he could have discovered its absence, before attempting to make the coupling, by the exercise of reasonable care. So held in *Hannigan v. Lehigh & H. R. Ry. Co.* (N. Y.), 12 Am. & Eng. R. Cas., N. S., 605.

a. Obvious Defects in Coupling.

In *Karrer v. Railroad Co.*, 76 Mich. 400, 43 N. W. 370, it is said in the opinion: "It was plaintiff's duty to examine into the coupling arrangements of both cars before he attempted to couple them, and as they were only a rod apart at most before he started the train back, and as he says the defect was visible at once to any one looking, one or two seconds would have furnished all the time needed to satisfy himself had he been acting under any one else's orders; but, as he had personal direction of the engineer's movements and could move when he pleased, the case, as he presents it, was an aggravated one of the grossest carelessness, for which he, and no one else, was responsible."

2. Absence of Ladders, Steps, and Handles—Failure to Examine—Coupling Moving Cars.

In *Chicago, B. & Q. R. Co. v. Warner*, 108 Ill. 538, it is held that where a railroad company has, in use on its road, freight cars without end ladders, steps and handles, which appliances are necessary in coupling or uncoupling cars in motion, and a conductor is aware of this fact, it is clearly his duty, before attempting to pass from the side to the end of the car for the purpose of uncoupling it, to ascertain whether it is one of that kind, and if he finds it is, it is negligence on his part to attempt to make the uncoupling while the train is in motion.

3. Peculiar Bumper of Foreign Car.

In *Simms v. South Carolina Ry. Co.*, 31 Am. & Eng. R. Cas. 199, 26 S. Car. 490, 2 S. E. 486, it is said in the opinion: "The intestate of

Note

plaintiff was a car coupler, and, as there was no proof that his engagement was limited to coupling cars of the South Carolina railroad pattern, it must be considered as including all cars which might be rightly carried on his road, and therefore this coupling was within his engagement. Besides, if the danger was "peculiar," can it be said that it was "not known or obvious?" The defendant company did not construct the car with the peculiar bumper, but had it temporarily in their possession under the requirements of the law. What other employee of the ideal thing called the company was likely to know as much about the peculiar construction of the stranger bumper as he whose duty it was to couple it to the train? Assuming that he was competent for his business, and was aware of its dangerous character, it seems strange, that he did not see at a glance, that, if he attempted to couple standing between the cars, he would be crushed to death. Something must be left to the sense and solution of persons having intelligence."

4. Curves in Track—Drawbars Passing Each Other.

In *Tuttle v. Detroit, etc., Ry.*, 122 U. S. 189, 7 Sup. Ct. 1166, it was claimed that a brakeman, who was injured in coupling cars, had a right to go to the jury on the question whether the defendant company was not negligent in having too sharp a curve in its road where it entered a yard, but the court said: "Although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety to passengers and the public is not involved; much less that it should be left to the varying and uncertain opinion of juries to determine such an engineering question * * * it is for those who enter into such employment to exercise all that care and caution which the perils of the business in each case demands. The perils in the present case were seen and known. They were not like the defects of unsafe machinery which the employer has neglected to repair, and which his employees have reason to suppose is in proper working condition. Everything was open and visible, and the deceased had only to use his senses and his faculties to avoid the dangers to which he was exposed. One of these dangers was that of the drawbars slipping and passing each other when the cars were brought together. It was his duty to look out for this and avoid it. The danger existed on the inside of the curve. This must have been known to him. It will be presumed that, as an experienced brakeman, he did know it, for it is one of those things which happen, in the course of his employment, under such conditions as existed here."

5. Failure to Examine Brakes and Report Defects.

The law imposing a high degree of care upon all employees of railway companies engaged in the running of trains, to insure the safety of those in the service, makes it the duty of a brakeman to see that the brakes on the cars of his train are always in proper order for working, and report all defects therein to the company; and if he sustains an injury in attempting to couple cars in consequence of his neglect to perform that duty, no recovery can be had against the company. So held in *Chicago & A. R. Co. v. Bragonier*, 119 Ill. 51, 7 N. E. 688.

6. Defect in Coupling Appliances—Plaintiff's Knowledge—Burden of Proof.

In *Chicago & E. R. Co. v. Wagner*, 17 Ind. App. 22, 45 N. E. 76, it is held, in an action for the death of a brakeman killed while coupling cars, that the burden is on plaintiff to show that deceased had no knowledge of any defect in the coupling appliances, and that no fact existed which, by the exercise of reasonable care, would have acquainted him with the danger.

7. Bumpers of Different Heights—Failure to Use Crooked Link—Right to Assume That Master's Duty Has Been Performed.

But in *Goodrich v. New York C. & H. R. R. Co.*, 116 N. Y. 22 N. E. 397, it appeared that plaintiff, a brakeman in defendant's employ, was

Note

injured while engaged in coupling a car received from another road; that the accident resulted from the fact that the bumper of such car was out of order so that it hung lower than the one on the car to which it was being coupled. The link in the bumper, at the time of the accident, was a straight one and plaintiff was unable to make it enter the bumper of the other car. It was customary in coupling cars with bumpers of different heights to use a crooked link, and that such links were supplied by defendant and were in the caboose of plaintiff's train; and after the accident the cars were coupled with a crooked link. It was held that the furnishing of such links did not fill the measure of the company's obligations; that the duty of examination to ascertain whether the coupling appliances were in proper condition rested, in the first instance, upon the master, and in the absence of evidence to that effect it could not be presumed that it had devolved upon plaintiff; and that unless it had he had the right to assume that the master's duty had been performed.

8. Defective Track and Cattleguard—Attention Absorbed by Duties.

So in *Illinois Cent. R. Co. v. Sanders*, 166 Ill. 270, 46 N. E. 799, it is said in the opinion: "But it is said, the defective track and cattle guard were in plain view, and might have been seen by the plaintiff if he had looked. * * * The coupling of cars is a dangerous service. The work has to be done instantly when the cars come together. A slight mistake or a false movement on the part of the brakeman may expose his life or limbs to danger. Hence it is apparent that when a brakeman undertakes to make a coupling he has no time to investigate the track and determine whether it is defective or safe. His whole attention is directed to the cars that are coming together and the dangerous act he is required to perform, and it cannot be expected that he will stop in the performance of his duty to examine the condition of the track."

9. Knowledge of Defect—Right of Brakeman to Rely on Judgment of Conductor.

And in *Grout v. Tacoma E. R. Co.* (Wash.), 74 Pac. 665, 10 R. R. R. 253, 33 Am. & Eng. R. Cas., N. S., 253, it is said in the opinion: "But it is strenuously argued that enough did appear to put Grout, who was an experienced brakeman, upon his guard, and make it his duty to examine the coupling; and that, if he took the dangerous post, after being thus warned, without such examination, he must be held to have assumed the risk of injury. Doubtless it is true that a servant who enters upon the performance of a dangerous task, after having been warned or otherwise made aware of the danger attending upon its performance, assumes the risk of injury therefrom, even though the danger be one which the master was bound to guard him against voluntarily assuming; but this rule imposes upon the servant no duty of investigation after he has been expressly told by the master that performance involves no risk. A master is in law bound as a primary duty to either furnish his servant with a reasonably safe place in which to work, and reasonably safe appliances to work with, or make the servant fully acquainted with the dangers caused by his nonperformance of that duty before the servant enters the place of work or commences to use the appliances. This rule places upon the master the initiative. The duty is on him in the first instance to discover and remedy or make known the defects, and it requires no affirmative act of the servant to cast upon him liability for his nonperformance of that duty. Hence, when a defect actually exists, and the servant is ignorant of the true conditions, or if the defect is sufficiently apparent as to cause discussion between the servant and the master, and the latter informs him that it involves no unusual hazard, he is under no obligation to make an investigation of his own to hold the master responsible for an injury caused by the defect. This is the general rule, if not the rule of all of the cases. *Goldthorpe v. Clark-Nickerson Lumber Co.* (Wash.), 71 Pac. 1091, and cases cited. In this case, therefore, though it be true that the defect causing the injury was suffi-

Note

ciently apparent to cause discussion, the brakeman was under no obligation to examine it after the conductor, who represented the master, had done so and pronounced it safe."

10. Coupling Iron of Different Heights.

But in *Kelly v. Abbot*, 63 Wis. 307, 23 N. W. 890, it appeared that a brakeman was killed by being crushed between the caboose and a foreign freight car which he was attempting to couple to the caboose by reason of the difference in height of the coupling irons, one of which passed over the other; that he had the same, if not superior, means of knowing the difference as or to that of the company. There was no allegation that he even looked to see, or that he could not have seen if he had looked, this clearly apparent difference in the couplings. It was held that the negligence, if any, which caused the accident was that of the brakeman or of his fellow servants, and that the company was not liable, as the duty of the company to know such difference was not absolute, and it was not presumed to know it as matter of law.

11. Flat Cars with "Aprons"—Failure to Examine—Coupling at Night.

And in *Henry v. Bond* (C. C.), 34 Fed. 101, it appeared that plaintiff had been for five years foreman of the switch engine in defendant's yard; that for two years previous to the injury complained of the company had used cars with what are called "aprons" on the sides and ends of flat or platform cars; that these apron cars have a plank of some inches wide projecting over the ends and sides so that when the ends come together the floors meet, or nearly so, and to enable them to be coupled a space is left over the coupling appliances instead of on the sides. The coupling is not so convenient, and, when done by getting under the cars, is attended with more risk than ordinary cars; that on the day of the injury complained of, in obedience to the orders of the yardmaster, plaintiff proceeded, after dark, to shift the cars; and that the first car he approached was one of such apron cars. His lantern not giving a good light, he did not distinguish it from an ordinary flat car and was standing on the apron of the engine, as he usually did in coupling an ordinary flat car, when he was struck by the apron and injured. It was held that it was his duty to use all necessary caution to ascertain the kind of cars he was coupling, and, having failed to do so, he could not recover.

12. Unaccustomed Use of "Goose Neck."

So in *Texas & N. O. R. Co. v. Conroy*, 83 Tex. 214, 18 S. W. 609, where it appeared that plaintiff, in coupling cars, had his hand mashed; that he went to make the coupling not expecting to find a goose neck, from which the injury was received; that he made the coupling quickly, in not more than two seconds; had never known the goose neck to be used on freight trains, during a long service on railways, and they are not commonly so used. Upon this statement, it was held that it was only necessary that the court instruct that "if the plaintiff saw the apparatus or should have seen it by the exercise of reasonable care, in time to have avoided the injury, he could not recover."

13. Unblocked Frogs and Guard Rails—Failure to Look Out for.

And for a brakeman, familiar with the locality to move about over unblocked frogs and switches while coupling and uncoupling cars, in moving trains, without taking any thought of the frogs and guard rails, or as to where he may be stepping, is negligence on his part contributing to the catching his foot in them. So held in *Gillin v. Patten & S. R. Co. (Me.)*, 16 Am. & Eng. R. Cas., N. S., 508.

14. Defective Coupling Link—Patent Defect—Sufficiency of Petition.

But in an action by an employee against a railway company to recover for injuries alleged to have been caused by negligence of the defendant in the use of a defective coupling link, the complaint alleged that the defect in the coupling was patent and open to the inspection of defendant if an examination had been made, and that the defendant knew of such defect or might have known by proper in-

Note

spection, and that the plaintiff was wholly ignorant of the defective condition of the same. It was held that such complaint was not insufficient as showing contributory negligence on the part of the plaintiff. *Louisville, etc., Ry. Co. v. Howell*, 147 Ind. 266, 45 N. E. 584.

15. Right to Assume That Track is in Safe Condition—Opportunity to Examine by Lantern Light.

And in *Cleveland, C. C. & St. L. Ry. Co. v. Sloan*, 11 Ind. App. 401, 39 N. E. 174, it is held that a brakeman has the right to assume that the track is in a reasonably safe condition; and the fact that he might, on examination with his lantern, have discovered the defective and dangerous condition of the track before stepping thereon between the cars to couple them, is not sufficient to charge him, as a matter of law, with contributory negligence.

D. VIOLATION OF RULES.

1. In General.

a. General Rule.

Where the death or injuries to a car coupler results directly from his violation of a rule made for his protection there can be no recovery against his railroad company.

United States.—*Alabama G. S. R. Co. v. Carroll* (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 759; *Lake Erie, etc., R. Co. v. Craig* (C. C. A.), 80 Fed. 488; *Hodges v. Kimball* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 755; *Richmond, etc., R. Co. v. Ward*, 61 Fed. 927; *Russell v. Richmond & D. R. Co.* (C. C.), 47 Fed. 204.

Alabama.—*Georgia Pac. R. Co. v. Propat*, 83 Ala. 518, 3 So. 764; *Memphis, etc., R. Co. v. Graham*, 94 Ala. 545, 10 So. 283; *Pryor v. Louisville, etc., R. Co.*, 90 Ala. 32, 8 So. 55; *Richmond, etc., R. Co. v. Free*, 97 Ala. 231, 12 So. 294; *Richmond, etc., R. Co. v. Hissong*, 97 Ala. 187, 13 So. 209; *Richmond, etc., R. Co. v. Thomason*, 99 Ala. 471, 12 So. 273; *Shorter v. Southern Ry. Co. (Ala.)*, 18 Am. & Eng. R. Cas., N. S., 761.

Arkansas.—*St. Louis, etc., R. Co. v. Rice*, 51 Ark. 467, 11 S. W. 699.

Georgia.—*Brunswick, etc., R. Co. v. Clem*, 80 Ga. 534, 7 S. E. 84; *Rome & Carrollton C. Co. v. Dempsey*, 86 Ga. 499, 12 S. E. 882; *Sloan v. Georgia Pac. R. Co.*, 86 Ga. 15, 12 S. E. 179.

Indiana.—*Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. 380.

Iowa.—*Deeds v. Chicago, R. I. & P. Ry. Co.*, 74 Iowa 154, 37 N. W. 124; *Ford v. Chicago, etc., R. Co.*, 91 Iowa 179, 59 N. W. 5; *Sedgwick v. Illinois Cent. R. Co.*, 76 Iowa 340, 41 N. W. 35.

Michigan.—*Loranger v. Lake Shore, etc., R. Co.*, 104 Mich. 80, 62 N. W. 137.

Missouri.—*Schaub v. Hannibal & St. J. Ry. Co.*, 106 Mo. 74, 16 S. W. 924.

North Dakota.—*Bennett v. Northern Pac. R. Co.*, 2 N. Dak. 112, 49 N. W. 408.

Ohio.—*Wolsey v. Lake Shore & M. S. R. Co.*, 33 Ohio St. 227.

Tennessee.—*East Tennessee, etc., R. Co. v. Smith*, 89 Tenn. 114, 14 S. W. 1077.

Texas.—*Missouri, etc., R. Co. v. Wood* (Tex. Civ. App.), 35 S. W. 879.

Virginia.—*Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. 511; *Norfolk, etc., R. Co. v. Briggs* (Va.), 14 S. E. 753; *Richmond, etc., R. Co. v. Pannill*, 89 Va. 552, 16 S. E. 748.

West Virginia.—*Johnson v. Chesapeake, etc., R. Co.*, 38 W. Va. 206, 18 S. E. 573.

Wisconsin.—*Lockwood v. Chicago & N. W. Ry. Co.*, 55 Wis. 50, 12 N. W. 401.

b. Assuming That Signals Will Be Obeyed—Right of Employee to Substitute His Judgment in Place of Rule.

In *Deeds v. Chicago, R. I. & P. Ry. Co.*, 74 Iowa 154, 37 N. W. 124, an action by a brakeman for injuries sustained while attempting to couple cars, it was held that the court rightly instructed the jury that a rule of his company providing that, "brakemen and switchmen, in

Note

Coupling and uncoupling cars, must not assume that signals given to the engineer or fireman will be obeyed," * * *, was a proper one, and that obedience thereto was incumbent on plaintiff; but in another instruction the jury were advised that plaintiff might recover, even though he violated the rule, if he was not guilty of negligence in any other respect. It was held that the last instruction was erroneous, because it substituted the judgment and discretion of plaintiff in place of the rule.

c. Failure to Examine Appliances.

Where a brakeman is required by the rules of the railroad company to examine the links and drawheads in his train, he is chargeable with notice of any defect in such links, if he has access to such rules; and where the injuries complained of were the result of a defective link which he failed to examine, such contributory negligence precludes his recovery in an action for damages. So held in *Alabama G. S. R. Co. v. Carroll* (C. C. A.), 9 Am. & Eng. R. Cas., N. S., 759.

d. Mismatched Couplings of Foreign Cars "Placing Cars in Train"—Application of Rule.

A rule of a railroad company forbade its employees to place a car with defective couplings in a train. It received from another road and carried a train of tourist sleepers having mismatched couplers. While stopping at a station the train was separated to leave a highway open. While coupling up preparatory to going on, such couplers slipped past each other, letting the cars together, crushing the brakeman who was attending to the coupling. It was held that making such coupling was not placing such cars in the train, and not contributory negligence or a violation of such rule. *Southern Pac. Co. v. Winton* (Tex. Civ. App.), 3 R. R. 358, 26 Am. & Eng. R. Cas., N. S., 358, 66 S. W. 477.

e. Going between Cars—Injured While on Footboard of Engine—Application of Rule.

In *Richmond & Danville R. Co. v. Jones*, 92 Ala. 218, 9 So. 276, it is held that although a rule of the railroad company forbade switchmen to go between cars for the purpose of coupling or uncoupling them, a switchman could not be charged with contributory negligence because when injured, he was standing on the footboard of the engine, "which was put there for switchmen to ride on." In this case it appeared that he went between the cars while in motion to uncouple them, and while between the cars he gave a signal, by means of his lantern, for the engine to go ahead, and at that time the cars which had been uncoupled rolled off from the engine a distance of four or five feet, and the engine instead of going ahead backed and struck the uncoupled cars, by means of which collision the plaintiff, who was still standing on the footboard of the tender of the engine, was injured. See also, *Memphis & Charleston R. Co. v. Graham*, 94 Ala. 545, 10 So. 283.

f. Starting from between Cars after Discovery of Defects—Struck by Detached Sliver—Application of Rule.

Plaintiff was not chargeable with contributory negligence for any violation of a rule of the defendant requiring employees to examine the drawheads, drawbars, and coupling apparatus before making a coupling, and not to make it if anything is in a dangerous condition, where it appears that the plaintiff, just prior to his accident, had ascertained that the coupling could not be made and had started from between the cars, when they came together and detached a sliver of iron which struck him in the eye and injured him. So held in *Denver, etc., R. Co. v. Smock*, 7 Am. & Eng. R. Cas., N. S., 773, 23 Colo. 456, 48 Pac. 681.

g. Standing on Footboard of Pilot to Uncouple by Hand—Going between Cars to Uncouple by Hand—Application of Rule.

A brakeman is not guilty of the violation of rule prohibiting brakemen "from coupling or uncoupling cars except with a stick," and declaring that brakemen and others must not go between the cars under any circumstances for the purpose of coupling or uncoupling, or adjusting pins, etc., when an engine is attached to such cars or train," where

Note

the engine in which he stationed himself, in the way usually practiced by employees, upon the footboard of the pilot on the tender, was not attached to any car or train, and while there attempted to withdraw with his hands, without a stick, a pin and link from the coupling apparatus of the engine, the engine and tender moving backwards at the time towards a standing car in the rear, for the purpose of being coupled thereto. So held in *Richmond & D. R. Co. v. Mitchell*, 92 Ga. 77, 18 S. E. 290.

h. Violation of Alleged Unreasonable Rule.

Where a rule of the company is in force, known to the employee, directing him how to couple cars, and he willfully disregards the rule, and is thereby hurt, he cannot claim damages for his injury, merely on the ground that, in his judgment, the rule is an unreasonable one. So held in *Wolsey v. Lake Shore & M. S. R. Co.*, 33 Ohio St. 227.

2. What is Contributory Negligence.

a. Failure to Use Coupling Stick.

In *Russell v. Richmond & D. R. Co.* (C. C.), 47 Fed. 204, it is held that where a rule forbids brakemen going between cars to couple them, and provides that coupling must be done by means of a stick, the company is not liable for the death of a brakeman, who, in consideration of employment by the company, signed a written recognition of such rule, waiving all liability of the company to him for any results of disobedience thereof, when it appears that he understood what he was signing; that the company had provided coupling sticks for the train; and that the death was the result of disobedience of the rule.

b. Failure to Use Coupling Stick—Disobedience of Order.

When the defendant's conductor ordered deceased, a brakeman, to cut off brakes at rear end of cars, telling him another brakeman would make the required coupling, and, not regarding such orders, deceased gave signal to slack back and attempted to make coupling himself, by hand, when a rule of the company required coupling to be made only with sticks, it was held that these facts showed lack of care and disregard of rules on part of deceased which contributed to his death and, therefore, no recovery could be had. *Hodges v. Kimball* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 755.

c. Going between Cars to Uncouple.

In *Lake Erie & W. R. Co. v. Craig* (C. C. A.), 80 Fed. 488, it is held that a railroad employee cannot recover for injuries resulting from his going between cars to uncouple them, in violation of a rule of the company.

d. Going in Front of Moving Car—Displacement of Load.

Deceased without necessity, and in violation of a rule of the railroad company forbidding him to go between cars, either of which is in motion, to couple or uncouple them, got between cars, one of which was in motion, and was killed in consequence of being there. It was held that his violation of the rule was such contributory negligence as to bar recovery for his death; and the fact that his death was caused by the dislocation and falling of the trucks with which the moving car was loaded was immaterial in this connection. *Shorter v. Southern Ry. Co.* (Ala.), 18 Am. & Eng. R. Cas., N. S., 761.

e. Going between Cars to Couple by Hand—Absence of Gross Negligence.

In *Louisville & N. R. Co. v. Watson*, 90 Ala. 68, 8 So. 249, it is held that a brakeman, who in attempting to couple cars, goes in between them, and uses his hands instead of a coupling stick, in violation of a rule of the company, of which he has notice, is guilty of such contributory negligence as will defeat a recovery of damages on account of injuries sustained, unless the defense is avoided by proof of gross negligence on the part of the employees in charge of the moving cars; that is, their failure to use ordinary care when knowing his danger, whereby the injury might have been averted, such as is the legal equivalent of recklessness, wantonness or intentional wrong.

Note

f. Failure to Use Stick.

In *Rome & Carrollton C. Co. v. Dempsey*, 86 Ga. 499, 12 S. E. 882, it is held that an employee who is under orders to couple cars with a stick only and is injured while coupling with his hand without a stick, is guilty of contributory negligence preventing recovery.

g. Coupling by Hand—Custom to Disregard Rule—Abrogation.

In *Sloan v. Georgia Pac. Ry. Co.*, 86 Ga. 15, 12 S. E. 179, it is held that a brakeman who is under orders always to couple cars with a stick, cannot recover against the company for an injury sustained while attempting to make a coupling directly with his hand without the use of a stick; and it is immaterial in this connection that other employees of the company frequently or customarily disregarded the rule unless the company, with knowledge of such custom, acquiesced in it so as to practically abrogate the rule.

h. Going between Moving Cars to Couple by Hand—Dangerous Frog—Chargeable with Notice—Failure to Examine Track.

In an action by a brakeman against a railroad company, for injuries sustained while coupling cars, by his foot being caught in a dangerously constructed frog at a switch on the line of the road, the jury found that the switches and frogs on the line were in the same condition all the time plaintiff was in the employ of the company, and that they were of the same kind as those used on the principal railroads of the country; that plaintiff had a full opportunity to acquire a knowledge of the condition of all the switches and frogs on the road; that he did not use any care to ascertain the condition of the frogs and switches at the place where the injury occurred; that while walking on the track behind a moving car his foot was caught in one of the frogs; that the printed rules of the company forbade brakemen to go between cars in motion to couple them, and forbade coupling by hand in all cases where a stick could be used; that, in consideration of employment by defendant, plaintiff agreed to obey said rules. It was held that defendant was not liable. *Lake Shore & M. S. R. Co. v. McCormick*, 74 Ind. 440.

i. Failure to Use Coupling Stick.

In *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. 380, it is held that where a rule of a railroad company requires that cars shall be coupled by the use of coupling sticks, and this rule is brought to the knowledge of one employed as a brakeman, and assented to by him, it constitutes part of his contract of employment, and for an injury received by him in endeavoring to make a coupling by hand, the company is not liable, unless it is shown that the act could not have been safely performed even by the use of the coupling stick, provided, or that obedience to the rule was not practicable under the circumstances of the particular case.

j. Going between Moving Cars.

A brakeman is bound by a rule of the company forbidding brakemen getting between the rails to couple or uncouple cars in motion, if he is chargeable with notice of the rule. So held in *Louisville & N. R. Co. v. Bowcock* (Ky.), 17 Am. & Eng. R. Cas., N. S., 421.

k. Going between Moving Cars—Fall on Track.

In *Pryor v. Louisville & N. R. R. Co.*, 90 Ala. 32, 8 So. 55, it is held that a brakeman, who, in violation of a known rule of his company, goes on the track in front of a moving car, intending to couple it with another, stumbles and falls, and is run over by the moving cars, is guilty of such contributory negligence as to bar recovery of damages on account of injuries sustained by him.

l. Going between Moving Cars.

In *Schaub v. Hannibal & St. J. Ry. Co.*, 106 Mo. 74, 16 S. W. 924, it is held that a brakeman who is injured while violating a known rule of the company prohibiting him from going between cars in motion to uncouple them cannot recover of the company for such injury, in the absence of all evidence showing that the company knowingly permitted the violation of the rule.

Note

m. Making Three Link Coupling—Car in Motion.

In *Darracott v. Chesapeake, etc., R. Co.*, 83 Va. 288, 2 S. E. 511, it is held that an attempt to make the three-link coupling by an employee who may readily see that the car is in motion, and in disobedience of the company's rules, is such contributory negligence as to defeat a recovery for injuries sustained by reason of making such attempt.

n. Uncoupling Moving Train.

In *Lockwood v. Chicago & N. W. Ry. Co.*, 55 Wis. 50, 12 N. W. 401, it is held that where a brakeman was injured by being thrown from a moving train while uncoupling the engine and tender, and it appears that he was not required to attempt such uncoupling while the train was in motion, but that the rules of the company forbade such attempt, this is such evidence of contributory negligence on his part as justified a compulsory nonsuit.

3. What Is Not Contributory Negligence.**a. Not Chargeable with Notice of Existence of Rule.**

It is not contributory negligence for a car coupler to fail to comply with a rule made for his guidance and protection when he is not chargeable with notice of its existence. *Alabama Midland R. Co. v. McDonald*, 112 Ala. 216, 20 So. 472; *Louisville, etc., R. Co. v. Hawkins*, 92 Ala. 241, 9 So. 271; *Brunswick, etc., R. Co. v. Clem*, 80 Ga. 534, 7 S. E. 84; *Port Royal, etc., R. Co. v. Davis*, 95 Ga. 292, 22 S. E. 833; *Strong v. Iowa Cent. R. Co.*, 94 Iowa 380, 62 N. W. 799; *Fay v. Minneapolis, etc., R. Co.*, 30 Minn. 231, 15 N. W. 241.

(1) Going between Cars to Couple by Hand in Ignorance of Rule.

In *Alabama M. Ry. Co. v. McDonald*, 112 Ala. 216, 20 So. 472, it is held that the rule of a railroad company, forbidding brakemen to go between the cars to make couplings and requiring them to use a coupling stick, is not binding on a brakeman unless he has knowledge or notice thereof; and in an action to recover for his death, where the defendant relies on the violation of such a rule as negligence contributing to the injury complained of, the proof must show that plaintiff's intestate had knowledge of such rule.

(2) Failure to Examine Appliances—Knowledge of Rule—Pleading.

A plea which sets up contributory negligence on the part of a brakeman in violating a rule of his company, which required employees, before attempting to make or unmake a coupling, to examine so as to know the condition of the drawhead, drawbars, and coupling apparatus, and forbade them to go between cars to make or unmake couplings until they had taken such precaution, is demurrable, unless it also avers that the brakeman was chargeable with notice of the rule. So held in *Louisville & N. R. Co. v. Hawkins*, 92 Ala. 241, 9 So. 271.

(3) Coupling by Hand—Ignorance of Rule and Defect in Coupling Spring.

Where an employee was not chargeable with notice of a rule of his company requiring every train hand to use a stick in coupling; and could not, in the ordinary mode of coupling cars, have discovered that the spring of one of the couplers was defective until he was injured by reason of the defect, it cannot be held that he was guilty of contributory negligence merely because he failed to use a stick, and attempted to make the coupling by hand. So held in *Brunswick & W. Ry. Co. v. Clem*, 80 Ga. 534, 7 S. E. 84.

(4) Notice of Rule—Information from Coemployees.

But in *Port Royal, etc., R. Co. v. Davis*, 95 Ga. 292, 22 S. E. 833, it is held that if a railroad employee may be chargeable with notice of the existence of a rule from information derived from his coemployees; and that it is not necessary in order to render a rule binding upon an employee that the company should furnish him with a copy of it or to inform him where it may be obtained, if he has other means of information.

(5) Failure to Use Stick—Violation of Rule or Custom—Notice from Observation.

And in *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518, 3 So. 764, it is

Note

said in the opinion: "If the plaintiff, either from a knowledge of the rules or from observing the practice of couplers, had learned the rule or custom of the road not to use the hand, but a stick in coupling, and in disregard of such rule or custom went on the track between the cars and attempted to couple with his hands, this would be contributory negligence and would deprive him of all right to recover in this action."

b. Impracticable Rules.

It is not contributory negligence to act in violation of a rule made for the guidance and protection of employees engaged in coupling and uncoupling cars where the circumstances render it impracticable to comply with the rule. *Brown v. Louisville, etc., R. Co.*, 111 Ala. 275, 19 So. 1001; *Memphis & Charleston R. Co. v. Graham*, 94 Ala. 545, 10 So. 283; *Richmond & Danville R. Co. v. Hissong*, 97 Ala. 187, 13 So. 209; *Renniger v. New York Cent., etc.*, 11 N. Y. App. Div. 565.

E. WAIVER OF RULES.

A car coupler is not guilty of contributory negligence in disregarding a rule, where the company is chargeable with notice that it has been habitually violated for a long time.

United States.—*Northern Pac. R. Co. v. Nickels (C. C. A.)*, 50 Fed. 718.

Alabama.—*Alabama M. Ry. Co. v. McDonald*, 112 Ala. 216, 20 So. 472; *Brown v. Louisville, etc., R. Co.*, 111 Ala. 275, 19 So. 1001; *Louisville & N. R. Co. v. Hawkins*, 92 Ala. 241, 9 So. 271; *Memphis, etc., R. Co. v. Graham*, 94 Ala. 545, 10 So. 283.

Georgia.—*Sloan v. Georgia Pac. Ry. Co.*, 86 Ga. 15, 12 S. E. 179.

Indiana.—*Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. 380.

Iowa.—*Fish v. Illinois Cent. R.*, 96 Iowa 702, 65 N. W. 995; *Lowe v. C., St. P., M. & O. Ry. Co.*, 89 Iowa 420, 56 N. W. 519; *Spaulding v. Chicago, St. P. & K. C. Ry. Co.*, 98 Iowa 205, 67 N. W. 227.

Kentucky.—*Louisville & N. R. Co. v. Bowcock (Ky.)*, 17 Am. & Eng. R. Cas., N. S., 421; *Louisville & N. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866.

Michigan.—*De Cair v. Manistee & G. R. R. Co. (Mich.)*, 94 N. W. 726, 8 R. R. R. 378, 31 Am. & Eng. R. Cas., N. S., 378.

Missouri.—*Schaub v. Hannibal & St. J. Ry. Co.*, 106 Mo. 74, 16 S. W. 924.

New York.—*Renniger v. New York Cent. R. Co.*, 11 N. Y. App. Div. 565.

North Carolina.—*Mason v. Richmond, etc., R. Co.*, 111 N. Car. 482, 16 S. E. 698.

Tennessee.—*Louisville, etc., R. Co. v. Reagan*, 96 Tenn. 128, 33 S. W. 1050.

Texas.—*Galveston, etc., R. Co. v. Steinkard (Tex. Civ. App.)*, 39 S. W. 961.

Car couplers may be justified in the nonobservance of the company's reasonable rules and when they have been habitually disregarded and protested by them, with the knowledge or acquiescence and without the protest of the company. So held in *Louisville, etc., R. Co. v. Reagan*, 96 Tenn. 128, 33 S. W. 1050.

1. Disregard of Rule—Custom—Acquiescence of Division Superintendent.

In *Northern Pac. R. Co. v. Nickels (C. C. A.)*, 50 Fed. 718, it is held that the mere disregard of an employee of a rule of his company in relation to the coupling of cars, when, with the acquiescence of the division superintendent of the road, such employee, and others coming under the rule, have constantly and without exception disregarded it, is not such negligence on the servant's part as will absolutely defeat his recovery for an injury caused by the negligence of the company.

2. Going between Moving Cars—Fulfilling Expectations of Superiors.

If a rule forbidding brakemen to go between rails to couple or uncouple moving cars, is habitually disregarded by the company or its officers having authority over a brakeman injured while in between the

Note

rails coupling moving cars, and he was expected by such officers to make couplings under such circumstances. such rule would be no bar to a recovery for the injury. So held in *Louisville & N. R. Co. v. Bowcock* (Ky.), 17 Am. & Eng. R. Cas., N. S., 421.

3. Failure to Use Coupling Stick—Custom to Disregard Rule.

A written agreement by a brakeman to use a coupling stick in coupling cars was not binding unless the stick was in fact indispensable, or at least clearly necessary for the safety of the brakeman against danger incident to coupling cars. And in determining whether the brakeman was guilty of contributory negligence in failing to use a coupling stick, it is competent to show that it has been generally discarded by brakemen. So held in *Louisville & N. R. Co. v. Foley*, 94 Ky. 220, 21 S. W. 866.

4. Obeying Order of Conductor—Violation of Rule—Discovered Too Late.

In *Mason v. Richmond, etc., R. Co.*, 111 N. Car. 482, 16 S. E. 698, it appeared that, when acting under the order of the conductor, but contrary to a rule of the railroad company to which he had assented, the plaintiff was injured in coupling defective cars, of which defect he had no notice until it was too late to escape. It was held that it was error to withdraw the case from the jury on the ground that plaintiff, upon such facts, could not recover.

5. Going between Moving Cars—Custom.

In *Lowe v. C., St. P., M. & O. Ry. Co.*, 89 Iowa 420, 56 N. W. 519, it appeared that as plaintiff's intestate, a brakeman on defendant's railroad, in the performance of his duty, stepped on a railroad track between slowly moving freight cars, for the purpose of uncoupling them; the engineer, without orders, gave the cars a "kick," and the brakeman was thrown under the wheels and killed. A rule of the company declared that "getting between cars in motion, to uncouple them" was in violation of duty, and strictly prohibited. It was held evidence that it was the custom of brakemen on such road to go between cars in motion to make and unmake couplings showed waiver of such rule; and that, therefore, the deceased's violation of the rule was not contributory negligence.

6. Uncoupling Moving Cars—Custom to Disregard Rule.

In an action for the death of a brakeman, killed while uncoupling cars, it was competent for plaintiff to show that it was the custom generally on defendant's road to uncouple cars in motion, though contrary to the rules, and that officers of the company knew of the custom, and had made no objection to it. So held in *Spaulding v. Chicago, St. P. & K. C. Ry. Co.*, 98 Iowa 205, 67 N. W. 227.

7. Evidence—Custom to Go in Front of Moving Cars.

In an action by a railroad brakeman to recover for injuries sustained by being run over by a car while he was walking in front of the same in an endeavor to adjust a coupling, in the performance of his duty, evidence that it was the custom of employees of defendant to go in front of moving cars, in coupling them, was admissible. *De Cair v. Manistee & G. R. R. Co.* (Mich.), 94 N. W. 726, 8 R. R. R. 378, 31 Am. & Eng. R. Cas., N. S., 378.

8. Mode of Coupling at Certain Point—Custom of Other Employees.

But in an action to recover for the death of an employee, sustained while he was coupling cars, evidence of the usual mode of coupling and uncoupling cars at the same place by others was inadmissible, as what others did, or were in the habit of doing, did not tend to prove the issue as to due care by deceased. So held in *Chicago, R. S. & Pac. Ry. Co. v. Warner*, 108 Ill. 113.

9. Coupling by Hand—Order of Conductor—Subsequent Violation of Rule.

And in *Mason v. Richmond & Danville R. Co.*, 114 N. Car., 718, 19 S. E. 362, it is held that while a brakeman is not culpable for exposing him-

Note

self to danger in disregard of the rules of the company prohibiting the coupling or uncoupling of cars except with a stick, which he had agreed to observe, but in obedience to the orders of the conductor in charge of the train, yet the fact that a conductor under whom a brakeman formerly served told him to go between the cars when they could not otherwise be coupled did not justify him in doing so several months later when under control of another conductor who gave no such order.

F. ACTING OUTSIDE SCOPE OF EMPLOYMENT.**(1) Method Prescribed by Company.**

If cars cannot be coupled or uncoupled except by a method prohibited by a rule of the company, and the act of doing the work in the only practicable manner is not negligence per se, it must be held that the rule does not apply to such act, but has been waived with respect to it. So held in *Brown v. Louisville, etc., R. Co.*, 111 Ala. 275, 19 So. 1001.

(2) Going between Cars in Motion—Coupling Sticks Too Short.

In *Memphis & Charleston R. Co. v. Graham*, 94 Ala. 545, 10 So. 283, it is held that a rule forbidding employees to go between cars in motion to make or unmake couplings is reasonable, and a violation of it is contributory negligence; but that the rule must be taken with the qualification, that the company must provide some safe method or means of performing such duties and if the coupling sticks provided are too short to effect a necessary coupling, the rule is no protection to the company against liability for damages on account of injuries sustained while performing such services in violation of it.

(3) Going between Cars—Impossibility of Using Stick—Custom.

In *Richmond & Danville R. Co. v. Hissong*, 97 Ala. 187, 13 So. 209, it is held that there was a custom for brakemen, when they found it impossible to couple with a stick, to go between the cars after having signaled the engineer to stop the train, is not admissible to vary the terms of a rule of the master, expressly agreed to by the injured employee, forbidding brakemen from going between cars to make a coupling.

1. Conductor Uncoupling in Absence of Emergency—Knowledge of Defect.

In *Whitton v. South Carolina & G. R. R. Co.*, 106 Ga. 796, 32 S. E. 857, it is held that where, in an action for the death of a conductor, it appears from the evidence, that he was in charge of and directing the movements of a train by which his death was caused; and that instead of confining himself within the scope of his duties, which did not include the making and unmaking of couplings, he, voluntarily and in the absence of any emergency, went between two cars, one of which he knew to be in a defective condition, for the purpose of uncoupling them, it was proper to grant a nonsuit.

2. Conductor Coupling Cars Absence of Emergency.

And in *Central R. & B. Co. v. Sears*, 59 Ga. 436, it is held that when the ordinary duties of a conductor do not include the duty of making and unmaking couplings, in attempting such work he is outside of his duty and at fault, unless there be a pressing emergency upon him to do such work. See also, *Sears v. Central R. & B. Co.*, 53 Ga. 630.

3. Conductor Coupling Cars—Emergency.

But if a conductor, whose ordinary duties do not include that of coupling and uncoupling cars, believes in good faith that a pressing emergency requires him to undertake such work, he is not guilty of contributory negligence in attempting it. So held in *Central R. & B. Co. v. Sears*, 59 Ga. 436.

4. Conductor Coupling Cars—Emergency—Delay—Burden on Conductor to Show Absence of Negligence on His Part.

But where an emergency is relied upon as justifying a conductor in going out of his sphere and taking upon himself the duty and hazards of a car coupler, and it is alleged that the emergency was occasioned by the train being behind time, it is incumbent upon the conductor, to

McLean v. Pere Marquette R. Co

make it clearly appear that the delay of the train was not caused by his fault or negligence. So held in *Central Railroad v. Sears*, 61 Ga. 279.

5. Switchman Uncoupling Moving Cars—Violation of Positive Orders—Defect in Track.

And in *Gardner v. Michigan C. R. R. Co.*, 58 Mich. 584, 26 N. W. 301, it appeared that a switchman, who had been strictly cautioned against having anything to do with coupling cars, tried to uncouple some while the train was moving, and had his foot caught where the planking had been for some time slightly broken, though the defect had not been seen by him as yardman and the company had no notice of it. It was held that he could not recover.

6. Voluntary Assumption of Duty—Custom Not Objected to by Officers.

But in *Hudson v. Charleston, C. & C. R. Co. (C. C.)*, 55 Fed. 248, it is held that when plaintiff had long been accustomed, in the course of his employment, to couple and uncouple cars and tend switches without objection from his superior officers, it was not contributory negligence for him to undertake to uncouple cars, exchanging duties with his mate, who had been ordered by the conductor to uncouple them.

A. R. Y.

McLEAN v. PERE MARQUETTE R. CO.

(Supreme Court of Michigan, Sept. 13, 1904.)

[100 N. W. Rep. 748.]

Injury to Trackman—Derailment of Hand Car—Negligence—Material Dropping Through Open Rack Car.*

In an action for injury to a railroad track hand by the derailment of a hand car, evidence held sufficient to establish negligence of defendant in permitting an open rack car to be loaded with loose planing mill refuse, from which short pieces of hardwood flooring could fall on the track, one of which caused the derailment in question.

Where a railroad company permitted planing mill refuse to be loaded loose on an open rack car, so that, as the car was being transported, some of the material would drop from the car, and might be drawn onto the rail and lodge there by the suction of the train, and plaintiff, a railroad track hand, was injured by the derailment of a hand car, caused by the lodgment of one of the pieces of wood so transported on the rail, there being no other possible theory of the cause of the accident, the rule that the happening of an accident was not of itself evidence of negligence did not apply.

Same—Same—Material Dropping Through Open Rack Car—Contributory Negligence.

Where defendant negligently permitted planing mill refuse to be loaded loose on an open rack car, and plaintiff, a track hand, was injured by the derailment of a hand car, caused by certain of such refuse falling on the track, the fact that, as the train containing the loaded car passed plaintiff, he saw it, and thought it was dangerous to so load such material, he never having seen it loaded in such manner before, did not render him guilty of contributory negligence, as a matter of law, in immediately following the train containing such car on his hand car, under the direction of his foreman.

*As to the liability of railroad companies for injuries to their employees from unsafe tracks and roadbeds, see foot-note appended to *Birmingham Traction Co. v. Reville (Ala.)*, 9 R. R. R. 524, 32 Am. & Eng. R. Cas., N. S., 524, where all the preceding authorities in this series are collected.

McLean v. Pere Marquette R. Co

Same—Same—Same—Assumption of Risk.

Plaintiff having a right to assume that defendant had furnished a proper car, and loaded it in a proper manner, the danger was not so obvious that he assumed the risk.

Fellow Servants—Nonassignable Duties.†

Where a railroad station agent was intrusted by his master to select proper cars for the transportation of property over its railroad, and he negligently ordered an open rack car for the transportation of planing mill refuse to be transported loose, and plaintiff, a track hand was injured by the derailment of a hand car, caused by the falling of certain of the refuse on the rail, the station agent, in selecting such car, etc., was not plaintiff's fellow servant, since the railroad's duty to select reasonably safe cars could not be delegated.

Error to Circuit Court, Osceola County; Aaron V. McAlvay, Judge.

Action by William E. McLean, by his next friend, Judson E. Richardson, against the Pere Marquette Railroad Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

On September 5, 1902, plaintiff, a section hand in the employ of the defendant, was injured by the derailment of a hand car upon which he and the other members of the section crew were riding. The section men had been working

†As to what are the duties of a railroad company which it cannot delegate so as to escape liability for injuries to its employees under the fellow servant doctrine, see *Marsh v. Lehigh Valley R. Co.* (Pa.), 9 R. R. 545, 32 Am. & Eng. R. Cas., N. S., 545, foot-note appended to *Louisville & N. R. Co. v. Lowe* (Ky.), 11 R. R. 434, 34 Am. & Eng. R. Cas., N. S., 434 (duty to inspect appliances, etc.); foot-note appended to *Wallace v. Boston & M. R. R.* (N. H.), 11 R. R. 497, 34 Am. & Eng. R. Cas., N. S., 497; *Northern Pac. Ry. Co. v. Dixon* (U. S.), 11 R. R. 368, 34 Am. & Eng. R. Cas., N. S., 368 (duties of train dispatchers and telegraph operators); *Fogarty v. St. Louis Transfer Co.* (Mo.), 11 R. R. 578, 34 Am. & Eng. R. Cas., N. S., 578 (duties of foremen); *Roche v. Denver & R. G. R. Co.* (Colo.), 8 R. R. 955, 31 Am. & Eng. R. Cas., N. S., 955 (duty to furnish safe place to work, or safe appliances); *St. Louis S. W. Ry. Co. v. Kelton* (Tex.), 2 R. R. 279, 25 Am. & Eng. R. Cas., N. S., 279 (brakeman was agent of company to see that switch was properly set); *Dolan v. Sierra Ry. Co. of California* (Cal.), 2 R. R. 875, 25 Am. & Eng. R. Cas., N. S., 875 (delegation of authority to fellow servants as relieving master of liability for performance of nonassignable duties); *Louisville & N. R. Co. v. Pointer* (Ky.), 5 R. R. 181, 28 Am. & Eng. R. Cas., N. S., 181 (duty to maintain safe roadbed); note, 11 Am. & Eng. R. Cas., N. S., 15 (selection of appliances); note, 12 Am. & Eng. R. Cas., N. S., 719 (duty to keep roadbed in safe condition); *Wright v. Southern Ry. Co.* (N. Car.), 20 Am. & Eng. R. Cas., N. S., 873 (care of roadbed); *San Antonio & A. P. Ry. Co. v. Harding* (Tex.), 3 Am. & Eng. R. Cas., N. S., 389 (duty to keep roadbed in repair); *Mercantile Trust Co. v. Pittsburgh, etc., Ry. Co.* (C. C. A.), 6 R. R. 354, 29 Am. & Eng. R. Cas., N. S., 354 (duty to warn servant of special risk); *Atchison, T. & S. F. Ry. Co. v. Kingscott* (Kan.), 4 R. R. 528, 27 Am. & Eng. R. Cas., N. S., 528; *Budge v. Morgan's L. & T. R. Co. & S. Co.* (La.), 4 R. R. 440, 27 Am. & Eng. R. Cas., N. S., 440 (duty to furnish and inspect appliances); *Smith v. Erie R. Co.* (N. J.), 4 R. R. 793, 27 Am. & Eng. R. Cas., N. S., 793 (duty to furnish safe place to work and proper appliances); *Louisville & N. R. Co. v. Miller* (C. C. A.), 19 Am. & Eng. R. Cas., N. S., 500 (duty to instruct employees).

McLean v. Pere Marquette R. Co

on the track about two miles east of Chase. About 10 or 15 minutes before they quit work in the afternoon a freight train passed over the track going west toward Chase. Plaintiff noticed in this train a rack car loaded with planing mill refuse. The rack car was such as the plaintiff understood was used for transporting barrels. The open spaces in the rack were three or four inches wide and about six feet long. The planing mill refuse consisted of pieces of hard maple flooring from three to four inches wide, and from four inches to three feet long. Plaintiff had never noticed such a car, loaded with such material, pass over the road before that. It was immediately in front of the caboose. Immediately upon seeing it, it occurred to him that that was a dangerous way of transporting mill refuse, for the reason that blocks might drop out between the racks and be drawn up on top of the rails by the suction of the train. Ten or fifteen minutes after the train had passed, the section crew placed their hand car on the track, and started toward Chase, following the train with the rack car in it. At that time they saw the smoke of another train coming from the east, and heard the whistle of its locomotive. Under the rules of the railroad company governing trackmen, it was their duty to keep out of the way of moving trains when they were passing along the track on a hand car. As they went westward they were watching the train approaching them from the east. As the hand car approached Chase, it was derailed by striking a block of hard maple flooring about one inch thick, three inches wide, and four inches long, which lay upon the rail just east of a highway crossing. Plaintiff was thrown upon the cattle guards at the side of the highway, and sustained the injuries upon which this action is based. The theory of the declaration is that the defendant furnished an improper car for the transportation of material of the character above described, and that a piece of it fell through one of the openings and lodged upon the rail, in consequence of which the hand car was derailed and plaintiff injured. The suit was brought in justice's court, where plaintiff recovered a verdict of \$100. Defendant appealed the case to the circuit court, where a like verdict was rendered.

Charles McPherson (Frederick W. Stevens, of counsel), for appellant.

Charles A. Withey, for appellee.

GRANT, J. (after stating the facts). 1. Defendants first contention is that there is no evidence of negligence. Defendant's trainmaster, a witness in its behalf, conceded that it was unsafe to load an open rack car with such material thrown loose in it. There was sufficient evidence to establish negligence on the part of some one in furnishing and loading the car in the manner described. The block or piece of wood was found immediately after the accident with the dent

of the flange of the car wheel on it. It was of the same material as that with which the car was loaded. The car had passed over the track only 10 or 15 minutes before. It is a fair inference that it fell from that car, and that in some way it lodged upon the rail. It might have lodged there as it fell. The train was going fast, and as the block struck the ground it would naturally roll some distance before stopping, and in this way might have lodged upon the rail. It might have been drawn there by the suction of the train. The evidence of the effect of the suction of a train upon pieces of wood the size of this was conflicting. There was no other probable theory of the cause of the accident. This is not a case, therefore, for the application of the rule that an accident is not of itself evidence of negligence. *Schoepper v. Hancock Chemical Co.*, 113 Mich. 582, 71 N. W. 1081.

2. The mere fact that, as the train passed, plaintiff saw the car, and thought it was dangerous to load such a car with such material in such manner; and that he, under the direction of the section foreman, road over the track immediately after, is not conclusive evidence of contributory negligence. Neither did he thereby assume the risk. He had seen nothing of the kind before, and had the right to assume that the defendant had furnished a proper car and loaded it in a proper manner. The danger was not so obvious as to require him to place his own judgment at once against that of his employer. The question of contributory negligence was properly submitted to the jury.

3. It is also contended that the furnishing and loading of the car were the acts of fellow servants. The precise claim is that the car was furnished to the shipper by defendant's station agent at Reed City, whose province it was to determine the kind of cars to be used; that it was the duty of the train conductor to inspect every loaded car before taking it, and to determine whether it was properly loaded, and to refuse to take it if, upon inspection, he determined it was not properly loaded; and that these two employees were plaintiff's fellow servants. The question as to the conductor may be eliminated from the controversy by the fact that there is no evidence of any other method of loading this mill refuse into cars for transportation. There is no suggestion, even, of any other method. The method was proper for a suitable car. The plaintiff gave no direct testimony showing by whose authority or direction this car was furnished. The only testimony upon the point is that of defendant's trainmaster, and is as follows: "As trainmaster I have supervision over the station agents of my division in the handling of cars for trains. I am acquainted with the manner in which agents obtain cars for their customers. The station agent determines what sort of a car shall be delivered to a customer who wants one. The customer applies to the agent, and the agent orders the kind of a car he wants from

McLean v. Pere Marquette R. Co

the car distributor. If the agent wanted a stock car for sheep, he would not specify to the car distributor that he wanted it to put sheep in. He would simply order a single or double deck stock car for a given destination. If he wanted a rack car, he would not specify to the car distributor what kind of wood he wanted to put in it. It appears that on the day on which plaintiff was injured a rack car loaded with mill refuse was shipped out of Reed City. The agent at Reed City determined what kind of a car should be used for that purpose. If he had chosen to order a box car, or a gondola, he could have obtained it." Under this record the defendant intrusted its station agent to select proper cars for the transportation of property over its road. The authority of a station agent is very extensive. His actions and contracts in all things within the scope of his authority bind the company. 1 Wood on Railroads, § 165. It is established by the decisions of this court that the primary duty to provide cars, etc., reasonably safe and in reasonably good condition for the purposes for which they are to be used, is one which cannot be delegated. *Thomas v. Ann Arbor R. Co.*, 114 Mich. 59, 72 N. W. 40; *Sheltrawn v. Michigan Cent. R. Co.*, 128 Mich. 669, 87 N. W. 893; *Morton v. Railroad Co.*, 81 Mich. 425, 46 N. W. 111; *McDonald v. Michigan Cent. R. Co. (Mich.)* 93 N. W. 1041. This duty is not performed by furnishing a car designed, suitable, and safe for one purpose, to be used for another purpose for which it is unsuitable and unsafe. The shipper in this case did not ask for a car suitable and safe for the transportation of barrels, but for one suitable and safe for the transportation of his mill refuse. The defendant is equally responsible for furnishing a car unsuitable and unsafe for the use to which it is to be put as it would be in furnishing a car of the proper kind in an unsafe condition. Cases of defective loading (*Miller v. M. C. R. Co.*, 123 Mich. 374, 82 N. W. 58) have no application to cases where defective appliances and machinery have been provided. See a discussion of this subject in *Beesley v. Wheeler & Co.*, 103 Mich. 203, 61 N. W. 658, 27 L. R. A. 266.

Some errors are assigned upon certain portions of the charge of the court. They are, in the main, controlled by what we have already said. Considering the charge as a whole, it was a correct exposition of the law, and we think there is no occasion for holding that the jury was misled by it, although in one instance a sentence standing by itself is not strictly correct.

Judgment affirmed. The other Justices concurred.

HAVENS *v.* RHODE ISLAND SUBURBAN RY. CO.

(Supreme Court of Rhode Island, Feb. 24, 1904.)

[58 Atl. Rep. 247.]

Injury to Conductor—Res Gestæ—Statements as to Inexperience of Motorman.*

In an action against a street railway for injuries to a conductor owing to the alleged negligence of a motorman, evidence that, on the day following the accident, defendant's general manager, who knew nothing of the accident until that day, stated to the foreman of the car barns that the motorman in question was not a regularly broke in man and was not competent, was not admissible as *res gestæ*.

Same—Evidence—Knowledge of Manager of Incompetency of Motorman.†

In an action against a street railway company for injuries to a conductor owing to the alleged negligence of a motorman, it was competent for plaintiff to prove that the manager of defendant had knowledge of the incompetency of the motorman.

Same—Same—Statements of General Manager as to Incompetency of Motorman.

In an action against a street railway company for injuries to a

*Declarations of employees and agents as *res gestæ* in actions for personal injuries, see foot-note appended to *Blackman v. West Jersey & S. R. Co.* (N. J.), 8 R. R. R. 364, 31 Am. & Eng. R. Cas., N. S., 364, where all the preceding authorities in this series are collected or referred to; *Bumgardner v. Southern Ry. Co.* (N. Car.), 8 R. R. R. 443, 31 Am. & Eng. R. Cas., N. S., 443; *Ensley v. Detroit United Ry.* (Mich.), 8 R. R. R. 452, 31 Am. & Eng. R. Cas., N. S., 452; *Birmingham Ry., Light & Power Co. v. Mullen* (Ala.), 10 R. R. R. 265, 33 Am. & Eng. R. Cas., N. S., 265 (evidence of conductor's use of profane language to another passenger, whereby the trouble was started, in action for assault); *Boone v. Oakland Transit Co.* (Cal.), 9 R. R. R. 601, 32 Am. & Eng. R. Cas., N. S., 601 (statements of conductor, made after he had walked back some distance to where plaintiff lay on the ground, form no part of the *res gestæ*); *Briggs v. East Broad Top R. & C. Co.* (Pa.), 10 R. R. R. 316, 33 Am. & Eng. R. Cas., N. S., 316 (in action for injuries to an employee caused by a broken rail, declarations of the division foreman, made half an hour after the accident, were inadmissible); *Kansas City Southern Ry. Co. v. Moles* (C. C. A.), 8 R. R. R. 22, 31 Am. & Eng. R. Cas., N. S., 22 (statements of conductor of car causing injury, made while it was still moving and plaintiff's leg still pinioned, that he thought plaintiff, another employee, was at dinner, was admissible).

†Knowledge of railroad officers or employees as notice to their company, *Hicks v. Southern Ry. Co.* (S. Car.), 4 R. R. R. 540, 27 Am. & Eng. R. Cas., N. S., 540 (knowledge of servant communicated to master binding on latter); *Read v. City & S. Ry. Co.* (Ga.), 3 R. R. R. 278, 26 Am. & Eng. R. Cas., N. S., 278 (notice to employee when not notice to railroad); notes, 5 Am. & Eng. R. Cas., N. S., 542, 9 Am. & Eng. R. Cas., N. S., 69 (notice of defects); note, 11 Am. & Eng. R. Cas., N. S., 6 (notice to servant as notice to master); *Missouri, K. & T. R. Co. of Tex. v. Belcher* (Tex.), 3 Am. & Eng. R. Cas., N. S., 498 (notice to agent as notice to company with respect to shipping contract); *Comer v. Hill* (Ga.), 11 Am. & Eng. R. Cas., N. S., 3 (notice to servant when notice to master); *Fagg v. Louisville & N. R. Co.* (Ky.), 22 Am. & Eng. R. Cas., N. S., 171 (notice to superintendent of peril of helpless trespasser on track as notice to company); *Bland v. Shreveport Belt Ry. Co.* (La.), 4 Am. & Eng. R. Cas., N. S., 349 (whether notice of defect injuring employee to officers of a preceding board of managers is notice to present board).

Havens v. Rhode Island Suburban Ry. Co

conductor owing to the alleged negligence of a motorman, evidence that, on the day after the accident, defendant's general manager, in a conversation with the foreman of the car barns relative to the accident, stated that the motorman in question was not competent, was not admissible on the ground that the statement was made by the manager, acting within the scope of his authority, and was a statement made to a subordinate in the course of conducting the business.

Instructions.

Where the charge, as a whole, states the law correctly, it is not error for the court to refuse a particular request already embodied in the charge.

Evidence—Statements of General Manager as to Incompetency of Motorman.

In an action against a street railway company for injuries to a conductor owing to the alleged negligence of a motorman, the erroneous admission of declarations made the next day by defendant's general manager to the superintendent of the car barns to the effect that the motorman in question was not competent was prejudicial error.

Action by Silas H. Havens against the Rhode Island Suburban Railway Company. Judgment for plaintiff. Defendant's petition for a new trial granted.

Argued before TILLINGHAST, DOUGLAS, and BLODGETT, JJ.

John M. Brennan and Richard E. Lyman, for plaintiff.

Henry W. Hayes, Frank T. Easton, and Lefferts S. Hoffman, for defendant.

TILLINGHAST, J. This is an action of trespass on the case for negligence, and is brought to recover damages for injuries sustained by the plaintiff on the 22d day of October, 1900, by reason of a collision between a car of the defendant and a car of the Union Railway Company. The collision occurred about 9 o'clock p. m. near to the Royal Mills Switch, so called, upon the highway at Riverpoint, in the town of Warwick. The collision was occasioned in this way, viz.: The car of the defendant upon which the plaintiff was serving as conductor was run by the turnout at said switch, at which it should have been held, and met the other car upon the single track. The declaration alleges that the defendant was negligent, in that it employed and had upon its car, as motorman, at the time of the accident, one Joe Fenner, who was an unfit, unskilled, and improper person to serve in that capacity, and that, because of his lack of skill and knowledge, he ran the car by the turnout, and thereby caused the accident by which the plaintiff was injured. At the trial of the case in the common pleas division a verdict was rendered for the plaintiff, and his damages were assessed at the sum of \$5,000, and the case is now before us on the defendant's petition for a new trial on the grounds (1) that the presiding justice erred in the admission of certain testimony; (2) that he erred in his charge to the jury, and in his rulings upon certain requests to charge; (3) that the verdict was against the evidence and the weight thereof; and (4) that the damages are excessive.

The ruling complained of in the admission of testimony was this: Henry B. Whitaker, a witness for the plaintiff, was allowed, against objection, to state what Mr. Albert T. Potter, the general manager of the defendant corporation, said to him, the next morning after the accident, about the accident, viz.: "Q. Has there been a conversation between you and Mr. Potter? A. There has. Q. When was it? A. After the accident. Q. How soon after? A. The next morning. Q. Was this conversation with reference to what had happened at the accident? Was it with reference to this accident? A. Yes, sir. Q. What did Mr. Potter say to you about Fenner? A. He told me not to let him run again. * * * Q. Did he say why? A. He said he wasn't a regularly broke in man, and he wasn't competent." The witness Whitaker was in the employ of the defendant corporation at the time of the accident, in the capacity of foreman of the car barn and station at Riverpoint; and it was by his direction that Fenner went upon the car as motorman on the night of the accident, the regular motorman being absent. There was an approved list of motormen at the car barn, but Fenner's name was not on the list; and, according to Whitaker's testimony, Fenner had not been instructed or trained as a motorman. The defendant's objection to Whitaker's testimony as to what Manager Potter told him as aforesaid was, first, that it was a statement made so long after the happening of the accident as not to form any part of the *res gestæ*; and second, that it was made by an agent of the defendant who had no power or authority to bind the defendant by anything that he might say in the premises. The plaintiff contends, on the other hand, that the statement of Manager Potter was part of the *res gestæ*, and hence properly admissible in evidence. He argues that the *res gestæ* in this case was the employment and supplying of an unfit and incompetent fellow servant, and that the improper action of this fellow servant at the time of the accident was but the natural and logical result of the defendant's negligence in placing him in a position of responsibility, and that the facts of the accident itself form but a small part of the *res gestæ* of the case.

That the declarations or admissions of an agent, made while acting within the scope of his authority in regard to the transactions depending at the very time, may be given in evidence against his principal, as a part of the *res gestæ*, is a well-settled rule of law. For, where the acts of the agent will bind the principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him, if made at the same time and constituting a part of the transaction. Sto. Ag. (9th Ed.) § 134. But the declarations or admissions of an agent not made at the time of the transaction to which they relate are not competent evidence against the principal unless they are so im-

Havens v. Rhode Island Suburban Ry. Co

mediately connected with the transaction in point of time and circumstance as in fact to constitute a part thereof. See A. & E. Ency. Law (2d Ed.) vol. 1, pp. 695-698, and cases cited. In *State v. Murphy*, 16 R. I. 530, 17 Atl. 998, Stiness, J., in considering the question as to the admissibility of statements made subsequent to the happening of the transaction, said: "The principal upon which the admission of such evidence rests is that declarations after an act may nevertheless spring so naturally and involuntarily from the thing done as to reveal its character, and thus belong to it and be a part of it; also to rebut all inference of calculation in making the declarations, and thus to entitle them to credit and weight as evidence of the transaction itself." In that case the statements which were admitted in evidence as part of the *res gestæ* were made about 10 or 15 minutes after the deadly assault in question, and by the person who was assaulted. In *Graves v. People*, 18 Colo. 170, 32 Pac. 63, Chief Justice Hayt, in delivering the opinion of the court, adopts Mr. Wharton's definition of *res gestæ*, which is as follows: "*Res gestæ* are events speaking for themselves through the instinctive words and acts of participants, not the words and acts of participants when narrating the events. What is done or said by participants under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted. What they did or said is not hearsay. It is part of the transaction itself." Under the law as above declared, we fail to see that the evidence objected to in the case at bar was admissible as part of the *res gestæ*. For, in the first place, Mr. Potter was not a participant in the transaction in question, and knew nothing about it until informed thereof the day following; and, in the second place, his declaration or admission did not spring naturally and involuntarily from the thing done, so as to illustrate its character and form a part thereof, but, on the contrary, it was a statement, evidently deliberately made, after learning from another of the happening of the accident. In other words, the statement and admission simply had to do with Mr. Potter's decision that, in view of what had happened, and in view of the incompetency of Fenner, he should not be permitted to again act as motorman. It therefore lacks the most essential elements of *res gestæ*. That it was competent for the plaintiff to prove, by proper testimony, that Manager Potter had previous knowledge of the incompetency of the motorman, may be conceded. For it is doubtless true that knowledge by a superintendent or manager having the control and management of a street railroad, including the power to employ and discharge conductors and motormen, is knowledge to the company. *Huntingdon Railway Co. v. Decker*, 82

Hayens v. Rhode Island Suburban Ry. Co

Pa. 119. But while this is so, it was held in the case just cited that conversation had with the superintendent on the day following the accident, and relating thereto, to the effect that the conductor had disobeyed orders, etc., was inadmissible, and a new trial was granted on account of the improper admission of this testimony. The case of *McDermott v. Railway Co.*, 73 Mo. 516, 39 Am. Rep. 526, is strongly in point in support of the position which we have taken. There the plaintiff was employed as a laborer on track repairs, and was injured, as he alleged, in consequence of the negligence of one Dawson, the defendant's section foreman, in having permitted a hand car to be on the track when the track should have been clear for the passage of trains, and in negligently and carelessly ordering the plaintiff to remove the car in the face of an approaching train. The plaintiff further alleged that the section foreman was incompetent, and that the defendant had knowledge of that fact before the injury complained of occurred. To sustain the allegation of the incompetency of Dawson, and the knowledge of the company that he was incompetent, the plaintiff, against defendant's objection, was permitted to testify that some days after the accident he saw Mr. Goodwin, the defendant's roadmaster when the accident occurred, whose duty it was to employ and discharge section foremen, and that Goodwin told the plaintiff that Dawson was incompetent. And the principal question in that case relates to the admissibility of the evidence referred to. In delivering the opinion of the court, Henry, J., quotes with approval the statement of Chief Justice Dallas in *Gow's N. P. Rep.* p. 456, as follows: "It is not true that, where an agency is established, the declarations of the agent are admitted in evidence merely because they are his declarations. They are only evidence when they form part of the contract entered into by the agent on the behalf of his principal, and in that single case they become admissible." Judge Henry then said: "The declarations of an agent at a different time have been decided not to be evidence. Indeed, the cases on the subject draw this distinction between the declarations of an agent accompanying the making of, and, therefore forming a part of, the contract, and those made either at a subsequent or antecedent period. This is now the well-established doctrine, and its application to other acts of an agent besides that of making contracts is equally well settled. The declarations of an agent are received, not as admissions, but as a part of the *res gestæ*. * * * The declaration of Goodwin, the roadmaster, was not made at the time of the disaster to the plaintiff, and had no connection whatever with it in the chain of causation. The question was whether the company had knowledge of the incompetency of Dawson, and while knowledge on that subject possessed by Goodwin, the roadmaster, was knowledge of the company, the fact that Goodwin

Havens v. Rhode Island Suburban Ry. Co

had such knowledge must be proved against the defendant, as any other fact, by the testimony of witnesses, and not by the declaration of third parties; and, so far as proof of that fact is concerned, his declarations, except as a part of the *res gestæ*, stand upon the same footing as declarations made by other persons." To the same general effect, see *Robinson v. Fitchburg Ry. Co.*, 7 Gray, 92; *Mich. Cent. Ry. Co. v. Carrow*, 73 Ill. 348, 24 Am. Rep. 248; *Luby v. H. River Ry. Co.*, 17 N. Y. 131; *Verry v. Burlington Ry. Co.*, 47 Iowa, 549; *Gt. Western Ry. Co. v. Willis*, 18 C. B. (N. S.) 748; *Memphis Railway Co. v. Maples*, 63 Ala. 601; *Bigley v. Williams*, 80 Pa. 107; 1 Greenl. Ev. (16th Ed.) § 184; *Williamson v. Ry. Co.*, 144 Mass. 148, 10 N. E. 790; *Vicksburg, etc., Ry. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 172, 30 L. Ed. 299; *Packett Co. v. Clough*, 20 Wall. 528, 22 L. Ed. 406; *Aldridge's Adm'r v. Furnace Co.*, 78 Mo. 559; *Am. S. S. Co. v. Landreth*, 102 Pa. 131, 48 Am. Rep. 196.

Upon examination of the case of *Ward v. White*, 86 Va. 212, 9 S. E. 1021, 19 Am. St. Rep. 883, cited by plaintiff's counsel, we are unable to see that it sustains their position in the case at bar. For, while it holds that the incidents of a particular litigated act which are illustrative thereof may be separated from the act by a considerable lapse of time, yet it holds that, in order to be admissible as part of the *res gestæ*, "they must stand in immediate causal relation to the act," and such was clearly not the fact in the case at bar. *Mayes v. State*, 64 Miss. 330, 1 South. 733, 60 Am. Rep. 58, also cited by plaintiff's counsel, while holding that there are no limits of time within which the *res gestæ* can be arbitrarily confined, yet holds that, according to all the authorities, the true inquiry is whether the declaration is a verbal act illustrating, explaining, or interpreting other parts of the transaction, of which it is itself a part, or is merely a history, or a part of a history, of a completed past affair, and that, in the one case it is competent, while in the other it is not. *State v. Daugherty*, 17 Nev. 376, 30 Pac. 1074, does not support the plaintiff's case. The late case of *Roberts v. Blakely Mill Co.* (Wash.) 70 Pac. 111, while seeming to furnish some support to the plaintiff's position, yet we do not think it goes to the extent of sustaining it. In that case the plaintiff's witnesses were permitted to testify to certain statements concerning the accident there in question made by Mr. Tew, defendant's general superintendent, and manager of the railroad. Mr. Tew arrived at the scene of the wreck about three hours after it occurred. Soon after his arrival he was examining the same, and one of the witnesses testified as follows: "I heard him say— He was looking at the flanges, and he said, 'If the company use any more Tacoma wheels,' he would not work any longer for them." Another witness testified that Mr. Tew at the same time and place said: "This puts me in a devil of a fix, and I

can't be putting in new wheels under the cars all the time." The court ruled that these declarations were admissible on the ground that they were spontaneous and tended to explain the transaction, and that so short an interval of time had elapsed between the happening of the accident and the making of said statements as to render premeditation improbable. It would certainly seem that this was carrying the doctrine of *res gestæ* to an extreme length, and particularly in view of the fact that Tew was not a participator in or witness of the transaction in question, and that the admissibility of such testimony was at least very doubtful. But accepting the decision of the learned court as good law, it falls short of sustaining the plaintiff's position in the case at bar, for here the statements were not made until the next day, and even then they were not made in view of the wreck, but deliberately—presumably at his office—and to an employee, by way of instruction. The case of *Wabash Ry. v. Brow*, 65 Fed. 941, 13 C. C. A. 222, cited by plaintiff, is a case which undoubtedly sustains the position taken by plaintiff; and, in view of the eminence and great learning of Judge Taft and his associates who rendered the opinion, it is certainly entitled to much weight. The main question discussed in the case, however, was one of jurisdiction, and not the one which is now before us in the case at bar. And it is to be noted that the question of *res gestæ* was passed upon without any discussion or citation of authorities, and it would seem to have been treated as a matter of minor importance in the decision of the case. But however this may have been, the decision upon that question seems to us to be clearly contrary to the great weight of authority, and hence should not be followed.

But counsel for the plaintiff contend that the testimony in question was admissible on another ground, viz., that the statement was made by the general manager of the defendant, acting within the scope of his authority; that it was a statement made to a subordinate in the course of conducting the business of the defendant in the matter of providing proper servants, and that it was not a statement of knowledge or information gained as a result of the accident, but one regarding the standard set by the defendant for the selection of motormen; and that the statement that Fenner was not up to that standard was a fact which was as well known before as after the accident. In support of this contention the following cases, amongst other, are cited: *Illinois Cent. R. R. v. Tronstine*, 64 Miss. 834, 2 South. 255; *Morse v. Conn. River Ry. Co.*, 6 Gray, 450; *Lane v. Boston R. R. Co.*, 112 Mass. 455; *Green v. Boston & Lowell R. R. Co.*, 128 Mass. 221, 35 Am. Rep. 370; *Burnside v. Grand Trunk Ry.*, 47 N. H. 554, 93 Am. Dec. 474; *McPherrin v. Jennings*, 66 Iowa, 622, 24 N. W. 242; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814; *McGenness v.*

Havens v. Rhode Island Suburban Ry. Co

Adriatic Mills, 116 Mass. 177; *Oil City Fuel Co. v. Boundy*, 122 Pa. 449, 460, 15 Atl. 865; *W. U. Tel. Co. v. Yopst*, 118 Ind. 248, 259, 20 N. E. 222, 3 L. R. A. 224; *C., B. & Q. R. Co. v. Coleman*, 18 Ill. 297, 299, 68 Am. Dec. 544; *St. Louis & San Fran. R. R. Co. v. Weaver*, 35 Kan. 412, 430, 11 Pac. 408, 57 Am. Rep. 176; *Abbott v. '76 Land & Water Co.*, 87 Cal. 323, 328, 25 Pac. 693. These cases are to the general effect that the declarations of an agent, made while acting within the scope of his authority and while the transaction is depending, are admissible in evidence against the principle—a rule which we have hereinbefore recognized, and about which there can be no question. Thus, in *Morse v. Conn. River R. R. Co.*, supra, it was held that the statements of the conductor and baggagemaster in relation to the loss of a trunk on a railroad, made to the owner upon inquiries by him on the morning after the loss, were admissible upon the ground that such statements were made by them as agents of the defendant, within the scope of that agency and while it continued. In *Burnside v. Grand Trunk Ry. Co.*, supra, it was held that the statements of the general freight agent of the defendant as to the condition of goods delivered to him for transportation, made while the goods were in transit, were admissible in evidence against the company. "So long as the duty of the defendants to transport the goods continued," said the court, "the authority of the agent would continue, and so long his declarations in respect to it would be regarded as the declarations of the principal." In *Green v. Boston & Lowell R. R. Co.*, supra, the evidence admitted was between the plaintiff and one Rolfe, who was a freight agent of the defendant, who made the contract with the plaintiff, and who was the person to whom the plaintiff might properly apply to account for the missing case. And the court held, and very properly, that statements made by him in the course of investigating the matter of the loss would be declarations within the scope of his agency, and admissible against the defendant. While we see no reason to question the soundness of these and other similar decisions, we must hold that, for the reasons already given, they are not applicable to the case at bar, and hence that the second ground taken by plaintiff's counsel in support of the admissibility of the testimony in question is untenable. And here we may observe that in the case of *Oil City Fuel Co. v. Boundy*, 122 Pa. 449, 15 Atl. 865, which is cited by plaintiff's counsel in support of the proposition last above considered, the court held that "it is imperative, in cases of alleged tortious conduct, such as negligence, unless the act is especially authorized, that the admissions of the agent must be part of the *res gestæ*; otherwise they are hearsay."

The defendant's counsel took exception to the granting by the court of the plaintiff's third request to charge the jury,

Havens v. Rhode Island Suburban Ry. Co

which request was as follows: "If the master carelessly place by the side of the servant another, unskilled and incompetent, and damage results to the servant in consequence of it, the master is liable. And this is so whether the incompetence or want of skill of the fellow servant existed when he was hired, or has come upon him since, and he has been continued in the service with notice or knowledge, or means of knowledge, on the part of the master of the incompetence or unskillfulness." The court said: "I am obliged to modify that slightly, so that it will read: 'If the master carelessly place by the side of one servant another, unskilled and incompetent, which unskillfulness and incompetence was unknown to the first-named servant, or by the exercise of reasonable care the incompetence and unskillfulness might have been unknown to the first-named servant, and danger results to the servant in consequence, the master is liable. And that is so whether the incompetence or want of skill of the fellow servant existed when he was hired, or has come upon him since, and he has been continued in the service with notice or knowledge, or means of knowledge, upon the part of the master of the incompetence and unskillfulness.'" We see no substantial objection to the request as presented by plaintiff's counsel, or to that which was granted by the court, taken in connection with the charge as a whole.

The defendant's fourteenth request to charge was as follows: "Even if the motorman was incompetent, if the defendant did not, or, in the exercise of reasonable care, might not have had knowledge of such fact, the verdict must be for the defendant." This request was refused, subject to exception. That it was correct, as a proposition of law, cannot be doubted; but as we find upon examination of other requests to charge, which were granted, that substantially the same rule of law was laid down, the defendant has no cause of complaint. For, as we have frequently held, if the charge as a whole states the law correctly, it will not be held error on the part of the court to have refused a particular request which was already embodied in the charge. In other words, a court is not called upon to emphasize a particular proposition of law by repeating it to the jury.

The exceptions to the charge and refusal to charge are therefore overruled.

Finally, as the declaration of Manager Potter to the witness Whitaker, as detailed by the latter, would naturally have great weight with the jury, and, for aught we know, may have had a controlling influence in determining their verdict upon the question of the competency of the motorman, and also as to the knowledge of the company regarding the same, it is clear that the error in admitting the testimony in question was not a harmless one, but one by which the defendant

Chicago & E. I. Ry. Co. v. White

was prejudiced, and hence that a new trial must be granted. *Graham v. Coupe*, 9 R. I. 478; *Tourgee v. Rose*, 19 R. I. 432, 37 Atl. 9. It is therefore unnecessary to consider the other grounds relied on by defendant.
Petition for new trial granted.

CHICAGO & E. I. RY. CO. v. WHITE.

(Supreme Court of Illinois, April 20, 1904.)

[70 N. E. Rep. 588.]

Fellow Servants—Different Departments.*

Servants of the same employer, directly co-operating in the particular business in hand, or whose usual duties bring them into habitual association, are fellow servants, though they are employed in different departments of the service.

Same.

The relation of fellow servants does not depend on personal acquaintance.

Same.

Whether a railroad brakeman and members of a switching crew were fellow servants, involving the issues of direct co-operation in the business in hand and of habitual association, *held* properly submitted to the jury.

Injury to Brakeman—Assumption of Risk—Negligence of Switching Crew.

A railroad brakeman, fatally injured while between the cars of a train in a yard, made up ready for its journey, caused by the yard switching crew sending a number of cars, without an attending brakeman, onto the track, in making a flying switch, did not assume the risk of the switching crew's negligence; it appearing that, while it was customary to kick the cars upon tracks without any brakeman to attend them, it was not customary to kick them on tracks where there was a standing train.

Same—Appeal.

In an action for the death of a railroad brakeman, the objection that there was no proof to sustain an allegation in the declaration that he was directed to go between the cars where he was injured cannot be taken for the first time in the Supreme Court, where it was not made in the Appellate Court.

Fellow-Servant Rule—Instructions.

The fact that, instructing in an action for the death of a servant, the court employs the term "respondeat superior" to express the master's liability, without explaining its meaning, is not ground for reversal on defendant's appeal, where the rule as to liability for negligence of a fellow servant—that being the defense relied on—was fully given in another instruction.

Appeal from Appellate Court, First District.

Action by Byron H. White against the Chicago & Eastern Illinois Railway Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

*As to the different department limitation of the fellow-servant doctrine, see foot-note appended to *Indianapolis & G. R. T. Co. v. Foreman* (Ind.), 11 R. R. R. 214, 34 Am. & Eng. R. Cas., N. S., 214.

Chicago & E. I. Ry. Co. v. White

Calhoun, Lyford & Sheean, for appellant.
James C. McShane, for appellee.

CARTWRIGHT, J. This is an appeal from a judgment of the Appellate Court for the First District affirming a judgment of the superior court of Cook county in favor of appellee and against appellant in an action on the case prosecuted to recover damages for the death of Samuel C. Woodward, a brakeman in the employ of appellant, who was killed in its railroad yard in Chicago on December 22, 1900. At the conclusion of the evidence, the defendant asked the court to instruct the jury to return a verdict of not guilty. The court refused to give the instruction, and the refusal is assigned as error, and is the principal subject of argument by counsel on both sides.

It was proved, and is not denied, that the death of Woodward resulted from the negligence of other servants of the defendant, and it is contended that the negligent servants were fellow servants with Woodward. The declaration consisted of a single count, alleging that Woodward was employed by the defendant as a brakeman on a train of cars standing on the side track of defendant in its railroad yard in Chicago; that the train had been made up, and was headed south; that deceased went between cars to repair an air brake; and that while there the defendant carelessly and negligently backed another train against his train and killed him. There was little or no controversy as to the facts, and the material facts proved are as follows: Woodward was head brakeman on a freight train which made daily trips between Chicago and Brazil, Ind., leaving Chicago about 12 o'clock. The crew to which he belonged took the train out usually three times a week. The railroad yard in Chicago extended from Thirty-Third to Thirty-Seventh street, and consisted of two divisions, known as the "New Yard" and the "Old Yard." The old yard was on the west, and contained tracks numbered from 1 to 18. The new yard was on the east side, and contained tracks numbered from 1 to 26; and all the tracks formed a continuous system, connected by lead tracks and switches, and forming one yard. Defendant had two switching crews employed in this yard—one at the north end, which broke up and switched trains arriving in the yard from the road, setting the cars on various tracks to go to other roads or to freight houses, and the other at the south end, which made up trains to go out on the road. When a freight train came in from the south, it stopped on any track which was unoccupied, and the engine was detached and went to the roundhouse at the north end of the yard, and it was the duty of the head brakeman to accompany the engine for the purpose of throwing switches. Trains were generally made up to go out on the road by the south-end crew, and, when ready to go out, the engine was taken from the roundhouse to the head of the train, which

was made up for departure, and it was the duty of the head brakeman to accompany it. It would take any track that might be unoccupied to the head of the train. In going to and from the roundhouse the engine was liable to traverse the whole length of the tracks in the yards, passing over the same tracks and through the same switches as the switching crews. In making up trains the crew at the south end would switch from one track to another, and in breaking up trains the switch crew at the north end used the various switch tracks in the same way. There was no dividing line between the switch crews, and they worked all over the yard, wherever their duties called them. On the day of the accident the train on which Woodward was head brakeman was made up as usual, consisting of about 20 coal cars, with a way car at the north end. The train was standing at the south end of the yard, and the crew to which Woodward belonged took the engine to the south end of the train and coupled to it; and Woodward commenced to examine the air brakes, starting from the engine, to see if they were in working order. There was a defect or leak in the air hose two or three cars from the engine, and Woodward went between the cars to fix the leak. While he was between the cars, the switch crew at the north end kicked 13 cars from the north end of the yard upon the track, without a brakeman on them, and they ran rapidly down the track, striking the rear of Woodward's train with such force as to move it two or three car lengths before it could be stopped, and he was run over and killed. He had been employed as brakeman for five or six months on this train, and before that had been a clerk in the office at the yard, and during all the time of his employment the manner in which trains were broken up and switched and made up was the same as at the time of his death. The switch crew in the yard were under the direction and control of the yardmaster, and the road crews, while in the yard, were also under his direction, but from the time the train was ready to leave until it returned to the yard they were under the direction and control of the trainmaster.

Woodward was a servant of the defendant, and, his death having been caused by the negligence of other servants of the same master, the request of defendant for the instruction raised the question whether there was any evidence fairly tending to prove that the relations of the servants were such as to render the defendant liable, or, in other words, that they were not fellow servants. If the only conclusion to be drawn from the evidence was that they were fellow servants, the instruction should have been given; but, if different conclusions on that question might be reached from the evidentiary facts before the jury, it was not error to refuse the instruction. One of the things to be considered on that question is whether the servants were employed in the same or

different departments of the service. The evidence was that the negligent switch crew and Woodward were not employed in the same department. The switch crew were under the control of the yardmaster, and performed all their work under his direction, while the road crew, in the general performance of their duties, were under the control of the trainmaster; and yet, when they were in the yard at Chicago, they were to some extent brought within the same department as the switch crews in handling their engine. Under the rule in this state relating to fellow servants, which is based so largely upon the doctrine of association in the performance of duties, the separation into different departments is not a conclusive test. In one sense, switching crews at different places remote from each other are in the same department; and yet, if they do not directly co-operate with each other, and their usual duties are not such as to bring them into habitual association, they are not fellow servants; and, on the other hand, where there is association between the servants in the performance of their duties, they are fellow servants, although in some sense employed in different departments. In *Joliet Steel Co. v. Shields*, 146 Ill. 603, 34 N. E. 1108, the rule is stated as follows (page 609, 146 Ill., and page 1110, 34 N. E.): "Persons may be fellow servants, although not strictly in the same line of employment. One person may be employed to transact one department of business, and another may be employed by the same master to transact a different and distinct branch of business; but if their usual duties bring them into habitual association, so that they may exercise a mutual influence upon each other, promotive of proper caution, such persons might be regarded as fellow servants. *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57 [29 N. E. 186]." If servants are directly co-operating in the particular business in hand, they are fellow servants, although their ordinary duties are in different departments. *Abend v. Terre Haute & Indianapolis Railroad Co.*, 111 Ill. 202, 53 Am. Rep. 616. If, therefore, Woodward and the north-end switch crew were at the time of the accident directly co-operating in the particular business of the defendant then in hand, or if their usual duties were of such a nature as to bring them into habitual association, so that they might exercise an influence upon each other promotive of proper caution for their mutual safety, then they were fellow servants, notwithstanding their employment in different departments of the service.

Appellant claims that the particular business in hand when the accident happened was the whole business of the railroad yard, which consisted of receiving trains from the road, breaking them up, and distributing cars for freighthouses and other roads, making up freight trains and dispatching them on the road, and the moving of cars and trains for all these purposes. It is quite evident that direct co-operation

in particular business does not mean the same thing as habitual association in the performance of duties, since, if that were so, there would be no occasion for stating two branches of the rule. Direct co-operation in a particular business is distinguished from indirect co-operation or co-operation in the general business of the master. Different persons employed in this extensive yard in some capacity, or who had occasion to be there in performance of different or separate duties, might be engaged in doing different parts of the same work, and promoting the general business of the master, and their duties be such as to bring them into habitual association, although not directly co-operating in a particular part of the work. The duties of the road crew respecting a train did not begin until the duties of the switch crew making it up ended, and the duties of the crew on the incoming train ceased before those of the switch crew began; and under the rule declared in *Chicago & Alton Railroad Co. v. Hoyt*, 122 Ill. 369, 12 N. E. 225, they could not be said, as a matter of law, to be directly co-operating in the particular business in hand. That question was properly submitted to the jury as one of fact.

On the question whether the duties of Woodward and the switch crew were such as to bring them into habitual association, so as to exercise an influence over each other, promotive of proper caution, the evidence was that the road crew, including the head brakeman, would take the engine, when uncoupled, and run over the track to the roundhouse, and would take it from the roundhouse and run over the tracks to couple on the outgoing train, and in doing so they ran through the yard over the tracks where the switch crews were working. It is contended by appellant that this fact established such habitual association between the two classes of servants as would make them fellow servants, in the law. Counsel for appellees says that they were not fellow servants, because Woodward was not even acquainted with the members of the north-end crew, and therefore the two could not have exercised an influence over each other promotive of proper caution. The fact of personal acquaintance does not determine the relation, but it depends upon the nature of the duties of the different servants, and the incidents of the employment. Whenever the requisite conditions are established, either by co-operation in a particular business then in hand, or duties which imply habitual association, that moment the relation commences, and under the law the servants are fellow servants. Whether they are fellow servants does not depend upon the accident of acquaintance or the length of time the men have worked together. *World's Columbian Exposition v. Lehigh*, 196 Ill. 612, 63 N. E. 1089. Any other rule would be vague, indefinite, and impracticable. It would be a question how long the servant must be employed before sufficient acquaintance would be established, and a sufficient

opportunity given for advice, counsel, and caution, so that the servant would cease to have a right of action against the employer. The conclusion might depend upon friendship, which would induce friendly counsel and advice, or personal enmity, which would prevent or prohibit it. The fellow-servant rule rests both upon considerations of public policy, and upon the rule that when a servant enters the employment he assumes all the ordinary risks of such employment, including the negligence of fellow servants associated with him, and both reasons for the rule have been recognized by this court. He assumes the risks as to all those whose duties bring them into habitual association with him, or who may be directly co-operating with him in some particular business in hand at the time of an accident. There was evidence tending to prove that the duties of the road crew and switch crews while in the yard brought them into habitual association, but the evidence was not of such a nature that but one conclusion could have been drawn from it, and therefore the question was properly submitted to the jury. Whether the proper conclusion was drawn from the facts was finally settled by the Appellate Court, and is not subject to review here.

It is also contended that the instruction should have been given because, even if Woodward was killed by the negligence of a servant who was not his fellow servant, yet the risk of such a collision and injury as occurred was assumed by him. As already stated, one who enters the service of another contracts to assume the risk of the negligence of fellow servants, and he also assumes all the risks or hazards usually incident to the employment. He is chargeable with the ordinary conditions under which the employment is conducted, and is presumed to have notice of dangers and defects which are patent and obvious, either in the premises where the work is done, or the methods of doing the work. It is also true that the question whether an accident or injury is included in the risks of the employment is to be determined from the question whether it is an accident or injury liable to occur in the ordinary prosecution of the business, and it is not necessary to the assumption of such risks that the same accident should have happened before. A servant, however, does not assume the risk of a negligent manner of doing the work by other servants who are not his fellow servants, unless it is customary to do the work in that manner. The risk of such an act is not one of the usual or ordinary hazards of the employment. In this case the evidence was that, while it was customary to kick cars upon tracks without any brakeman to attend them, it was not the custom to kick them on tracks where there was a standing train, as was done in this case. The evidence tended to show that an out-going train was made up on a separate track, and not on one used for kicking cars up on. We conclude that the court was right in refusing the instruction.

McCabe v. Montana Central Ry. Co

The next proposition of counsel is that there was no proof to sustain an allegation of the declaration that Woodward was directed to go between the cars, and that he went in obedience to orders. This point was not made in the Appellate Court, and will therefore not be considered.

The last proposition of appellant's argument is that the court erred in giving the first instruction at the request of the plaintiff. The instruction used the term "respondeat superior" to express the liability of a master for a negligent act of his servant, without any explanation of what it meant, and also stated a principle of law to be within the rule, when it was in fact without the rule, or an exception to it. The jury may have had no idea of the meaning of the words "respondeat superior," and the instruction was apparently copied from a judicial opinion written for professional men. The general language often used in instructions conveys a very indefinite idea of the law of fellow servants, and the language of opinions as to co-operation, habitual association, and the like, has but little tendency to enlighten a jury upon that question. The giving of such instructions and the practice of making use of phrases unintelligible to the ordinary juror is disapproved. There was, however, nothing that could be said to be incorrect in the instruction, and the twelfth instruction given at the request of defendant seems to have been a much clearer statement of the rule, and doubtless gave the jury an understanding of the relations of fellow servants.

We find no reason for reversing the judgment. The judgment of the Appellate Court is affirmed. Judgment affirmed.

MCCABE v. MONTANA CENTRAL RY. CO.

(Supreme Court of Montana, May 6, 1904.)

[76 Pac. Rep. 701.]

Duty of Master to Furnish Safe Place to Work.*

It is the duty of an employer to use all reasonable care, considered in relation to the kind of business, to provide a safe place in which the employee may perform his service.

Same—Presumptions—Employee Engaged in Switching.†

A railroad employee engaged in switching is entitled to rely on the presumption that the railroad has properly constructed its line and appliances.

Nonsuit.

On motion for a nonsuit, every fact will be deemed proved which the evidence tends to prove.

*See foot-note appended to *Scott v. Seaboard Air Line Ry. Co.* (S. Car.), 9 R. R. R. 148, 32 Am. & Eng. R. Cas., N. S., 148; foot-note appended to *Bateman v. New York Cent. & H. R. R. Co.* (N. Y.), 11 R. R. R. 200, 34 Am. & Eng. R. Cas., N. S., 200.

†As to the right of an employee to rely on his master's performance of duties owing to him, see *Gulf, C. & S. F. Ry. Co. v. Garren* (Tex.),

McCabe v. Montana Central Ry. Co

Injury to Employee—Implied Notice of Proximity of Switch Stand.†

The fact that a railroad employee went in and out of the yards in which he was employed during a period of three months, and that immediately before the accident he threw switches, was not conclusive on the question of notice to him of the proximity of the switch stand to the track.

Care Required of Master.§

A railroad is not an insurer of the safety of its employees, but is required only to exercise all reasonable care to provide and maintain safe, sound, and suitable machinery, roadway structures, and instrumentalities.

Injury to Employee—Contributory Negligence—Proximity of Switch Stand.‡

Where a railroad negligently maintained a switch stand so near its track as to imperil the safety of its employees, and an injured employee testified that he did not know of such dangerous proximity, and had never thrown the switch prior to the day of the accident, and up to that day had never done any switching in the portion of the yard in which such switch stand stood, it could not be said, as a matter of law, that he was guilty of contributory negligence in attempting to mount an engine near the switch.

Assumption of Risk.

Where a servant assumes the risk, the question of his contributory negligence is immaterial.

Same—Brakemen.

While the occupation of a freight brakeman is a perilous one, and those who engage in it must be held to have anticipated its dangers, and to have assumed the risks ordinarily incident thereto, yet they assume only the ordinary risks of the employment, and not extraordinary ones, unless they are aware of such at the time of their employment, or, on learning of their existence, they continue in the employment after the lapse of a reasonable time for the defects to be remedied or removed.

Same—Same—Proximity of Switch Stand.‡

Whether a freight brakeman engaged in switching, and who was

8 R. R. R. 384, 31 Am. & Eng. R. Cas., N. S., 384 (reliance on insufficient promise to repair engine step); *Carroll v. New York, N. H. & H. R. R. (Mass.)*, 6 R. R. R. 313, 29 Am. & Eng. R. Cas., N. S., 313 (employee working under car had right to assume that train would not be backed on track at unreasonable rate of speed); *Chicago & A. Ry. Co. v. Eaton (Ill.)*, 1 R. R. R. 353, 24 Am. & Eng. R. Cas., N. S., 353 (right of brakeman to rely on compliance with rule requiring flags and torpedoes); *Smith v. Erie R. Co. (N. J.)*, 4 R. R. R. 793, 27 Am. & Eng. R. Cas., N. S., 793 (right to assume that master has performed his duty with respect to furnishing safe place to work and suitable appliances); *Talor v. Nevada-California-Oregon Ry. Co. (Nev.)*, 4 R. R. R. 781, 27 Am. & Eng. R. Cas., N. S., 781 (right to continue work relying on promise to repair); *Louisville & N. R. Co. v. Richardson (Ky.)*, 1 R. R. R. 360, 24 Am. & Eng. R. Cas., N. S., 360 (right to rely on master's judgment in using wooden fulcrum in repairing engine); *Mann v. Lake Shore & M. S. Ry. Co. (Mich.)*, 21 Am. & Eng. R. Cas., N. S., 325 (reliance on promise to repair appliance, question for jury); *O'Neill v. Chicago, etc., R. Co. (Neb.)*, 22 Am. & Eng. R. Cas., N. S., 578 (right of employee to assume that master has exercised due care for his protection); note, 12 Am. & Eng. R. Cas., N. S., 789 (servant going into danger relying on master's promise of protection).

†See generally, foot-note appended to *Hoffmeier v. Kansas City, etc., R. Co. (Kan.)*, 11 R. R. R. 207, 34 Am. & Eng. R. Cas., N. S., 207; foot-note appended to *Coles v. Union Terminal Ry. Co. (Iowa)*, 11 R. R. R. 392, 34 Am. & Eng. R. Cas., N. S., 392.

§See foot-note appended to *Scott v. Seaboard Air Line Ry. Co. (S. Car.)*, 9 R. R. R. 148, 32 Am. & Eng. R. Cas., N. S., 148.

McCabe v. Montana Central Ry. Co

injured while mounting an engine by coming in contact with a switch stand placed near the track, knew or should have known of the dangerous proximity of such switch stand to the track, so as to have assumed the risk of injury therefrom, held, under the evidence, a question for the jury.

Direction of Verdict.

No case should be withdrawn from the jury unless the conclusion necessarily follows from the facts as a matter of law that no recovery could be had on any view which could reasonably be drawn from the facts which the evidence tends to established.

Commissioners' Opinion. Appeal from District Court, Cascade County; J. B. Leslie, Judge.

Action by Joseph D. McCabe against the Montana Central Railway Company. From a judgment of nonsuit, and from an order denying a new trial, plaintiff appeals. Reversed.

Frank D. Larrabee and Downing & Stephenson, for appellant.

I. Parker Veazey, for respondent.

CALLAWAY, C. Appeal from a judgment of nonsuit and from an order denying plaintiff's motion for a new trial.

The plaintiff brought this action to recover damages for injuries sustained by him in defendant's railway yards in Great Falls, caused, as he alleges, by defendant's negligence in constructing and maintaining a switch stand so near its railway track that plaintiff, in the performance of duty, was struck thereby as he attempted to mount a moving engine, and, falling thereunder, was run over, resulting in the loss of his left leg a few inches above the knee. A somewhat extended statement of the existing conditions seems to be necessary. In the north end of the freight yard, where the accident occurred, the tracks run northerly and southerly. The easterly one is called the "house track." Adjacent to the house track on the west is the lead track, which is somewhat in the form of an arc of a circle. Other tracks connect with the lead track at the northerly and southerly portions thereof, and each in appearance, taken in conjunction with the lead track, is not unlike the string to a bow. The first track west of the lead track is called "No. 7," the next west "No. 6," and so on, there being seven of these connecting tracks. Where each of the tracks connects with the lead track at the northerly end there is a switch stand, which is numbered to correspond with the connecting track. Thus the northerly switch stand is No. 1, and the next to it is No. 2. The distance between No. 1 and No. 2 is 185 feet. The seven switch stands are similar, and are the same distance from the lead track, but plaintiff testified that he did not know this until after the accident. On the top of each is what the witnesses call a "target," and this is surmounted by two prongs, upon which lights are placed at night. It is 45 inches from the center of switch stand No. 2 to the easterly rail of the lead track when the target is parallel with the track; but when

McCabe v. Montana Central Ry. Co

the switch is turned so that cars may pass from the lead track to track No. 2 the target is at a right angle with the tracks, and it is then but 40 inches from the target to the easterly rail of the lead track. At the time the measurements were taken, which was a day or two prior to the trial, the distances between the switch stands and the track were the same as they had been for the two years immediately preceding, and this would include the time in which plaintiff worked for the defendant in the year 1899.

The testimony discloses that the steps on an engine similar to the one in use at the time of the accident project over the track a distance of 30 inches, and the space between the engine and the switch stand, the target being at a right angle with the track, when the engine is backing in on track No. 2, is about 10 inches. Prior to the accident, which occurred December 13, 1899, plaintiff had been in defendant's employ as head brakeman on a freight train for nearly three months. About a year before he had been in defendant's employ for a few months, serving as helper in the boiler shop, hostler's helper, and fireman on a switch engine; but in none of these capacities did he ever do any switching in that portion of the yard where he was afterwards injured. While in the discharge of his duties as brakeman, plaintiff became familiar with the railroad yards at Havre, Helena, Clancy, Belt Mine, Sand Coulee, and Neihart. In all of these places he did considerable switching, and in all of those yards he had ridden on the sides of engines and cars past the switch stands, and was never interfered with by the switch stands or targets thereon in any way. Throughout defendant's entire system, save in the northerly portion of the Great Falls yards, it appears that the switch stands are about six feet from the track. There are eighteen switches in the Great Falls yards and all are about six feet from the track, save the seven mentioned. Plaintiff testified that he did not know until after the accident that the seven were any closer to the track than are the others on the system. Plaintiff testified that he had never done any switching in the north end of the Great Falls yards prior to the morning in question. While plaintiff was in the employment of the defendant as head brakeman, the train started from different places in the yards. In coming into the yard plaintiff never had to throw any switches, but did throw switches in different parts of the yard upon going out. It was his duty to couple the engine and tender on every train that was taken out on which he worked as brakeman, but there were exceptions to that rule.

The defendant pleaded that the plaintiff was guilty of contributory negligence, and that he had assumed the risk of the employment. In order to determine whether the plaintiff was guilty of such contributory negligence as will defeat his action it becomes necessary to look to the situation of the defendant and plaintiff—the master and servant—at the time

McCabe v. Montana Central Ry. Co

of the accident. On the afternoon of the day on which plaintiff was hurt he was summoned to take out a train. Going to the yards he found the train he was to take out standing on track No. 2. No engine was as yet attached. Engine No. 500, which had been assigned to the train, was on track No. 1. Another engine, by mistake, had been let in on track No. 2. Plaintiff went to switch stand No. 2, and threw it to let the engine on that track come to the lead track, so that engine No. 500 could move to track No. 2. This was the only occasion upon which he ever threw switch No. 2. He then went to switch stand No. 1, and threw that to allow engine No. 500 to go from track No. 1 to the lead track, which it immediately did. In the meantime the conductor had again thrown switch No. 2 to allow this engine, No. 500, to go to the train standing on track No. 2. It was then standing about 30 feet north of switch No. 1. Plaintiff started to walk to switch No. 2. At one place in the testimony plaintiff says he walked towards switch No. 2 with the intention of turning it. On cross-examination he testified that he could have safely discharged his duty and have ridden to the train made up on track No. 2 by getting onto the engine near switch No. 1, and said that he walked towards switch No. 2 leisurely until the engine caught up with him; that there was no purpose in doing so except to put in the time while the engine was going along. When about 20 feet from switch stand No. 2, the engine, traveling about 5 or 6 miles an hour, caught up with him, and he then mounted it by getting upon the steps, but before he had fully straightened up his body came in contact with the prongs and target upon switch stand No. 2. He was knocked from the engine, which ran over his left leg. The witnesses testified that it is customary for employees in a railway yard to mount an engine when it is not going faster than six miles an hour.

One ground urged by defendant's counsel in his motion for a nonsuit is: "Because it appears from the plaintiff's proof that the duties which he was seeking to perform at the time of the accident complained of could have been performed safely and without injury or danger to him, but he voluntarily and unnecessarily chose a dangerous method of performing these duties, and unnecessarily placed himself in a position of known peril, thereby negligently contributing to the injury for which he now seeks damages from the defendant." In his brief counsel urges this position with great force, and cites the following authorities in his support: *Cummings v. H. & L. S. & R. Co.*, 26 Mont. 434, 68 Pac. 852; 1 *Bailey's Personal Injuries*, § 1121; *Highland Ave. & D. R. Co. v. Walters* (Ala.) 8 South. 360; *Central Ry. of Ga. v. Mosley* (Ga.) 38 S. E. 350; *Morris v. Duluth, S. S. & A. Ry. Co.*, 108 Fed. 747, 47 C. C. A. 661; *Chicago & Northwestern Ry. Co. v. Davis*, 53 Fed. 61, 3 C. C. A. 429; *Richmond & D. R. Co. v. Bivins* (Ala.) 15 South. 515; *George v. Mobile & O. R.*

McCabe v. Montana Central Ry. Co

Co. (Ala.) 19 South. 784; Davis v. Western Ry. of Ala. (Ala.) 18 South. 173; Ferguson v. Chicago, M. & St. P. Ry. Co. (Iowa) 69 N. W. 1026; Union Pacific Ry. Co. v. Estes (Kan.) 16 Pac. 131; Carrier v. Union Pacific Ry. Co. (Kan.) 59 Pac. 1075; Quirault v. Alabama G. R. R. Co. (Ga.) 36 S. E. 599; Fritz v. Salt Lake & O. G. & E. L. Co. (Utah) 56 Pac. 90; Jenkins v. Cotton Mills (La.) 25 South. 645. There can be no question as to the correctness of the legal proposition upon which counsel relies, but is it applicable to the facts in this case? That the duties plaintiff was seeking to perform could have been performed safely and without injury to him is conceded, but did he voluntarily or unnecessarily place himself in a position of known peril? Did he know, or ought he to have known, that the way he adopted was unsafe? Did he know, or ought he to have known, that the switch stand was but 40 inches from the track? The testimony discloses that the switch stands at all other places upon defendant's system were about six feet from the track, and plaintiff had frequently ridden past them without injury on the sides of cars and engines. It is the duty of the employer to use all reasonable care to provide a safe place in which the employee may perform his service (Kelley v. Fourth of July M. Co., 16 Mont. 484, 41 Pac. 273); that is, reasonable care considered in relation to the kind of business in which he is engaged (Kelley v. Cable Co., 8 Mont. 440, 20 Pac. 669). In the case of Pikesville, etc., R. Co. v. Russell, 88 Md. 563, 42 Atl. 214, the court said: "It is the duty of the master to exercise all reasonable care to provide and maintain safe, sound, and suitable machinery, roadway, structures, and instrumentalities; and he must not expose his employees to risks beyond those which are incident to the employment, and were in contemplation at the time of the contract of service; and the servant or employee has a right to presume that the master has discharged these duties. Stricker's Case, 51 Md. 47, 34 Am. Rep. 291; Baker's Case, 84 Md. 21, 35 Atl. 10; 3 Elliott on Railways, §§ 1288 to 1291, and authorities cited." And see Berg v. B. & M. Con. C. & S. M. Co., 12 Mont. 212, 29 Pac. 545; Ill. Cent. R. R. Co. v. Welch, 52 Ill. 183, 4 Am. Rep. 593; Geo. Pacific Railway Co. v. Davis, 92 Ala. 300, 9 South. 252, 25 Am. St. Rep. 47; St. Louis, Ft. Scott & Wichita R. R. Co. v. Irwin, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266; Bryce v. C., M. & St. P. Ry. Co., 103 Iowa, 665, 72 N. W. 780. Mr. Justice DeWitt, in Prosser v. Montana Central Railway Co., 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814, states the tenor of the authorities to be "that, if the question of negligence or contributory negligence is a fairly disputed question of fact, it must be resolved by the jury, but that, if the evidence is perfectly clear, the matter is for the court; and by 'perfectly clear,' the authorities say, is meant not perfectly clear in the view of the particular court or persons composing the court which is

reviewing the matter, but rather in the judgment of reasonable men of sound minds. That is, if different conclusions might be drawn by different men of fair, sound minds, then the matter must go to the jury; but, if only one conclusion can be reached by men of fair, sound minds, the determination is for the court." *Berg v. B. & M. Con. C. & S. M. Co.*, supra; *Sweeney v. City of Butte*, 15 Mont. 274, 39 Pac. 286; *Nord v. B. & M. Con. C. & S. M. Co.*, 30 Mont. —, 75 Pac. 681. As to whether the plaintiff knew, or reasonably should have known, that he was adopting a dangerous course in mounting the engine when and where he did is a question upon which men of fair, sound minds may differ. Plaintiff was entitled to rely upon the presumption that the defendant had properly constructed its railway line and appliances. However, he was somewhat familiar with the Great Falls yards, as the facts herein recited show, and "what a man in law ought, by the exercise of reasonable diligence, to know, he does know" (*Bryce v. C., M. & St. P. Ry. Co.*, 103 Iowa, 665, 72 N. W. 780); but to what extent was he familiar with the switch stand in question? Ought he, by the exercise of reasonable diligence, to have known its location and proximity to the track? He testified that he did not know the distance the seven switch stands were from the track; that he never threw switch stand No. 2 before the afternoon upon which he was hurt, and then threw it but once. Throughout this inquiry it must be borne in mind that on a motion for a nonsuit every fact will be deemed proved which the evidence tends to prove. Such has always been the rule of practice in this court. *Herbert v. King*, 1 Mont. 475; *Gans v. Woolfolk*, 2 Mont. 463; *McKay v. Montana Union Ry. Co.*, 13 Mont. 15, 31 Pac. 999; *Creek v. McManus*, 13 Mont. 152, 32 Pac. 675; *State v. Benton*, 13 Mont. 306, 34 Pac. 301; *Mayer v. Corothers*, 14 Mont. 274, 36 Pac. 182; *Soyer v. Great Falls Water Co.*, 15 Mont. 1, 37 Pac. 838; *Powers v. Klenzie*, 15 Mont. 177, 38 Pac. 833; *Jenson v. Barbour*, 15 Mont. 582, 39 Pac. 609; *Emerson v. Eldorado Ditch Co.*, 18 Mont. 247, 44 Pac. 969; *Holter Lumber Co. v. Fireman's Ins. Co.*, 18 Mont. 282, 45 Pac. 207; *State v. Conrow*, 12 Mont. 552, 35 Pac. 240; *Morse v. Commissioners*, 19 Mont. 450, 47 Pac. 639; *Cameron v. Commercial Co.*, 22 Mont. 312, 56 Pac. 358, 44 L. R. A. 508, 74 Am. St. Rep. 602; *Cummings v. H. & L. S. & R. Co.*, 26 Mont. 434, 68 Pac. 852; *Cain v. Gold Mtn. Mg. Co.*, 27 Mont. 529, 71 Pac. 1004; *Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42; *Ball v. Gussenhoven*, 29 Mont. —, 74 Pac. 871; *Nord v. B. & M. Con. C. & S. M. Co.*, 30 Mont. —, 75 Pac. 681.

Counsel for defendant argues that plaintiff, in going into and out of this portion of the Great Falls yards during a period of three months, must have noticed the proximity of these switch stands to the lead track, and especially must have done so at the two times he threw them immediately

McCabe v. Montana Central Ry. Co

prior to the accident. This is not conclusive. As the court remarked in the case of *Railway Co. v. Michaels*, 57 Kan. 474, 46 Pac. 938: "In *Rouse v. Ledbetter*, 56 Kan. 348 [43 Pac. 249], an injury to a switchman resulted from a defective structure in the yard, and one that he might have seen by the reasonable use of his eyesight. It was held, however, that the fact that he was working in that part of the yard, and might have seen it if his attention had been called to it, was not conclusive evidence of contributory negligence. It was said: 'The faculty of close observation of objects is largely a gift. Some persons may walk once along a street, and be able, without any special effort, to describe every prominent object upon and every projection into the street, while others might go up and down the same street for a year, who could not describe such objects and projections.'"

* * * Many dangers necessarily attend the performance of the duties of a yard switchman, but the master is not allowed to increase the hazards of his servant by placing pitfalls, obstructions, traps, or inclines in his path, whereby he may lose his footing, and be mangled or killed.'" *Dorsey v. Construction Co.*, 42 Wis. 583. A railroad company is not an insurer of the safety of its employees. All the law demands it to do is to "exercise all reasonable care to provide and maintain safe, sound, and suitable machinery, roadway, structures, and instrumentalities." Whether it did so in this instance we are unable to say. The defendant's side of the case is not before us. From the plaintiff's showing we should say it did not. He proved, *prima facie*, that the defendant negligently maintained a switch stand so near its track as to imperil the safety of its employees. In the face of affirmative testimony to the effect that plaintiff did not know the dangerous proximity of switch stand No. 2 to the track, had never thrown it prior to the day of the accident, and prior to that day had never done any switching in that portion of the yard, it cannot be said, as a matter of law, that the plaintiff was guilty of contributory negligence. Thus we do not say that the plaintiff was negligent; neither do we say that he was not negligent; but we do say, upon the record presented, that the question of his negligence is one of fact, which should be submitted to the jury for its determination. *Wastl v. M. U. Ry. Co.*, 24 Mont. 159, 61 Pac. 9; *Pidcock v. Railway Co.*, 5 Utah, 612, 19 Pac. 191, 1 L. R. A. 131; *Sweet v. Mich. Cent. R. R. Co.*, 87 Mich. 559, 49 N. W. 882; *Keist v. Chic. G. W. R. R. Co.*, 110 Iowa, 32, 81 N. W. 181; *Babcock v. Old Colony R. R. Co.*, 150 Mass. 467, 23 N. E. 325; *Hollenbeck v. Mo. Pac. Ry. Co.*, 141 Mo. 97, 38 S. W. 723, 41 S. W. 887; *Johnston v. O. S. L. Ry. Co.*, 23 Or. 94, 31 Pac. 283; *Boss v. N. P. R. R. Co.*, 5 Dak. 308, 40 N. W. 590; *North Chicago St. R. R. Co. v. Dudgeon*, 184 Ill. 477, 56 N. E. 796; *Vorhees v. Ry. Co.*, 193 Pa. 115, 44 Atl. 335; *Whitcher v. B. & M. R. R. Co.*, 70 N. H. 242, 46

McCabe v. Montana Central Ry. Co

Atl. 740; *Peirce v. Clavin*, 82 Fed. 550, 27 C. C. A. 227; *Hennesey v. Bingham*, 125 Cal. 627, 58 Pac. 200.

As to the question of assumed risk. Of course, if plaintiff assumed the risk, the question of his contributory negligence is out of the way. *Ball v. Gussenhoven*, 29 Mont. —, 74 Pac. 871. The occupation of freight brakemen is a perilous one at best, and those who engage in it must be held to have voluntarily gone into it anticipating its dangers, but only the dangers which one may ordinarily encounter in the nature of the calling. The authorities hold that the plaintiff is to be held as having assumed the ordinary risks of the business, but not any extraordinary risks, unless it appear that he was aware of such at the time of his employment, or that, upon learning of their existence, he continued in the employment after the lapse of a reasonable time for the defects to be remedied or removed. *McAndrews v. Montana Union Ry. Co.*, 15 Mont. 290, 39 Pac. 85; *Labatt on Master and Servant*, §§ 259, 270, 271, et seq.; *Geo. Pac. Ry. Co. v. Davis*, 92 Ala. 300, 9 South. 252, 25 Am. St. Rep. 47; *St. Louis, Ft. Scott & Wichita R. R. Co. v. Irwin*, 37 Kan. 701, 16 Pac. 146, 1 Am. St. Rep. 266. Whether the plaintiff assumed the risk in this case necessarily depends upon his knowledge or means of knowledge as to the location of switch stand No. 2; that is, whether he knew or should have known its close proximity to the track. Under the circumstances of this case this question, therefore, should be left to the jury. "No cause should ever be withdrawn from the jury unless the conclusion from the facts necessarily follows as a matter of law that no recovery could be had upon any view which could reasonably be drawn from the facts which the evidence tends to establish." *Cain v. Gold Mtn. Mg. Co.*, 27 Mont. 527, 71 Pac. 1004; *Michener v. Fransham*, 29 Mont. —, 74 Pac. 448; *Ball v. Gussenhoven*, supra; *Nord v. B. & M. Con. C. & S. M. Co.*, supra.

We think the complaint states a cause of action.

The judgment and order should be reversed, and the cause remanded for a new trial.

CLAYBERG, C. C., and POORMAN, C., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause is remanded for a new trial.

MISSOURI, K. & T. RY. CO. OF TEXAS *v.* SMITH.

(Supreme Court of Texas, May 30, 1904.)

[81 S. W. Rep. 22.]

Master and Servant—Personal Injuries—Release—Consideration.*

An agreement by plaintiff to release a claim against defendant for personal injuries sustained while the relation of master and servant existed between them, in consideration of a re-employment by defendant for such time as might be satisfactory to defendant, was void for want of consideration, even though plaintiff was employed for some time.

Certified Questions from Court of Civil Appeals of Third Supreme Judicial District.

Action by J. W. Smith against the Missouri, Kansas & Texas Railway Company of Texas. On certified questions from the Court of Civil Appeals.

T. S. Miller and Thomas & Rhea, for appellant.
Clark, Mathis & Freeman, for appellee.

WILLIAMS, J. Certified question from the Court of Civil Appeals of the Third District, as follows:

"This suit was instituted by the appellee to recover damages alleged to have been sustained on account of the negligence of the Missouri, Kansas & Texas Railway Company of Texas on or about the 19th day of August, 1902, and resulted in a judgment for appellee in the sum of \$1,965.

"Among other defenses, the appellant alleged as follows:

"(5) This defendant says that, at the time of the alleged accident to the said plaintiff, it had in force among its employees a rule and regulation, which was well known to all of its employees, by virtue of which, if an employee was injured, he was not allowed to return to work for this defendant unless he settled his claim for such injury, or signed a release to said defendant for such injury; that, after the plaintiff was injured, he, the said plaintiff, in order to return to work and secure employment from this defendant, for and in consideration of re-employment by this defendant, by written release duly executed, he, the said plaintiff, discharged this defendant from all liability on account of said alleged accident, and, after the execution of said release, he, the said plaintiff, was employed by this defendant and worked for this defendant for ——— days, for which he was paid, and on, to wit, the ——— day of ———, A. D. 1902,

*See note 3 R. R. R. 211, 26 Am. & Eng. R. Cas., N. S., 211; *Sax v. Detroit, G. H. & M. Ry. Co.* (Mich.), 2 R. R. R. 288, 25 Am. & Eng. R. Cas., N. S., 288; note, appended to *Rhoades v. Chesapeake & O. Ry. Co.* (W. Va.), 22 Am. & Eng. R. Cas., N. S., 283; *Chesapeake & O. Ry. Co. v. Mosby* (Va.), 4 Am. & Eng. R. Cas., N. S., 633; *Sax v. Detroit, etc., R. Co.* (Mich.), 20 Am. & Eng. R. Cas., N. S., 653 (contract of employment as consideration for release of liability to servant for personal injuries).

Missouri, etc., Ry. Co. v. Smith

voluntarily left the service of this defendant. Wherefore this defendant says that whatever claim that this plaintiff may have had against this defendant has been fully adjusted and settled.'

"By supplemental petition the plaintiff, under oath, made the following plea:

"(2) Specially replying to that part of said answer which attempts to set up a release by plaintiff of defendant's liability to plaintiff for his said injuries, plaintiff admits that he signed a paper of some kind; that he signed the same under the following circumstances: That, in about fifteen or twenty days after he was hurt, thinking that he had sufficiently recovered to return to work, he went back to resume his work, when Mr. Allen, defendant's foreman, told plaintiff that he could not return to work unless he signed a release, and told plaintiff to go and see Mr. Brundet. Plaintiff says that he went to see Mr. Brundet, defendant's agent, and told him that Mr. Allen said that he would have to sign a release before he could return to work; that said ——— handed plaintiff a paper, and told him to sign it, which he did; that he never read the same, nor was it read to him by any one; that he did not know what it was, nor what it contained. Plaintiff states that defendant did not pay him anything for signing same; that, if he signed a release discharging defendant of liability to him, the same was and is wholly without consideration. Plaintiff further states that he had no knowledge of the fact that defendant had a rule requiring its employees to sign a release discharging defendant from liability before they could return to work after getting hurt, until defendant filed its answer herein. Plaintiff further states that he attempted to go to work, but his head hurt him so badly he could not work, and he has not been able to work since he was hurt.'

"There was evidence in the case which would support the finding of the jury that the plaintiff was injured in the sum found by the jury. There is a conflict of evidence as to the date when the injury was received—the plaintiff and his witnesses testifying that the accident occurred on the 19th of August, 1902; and the defendant's witnesses, that he was hurt on the night of July 7th.

"Appellant offered in evidence the following release:

"'The Missouri, Kansas & Texas Railway Company of Texas.

"'Whereas, on or prior to the 8th day of July, 1902, I, the undersigned J. W. Smith, (Col.) of Dallas, was an employee of the Missouri, Kansas & Texas Railway Company of Texas, and as such employee was engaged as coal heaver.

"'Whereas, on or about the 8th day of July, 1902, afore-said, I the undersigned received personal injuries whilst in the service of said company at or near Dallas, caused as follows: struck by handle of coal bucket for which such injuries and

Missouri, etc., Ry. Co. v. Smith

Damage resulting to me therefrom I claim to have a demand against the said Missouri, Kansas & Texas Railway Company of Texas, and

“Whereas, said claim and demand has been compromised and adjusted by and between myself and said company.

“Now therefore, in consideration of re-employment by said company, for such time only as may be satisfactory to said company, I do hereby acknowledge full settlement, payment and satisfaction of all claims and demands against said company for the injuries and damages aforesaid, and do hereby fully release and discharge said company from any and all claims of whatever kind or character I may have on account of or arising from said injuries.

“Witness my hand, this 14th day of July, 1902, J. W. Smith.”

“The same conflict in evidence occurs with reference to the date when this release was executed. The evidence, however, shows that the release was signed after the plaintiff was injured—whether the date of the accident was in July, as claimed by appellant, or in August, as claimed by appellee.

“There is evidence which would have warranted the jury in finding that after the plaintiff was injured he sought re-employment with appellant, and that the agent of appellant told him that he could not work for appellant again unless he signed a release, and that appellee thereupon went to another agent of appellant, and, for the purpose of obtaining re-employment, executed the release above set out, and that he then proceeded to work for appellant for some time, and received wages therefor. There is also evidence which tends to show that there was a rule of appellant which prevented employees who had been injured from being re-employed, unless a release was executed by them for all damages sustained by them, and that appellee was informed of said rule before he executed said release and obtained said re-employment.

“Among other instructions, the court charged the jury as follows: ‘You are instructed that the instrument offered in evidence as a release to defendant of all liability on account of the accident in question, was without consideration; and you will therefore not consider the same in arriving at your verdict.’

“Under a similar state of facts, the Court of Civil Appeals for the Fifth District, in the case of Carroll v. M., K. & T. Railway Co., 69 S. W. 1004, decided that the contract was not without consideration. We entertain some doubt as to the correctness of this decision, and for said reason, and for the further reason that this case will have to be reversed for other errors in the record, we therefore certify the following question:

“Did the court err, under the facts stated, in instructing the jury peremptorily that the release offered in evidence was without consideration?”

The question is answered in the negative.

When the release was executed there was no promise on part of the defendant to re-employ plaintiff at all, nor any other consideration to support plaintiff's promise, and hence no contract binding on either party arose. So far the case of *Gulf, Colorado & Santa Fe Railway Company v. Winton*, 26 S. W. 770, decided by the court of Civil Appeals for the Second District, whose decision was and is approved by this court, is decisive. From the opinion of the Court of Civil Appeals in that case, which was all that was presented in the application to this court for a writ of error, it appears that no other consideration was shown than that recited in the instrument passed upon, viz., employment of the releasor to be given by said company "for such time and in such capacity as may be satisfactory to said company, and not longer or otherwise." Hence this court cannot be said to have passed upon the additional question presented in this case, and in the one referred to in the certificate, decided by the Court of Civil Appeals for the Fifth District, arising out of the fact that employment was given after the execution of the release. We have concluded that such fact, as it appears in the certificate, does not constitute a consideration to support the release. As we have said, there was no promise on the part of the defendant to employ at all; hence there was originally no mutuality of obligation. Had there been an absolute promise to employ, in the terms of the release, "for such time only as may be satisfactory to said company," it would have been too uncertain to be enforceable, because the time of employment would have been wholly optional with the defendant, and therefore would not have afforded a consideration for the release. The case is not the same as those in which there is a promise to employ, and in which no time is fixed and no option reserved. In such cases some authorities would hold that, if the person to be employed has rendered a consideration for such a promise, he acquires the option of fixing the term of employment (*Railway v. Scott*, 72 Tex. 77, 10 S. W. 99, 13 Am. St. Rep. 758, and cases cited); and others, that he acquires the right to employment for a reasonable time. Under either view, such authorities hold that there would be a valid contract. Both of these views are excluded by the defendant's reservation of the option, which, as we have said, would have destroyed all mutuality in the alleged contract, and left the release without consideration, even had there been a promise on defendant's part to employ according to its terms.

The question then remains, did the actual employment and payment of wages "for some time" supply the consideration which was originally lacking? It is claimed that it did, upon a principle that has been applied in a great number of cases, and which is thus stated by standard writers: "A contract is often such that, until something is done under it, the consideration is imperfect, yet a partial performance or com-

plete performance on one side supplies the defect. If, for example, one promises another, who makes no promise in return, to pay him money when he shall have done a special thing, if he does it, not only is the contract executed on one side, but also the consideration is perfected, and payment can be enforced." Bishop on Contracts, § 87. "A contract arises upon executed consideration when one of the two parties has, either in the act which amounts to a proposal or the act which amounts to an acceptance, done all that he is bound to do under the contract, leaving an outstanding liability on one side only." Anson on Contracts, 116; *Heisch v. Adams*, 81 Tex. 97, 16 S. W. 790. This principle is usually applied in cases in which the only original defect in the negotiation was that it was left optional with one of the parties whether or not he would do the thing contemplated by the other as the consideration of his promise; that which was to be done, if the party chose, being, however, sufficiently definite to enable the court to see, after it had been done, that the intended consideration had been rendered. In such cases the original objection of want of mutuality is removed by actual performance. The authorities go further, and hold that where a particular, definite thing is to be done by the promisee, and he enters upon the performance, that fixes the obligations, and binds both parties to carry out the contract. *Fontaine v. Baxley*, 90 Ga. 425, 17 S. E. 1015. The principle might have application here if the terms of the stipulations had been such that the time of employment could be legally ascertained. In that case, by entering upon performance the defendant would, perhaps, have removed the objection that it was not originally bound to employ at all, and all the terms of the contract would have become fixed. But here there is another difficulty, which still remains, consisting in the fact that the time of employment was left optional with the defendant, and the fact of employment did not bind it, and therefore could not bind plaintiff to anything. With the parties thus situated, how could it be said that the defendant had performed or commenced the performance of that which was stipulated to be the consideration of plaintiff's promise, when the consideration is not agreed upon? The only answer that can be made is that any employment which defendant might choose to give was the consideration stipulated for, and this was furnished, which throws the question back upon the very uncertainty that affected the transaction originally. If upon employment the parties became bound, to what were they bound? The so-called contract furnishes no answer. Cases analogous to this are those in which a promise is made to obtain forbearance from a creditor to his debtor. The authorities hold that, in order to bind either party, the forbearance stipulated for must be for a time sufficiently definite to enable the court to ascertain it. They differ as to what constitutes sufficient definiteness, but they hold that a promise made upon con-

Missouri, etc., Ry. Co. v. Smith

sideration of forbearance for a time left entirely optional with the creditor is without consideration, although indulgence may in fact be given. In *Strong v. Sheffield*, 144 N. Y. 394, 39 N. E. 330, a husband gave a note, and his wife indorsed it, for an antecedent debt of the husband to the payee, and it was claimed that the consideration for the wife's obligation was indulgence extended to the husband. There was in fact forbearance for two years. But the only promise of the creditor was that he would hold the note until he wanted the money. Said the court: "It would have been no violation of the plaintiff's promise if, immediately on receiving the note, he had commenced suit upon it. Such a suit would have been an assertion that he wanted the money, and would have fulfilled the condition of forbearance. The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what was done under it." This reasoning applies here. Defendant, upon employing plaintiff, could, under the right expressly reserved, have discharged him at once without violating any agreement. Employment for the time plaintiff remained in defendant's service might have been a sufficient consideration for his release, as forbearance for the two years in the New York case would certainly have been for the wife's promise, had the contract so stipulated. But "nothing is a consideration that is not regarded as such by both parties. To constitute a valid agreement, there must be a meeting of minds upon every feature and element of such agreement, of which the consideration is one." *Fire Ins. Ass'n v. Wickham*, 141 U. S. 579, 12 Sup. Ct. 84, 35 L. Ed. 860, and authorities cited.

It is laid down in many authorities that original uncertainty in a contract may be cured by action of the parties under it, as where they have cited upon and executed it according to their understanding and intentions. *Alabama G. S. R. Co. v. Railway Co.*, 84 Ala. 570, 3 South. 286, 5 Am. St. Rep. 401. It is, perhaps, possible that such a state of facts might arise from action upon such an agreement as that in question as to call for the application of this principle. Nothing of the kind appears from the certificate, which states only the fact that plaintiff was employed and received wages for some time after the execution of the release. It is suggested that the release should be construed to mean that the employment was to be for so long a time as plaintiff's services were "satisfactory" to defendant, and that, thus understood, the stipulation is good. Whether or not such a construction would make it good, need not be determined, for it is plain that the language has the meaning which we have attributed to it.

CHICAGO & G. T. RY. CO. et al. v. HART.

(Supreme Court of Illinois, April 20, 1904.)

[70 N. E. Rep. 654.]

Railroads—Lease—Negligence of Lessee—Injury to Servant—Liability of Lessor.*

A railroad company owning a railroad track, which it leases to another corporation, is liable for injuries to an employee of the lessee arising from the negligence of the lessee alone; 3 Starr & C. Ann. St. 1896, p. 3247, c. 114, par. 53, which authorizes railroads to lease their roads or any part thereof, not relieving a railroad corporation of liabilities which would attach if it operated the road itself.

Scott, Cartwright, and Ricks, JJ., dissenting.

Appeal from Appellate Court, First District.

Action by Henry Hart against the Chicago & Grand Trunk Railway Company and another. From a judgment of the Appellate Court (104 Ill. App. 57) affirming a judgment in favor of plaintiff, defendants appeal. Affirmed.

Kenesaw M. Landis (Albert M. Cross, of counsel), for appellants.

James C. McShane, for appellee.

BOGGS, J. The judgment entered in the superior court of Cook county in favor of the appellee and against the appellant companies, in the sum of \$6,000, was affirmed in the Appellate Court for the First District on appeal, and it is now before us on a further appeal.

The action was in case to recover the damages for personal injuries sustained by the appellee by the negligence, as he alleged, of the appellant companies in permitting a switch engine to become and remain in an unsafe and defective condition; one of the journals of the said engine having become worn and weakened, and by reason thereof broke and gave way, and caused the said engine to be derailed, whereby the appellee was injured.

On the 22d day of December, 1880, the appellant the Chicago & Grand Trunk Railway Company, an Illinois corporation (hereinafter, for convenience, called the "lessee company") and the appellant the Grand Trunk Junction Railway Company, also an Illinois corporation (hereinafter called the "lessor company") entered into an agreement whereby the Junction Company agreed, among other things, to construct a line of railroad and to lease the same to the Grand Trunk Company for a stipulated annual rental, and did construct such line of railroad and leased the same to the Grand Trunk Company. It appeared from the agreement that the lessor company, by its charter, had power to construct and operate the contemplated and leased line of

*See generally, foot-note appended to *Lewis v. Maysville & B. S. R. Co.* (Ky.), 11 R. R. R. 781, 34 Am. & Eng. R. Cas., N. S., 781.

railroad. On the 19th day of June, 1899, the Grand Trunk Company, as such lessee, was operating trains of cars over said line of road. The appellee was in its employ as a switchman, and was injured while in the discharge of his duty in that capacity by reason of the breaking of a worn and defective axle or journal of a switch engine, and the judgment herein was rendered in an action against both the lessor and the lessee companies to recover damages for such injuries. Judgment was awarded him against both companies, and such judgment was affirmed as aforesaid in said Appellate Court.

Counsel for the appellant companies present but a single question for decision, and that is whether, as the cause of action is based solely upon the alleged negligence of the lessee company, any liability is established against the lessor company. It is conceded by appellants that under the law of this state the lessor and lessee of a railway track are jointly and severally liable to the general public for all damages resulting from the negligent acts of the lessee while operating engines and cars on that track, but it is contended that this rule does not apply to an employee of the lessee whose cause of action results solely from the negligence of his employee, and this presents the only question for our determination.

There is a conflict in adjudicated cases on the question whether a lessor railroad company is liable to a servant of the lessee company for injuries occasioned by the negligence of the lessee company in the operation of the leased road. Mr. Elliott, in his work on Railroads (volume 2, p. 610), says that he inclines to the opinion that the lessor company is not so liable where the injuries to the servant of the lessee company are caused solely by the negligence of the lessee company in operating the road, but this author says that the weight of authority is against the view that he is inclined to adopt. We think this court is committed to the view held by the current of authorities on the question, and, moreover, that, in sound reason, and as the better public policy, the doctrine should be maintained that the lessor company shall be required to answer for the consequences of the negligence of the lessee company in the operation of the road, not only to the public, but also to servants of the lessee company who have been injured by actionable negligence of the lessee company.

The charter of the lessor company empowered it to construct this line of railroad and operate trains thereon. It became its duty to exercise those chartered powers, otherwise they would become lost by nonuser. The statute authorized it to discharge that duty through a lessee, and it adopted that means of performing the duty which the state had created it to perform. The statute which authorized it to operate its road by means of a lessee did not,

however, purport to relieve it of the obligation to serve the public by operating the road, nor of any of the consequences or liabilities which would attach to it if it operated the road itself. 3 Starr & C. Ann. St. 1896, p. 3247, c. 114, par. 53. Statutory permission to lease its road does not relieve a railroad company from the obligations cast upon it by its charter unless such statute expressly exempts the lessor company therefrom. *Balsley v. St. Louis, Alton & Terre Haute Railroad Co.*, 119 Ill. 68, 8 N. E. 859, 59 Am. Rep. 784. While the duty which rests upon the lessor companies to operate their roads is an obligation which they owe to the public, the permission given by the Legislature, as the representative of the public, to perform that duty through lessees, has no effect to absolve such companies from the duty of seeing that the lessee company provides and maintains safe engines and cars, and that the employees of the lessee companies to whom is intrusted the operation of their roads are competent, and that they perform the duties devolving upon them with ordinary care and skill, for upon the character and condition of safety of such engines and cars and on the competency and care of such employees depend the lives and property of the general public. As a matter of public policy, such lessor companies are to be charged with the duty of seeing that the operation of the road is committed to competent and careful hands. The General Assembly of this state, though willing to permit railroad companies to operate their lines of road by lessees, refrained from relieving the lessor companies from any of their obligations, duties, or liabilities. Therefore it is that though a railroad company may, by lease or otherwise, intrust the execution of its chartered powers and duties to a lessee company, this court has expressed the view the lessee company, while engaged in exercising such chartered privileges or chartered powers of the railroad company, is to be regarded as the servant or agent of the lessor company.

In *West v. St. Louis, Vandalia & Terre Haute Railroad Co.*, 63 Ill. 545, appellee railroad company had contracted with the firm of McKee, Smith & Co. to construct its road and the appurtenances thereto. The superintendent of the firm employed the appellant, West, as a workman to assist in building a freight house for the railroad company. The timbers used in the construction of the freight house were treated with a liquid in which corrosive sublimate was an ingredient, to prevent decay. West was injured by breathing the fumes of this liquid, and by handling the timbers to which the liquid had been applied. He brought an action against the railroad company to recover damages for the injury, but was defeated in the trial court on the ground that the contractors alone were liable. The appellant contended that the work in which he was injured was being done for the benefit of the railroad company and by its authority, and

"that the contractors must be considered its servants, for whose wrongful acts in the performance of their work the company must be held responsible." In support of that contention, counsel for appellant cited a number of cases decided in this court. We said as to such cited cases (page 546): "There is a radical distinction between each of these cases and that at bar. These were all cases in which redress was sought against a chartered company for wrongs done by persons while in the performance of acts which they would have had no right to perform except under the charter of the company. The court laid down the salutary rule that as to such acts the company could not escape corporate liability by having the acts performed or the work done by contractors or lessees. These persons must be regarded in such cases as the servants of the company, acting under its directions, and the company must see that the special privileges and powers given to it by its charter are not abused"—and, after making reference to the facts in such cases, deduced the following principles therefrom: "But between all these cases and the one at bar there is a radical difference. In these the wrong for which the action was brought was committed in the performance of acts which were performed by virtue of the authority of the company derived from its charter, and could have been performed in no other way. In such cases the public has the right to hold the company responsible, because it is really the company that is acting. The personal actors may, as between themselves and the company, be lessees or contractors, and the company may have its action agents them for indemnity, according to the terms of its private contract; but they are, as to the public, the servants or against of the company so long as they are doing what they could not do except by the chartered authority of the company. * * * The principle we consider to be substantially this: The company may be held liable when the person doing the wrongful act is the servant of the company and acting under its directions, and, though such person is not a servant as between himself and the company, but merely a contractor or lessee, still he must be regarded as a servant or agent when he is exercising some chartered privilege or power of the company, with its assent, which he could not have exercised independently of such charter. In other words, a company seeking and accepting a special charter must take the responsibility of seeing that no wrong is done through its chartered powers by persons to whom it has permitted their exercise."

While the liability enunciated by the declaration of the court is left to rest upon the ground that the injury was inflicted while in the performance of acts which could only be performed under the charter of the company, and therefore to be regarded as having been performed by servants or agents of the company, whether independent contractors or

lessees, we had occasion in the latter case of *Balsley v. St. Louis, Alton & Terre Haute Railroad Co.*, supra, to consider what had been said in the former case of *West v. St. Louis, Vandalia & Terre Haute Railroad Co.*, supra, and we then said (page 71, 119 Ill., page 860, 8 N. E. 59 Am. Rep. 784): "The reason for holding a railroad company responsible for the performance of all the duties and obligations imposed upon it by its charter or the general law of the state while it is being operated by a lessee does not, we conceive, rest upon the narrow ground alone of the latter being in the exercise of a franchise which belongs to the former, and in so acting is to be held as the servant or agent of the lessor corporation. In consideration of the grant of its charter, the corporation undertakes for the performance of duties and obligations towards the public; and there is a matter of public policy concerned, that it should not be relieved from the performance of its obligations without the consent of the Legislature."

A railroad company is granted a charter for the purpose of enabling it to perform duties for the benefit of the public. Such a company does not take, as one of its general powers, the right to substitute another to discharge those duties as its lessee. 23 Am. & Eng. Ency. of Law (2d Ed.) 776; 2 Elliott on Railroads, §§ 429, 430. In the absence of statutory authority to execute a lease, any attempt to do so is *ultra vires*; and the acts of the lessee in the operation of the road under such a void lease are, in legal contemplation, the acts of an agent of the railroad company. 23 Am. & Eng. Ency. of Law (2d Ed.) 777, 778. A lease, though authorized by an act of the Legislature, does not operate to relieve the lessor company of any duty or liability imposed by its charter unless the enabling statute contains an exemption therefrom. *Balsley v. St. Louis, Alton & Terre Haute Railroad Co.*, supra; 23 Am. & Eng. Ency. of Law (2d Ed.) 784; 2 Elliott on Railroads, §§ 429, 430. Therefore it is that in the discharge of an act, the performance of which devolved upon the lessor company as a chartered power or duty, the lessee, under our statute authorizing a railroad company to perform its chartered powers through the medium of a lessee, is but the agent or servant of the lessor company, to the same extent as if the lease had been executed in the absence of statutory authority.

In the absence of a statutory exemption from liability for the negligence of the lessee company, the obligation to respond for such negligence is also to be maintained upon grounds of public policy. The fact the contract relation is between the employee and the lessee company, and was voluntarily entered into by the employee with the lessor company alone, cannot be allowed to control. The public are interested in the safe and efficient transportation of passengers and property over the line of road the lessor herein

was given power to construct and operate. Competent and careful servants, well-constructed engines and cars, which are properly inspected and kept in good and safe condition of repair, are essential to the speedy and safe transportation of passengers and property. That such engines and cars to be used in the operation of the railroad shall be provided and kept in good repair is a chartered duty, compliance where-with is of the greatest concern to the general public. No more effective means of compelling performance of that duty can well be conceived than to hold the lessor company responsible to all the world for the actionable negligence of the lessee company. The negligence of the lessee company here complained of is that it failed to keep its locomotive engine in safe and usable condition, and that negligence endangered not only those in the employ of the lessee company, but also the general public; and considerations of public policy are involved and must control in determining the liability of the lessor company. The obligation to provide cars and engines that are reasonably safe, and servants that are reasonably competent and skillful, which was cast upon the lessor company by the grant to it of its corporate powers, is not shifted to one with whom it has contracted to operate its road as lessee, but remains to be discharged by the lessor company to all the public; and to relieve it of that duty as to its employees would invite negligence from which injury to the public would likely occur. The lessee's employees are a part of the general public, and the lessor company is liable to them for the actionable negligence of the lessee company to the same extent as if such workmen were in the employ of the lessor company. The liability rests not only on the ground the lessee company, in discharging the corporate powers and duties of the lessor company, is but the agent or servant as to all others than the lessor company, but also on the ground that sound public policy demands that all corporations which the state has created, and given special privileges and powers, shall stand charged with the obligations and duty to see that such privileges and powers are properly exercised and discharged, unless relieved by express authority of the lawmaking department of the state.

The judgment must be, and is, affirmed. Judgment affirmed.

SCOTT, CARTWRIGHT, and RICKS, JJ. (dissenting). The question whether a railroad company owning a right of way, roadbed, and track lawfully leased to another company is liable for damages to a servant of the lessee, injured solely by the negligence of his employer, is one which has not been before presented to this court. The general statements quoted in the opinion of the majority from earlier decisions in this state dealing with the relations of the lessor company to the public and to persons other than servants of the lessee

Chicago & G. T. Ry. Co. v. Hart

must be limited by the facts appearing in those cases, and **should** not, therefore, be deemed of controlling importance **here**. Authorities in other states are not entirely unanimous. The question was first presented to the Supreme Court of North Carolina in the case of Logan v. N. C. R. R. Co., 116 N. C. 940, 21 S. E. 959, where it was said: "A part of the original duty imposed by the charter was to **compensate** servants in damages for any injury they might **sustain**, except such as should be due to the negligence of their fellow servants. The employee is deemed, in law, to **contract** ordinarily to incur such risks as arise from the **carelessness** of the other servants of the company; but where the lessor company would be liable, if it had remained in charge of the road, to a person acting as its own servant, we see no reason why it should not be answerable to him when employed by the lessee." This rule has been steadily adhered to by the North Carolina court, and has been reaffirmed in Harden v. N. C. R. R. Co., 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747; James v. Western N. C. R. R. Co., 121 N. C. 523, 28 S. E. 537, 46 L. R. A. 306; Smith v. Atlanta & C. R. R. Co., 42 S. E. 139; and Brown v. Atlanta & C. Air Line Ry. Co., 42 S. E. 911. The only other case to which we have been referred announcing the same doctrine is the case of Macon & Augusta Railroad Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678. That case, however, has been criticised and weakened by the Supreme Court of that state in later cases, and finally, in the case of Banks v. Georgia R. R. & B. Co., 112 Ga. 655, 37 S. E. 992, the liability of the lessor company to the employee of the lessee for an injury caused by the negligence of the lessee is denied where the lease is made under legislative authority, although the statute authorizing the lease was without a provision exempting the lessor for the lessee's negligence; and in discussing the Mayes Case it was said: "In that case the company owning the road was held liable for a tort to an employee of the company using the franchise, occasioned by the negligence of his co-employee, but there was no legislative authority for the latter company to use the franchise. Indeed, there was no lease at all. And therein lies the marked distinction between that case and the one in hand." In the Banks Case the earlier decisions of the court are reviewed and discussed, and the conclusion reached denies the liability of the lessor. In the case at bar it is conceded that the lessor company had lawful right and authority to make the lease of its tracks to the lessee company, so that the case cited from 112 Ga., 37 S. E., seems to be fairly in point.

An able discussion of this question is found in E. L. & R. R. Co. v. Culberson, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805, where it is said, discussing the general rule of the liability of the lessor: "The reason for the rule is the protection of the public who need the protec-

tion. The passenger and the shipper of goods have no option, but much avail themselves of the services of the lessees, whether the lease is authorized or not. The law will not permit the owner of the road to shirk its duty to them by turning over its road to another company, nor will it permit it to deny its liability where it has allowed such other company, without authority of law, negligently to injure wayfarers over the track or property along the line. There is no privity between the persons injured, in such case, and the operating company. It is not so with an employee who voluntarily enters the service of the latter company with a knowledge of the facts, and participates knowingly in the wrong, if wrong it be. Where in similar cases a recovery has been permitted against a lessor, it has usually been allowed upon various considerations of public policy: First, because the franchises granted are in the nature of a personal trust, and sound policy demands, so far as the general public is concerned, that the corporation receiving the grant should be held responsible for the proper execution of the powers granted; and, second, for the reason that to deny the responsibility of the lessor would enable a railroad to shirk its responsibility and to injure the public by placing its property under the control of irresponsible parties; and, third, because a person who has received an injury at the hands of the operating company, and was ignorant of the relations between that company and the owner of the road, might be at a loss to determine against which to bring his action, and thereby placed at a disadvantage in seeking a redress of his wrongs. None of these reasons apply in the case of the servant of a lessee who is injured through the neglect of his employer. He needs no protection as one of the general public, because he can enter the service, or not, as he chooses. He is under no compulsion to take employment from an irresponsible company, and he certainly knows whom to sue for a wrong inflicted through his employer's neglect, for the latter is certainly liable to him in such a case. The reason of the rule which holds the lessor liable fails in case of an employee of the lessee, and we think that to follow it in a case like this would be to give it an arbitrary, and not a reasonable, application." The same view of the matter is taken in Indiana, Kentucky, Virginia, California, Georgia, and the federal courts. *B. & O. & C. R. R. Co. v. Paul*, 143 Ind. 23, 40 N. E. 519, 28 L. R. A. 216; *Swice v. M. & B. S. R. Co.* (Ky., decided June 20, 1903) 75 S. W. 278; *V. M. Ry. Co. v. Washington*, 86 Va. 629, 10 S. E. 927, 7 L. R. A. 344; *Lee v. S. P. R. Co.*, 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140; *Banks v. G. R. & B. Co.*, 112 Ga. 655, 37 S. E. 992; *Hukill v. M. & B. S. R. Co.* (C. C.) 72 Fed. 745.

The editors of the American State Reports state their conclusion thus: As to employees of a lessee corporation,

the weight of authority, whether the lease is authorized or not, is to the effect that they cannot recover from the lessor for injuries received through the negligence of such lessee or its servants or agents. 58 Am. St. Rep. 155. In the American & English Encyclopædia of Law, vol. 23 (2d Ed.) p. 785, after setting out the rule in reference to the liability of the lessor company to the public as it exists in this state, it is said: "The rule of liability which has just been stated does not apply to the lessees' servants who may be injured by the lessees' negligence."

As the view of the majority has been rejected by every one of the numerous courts in the Union to which it has been presented, except North Carolina, and, after having been once adopted by the Supreme Court of Georgia, has been there discredited, and the case announcing it overruled, we think the language quoted by Mr. Justice Boggs from Elliott on Railroads, to the effect that the weight of authority supports that view, incorrect. The researches of court and counsel in the case at bar certainly do not warrant the conclusion of that author, but, on the contrary, show that every court, save one, has reached the opposite conclusion.

This court has frequently spoken of the lessee company as the agent or servant of the lessor in discussing the relations of the latter with persons other than the employees of the former, and, in a general sense, this is a correct view to take of the situation. The lessor, by accepting its charter, assumes the duties of a common carrier, and when, by the lease, it causes another to assume those duties, it becomes liable to the public for their performance in a lawful manner, and the lessee is its agent and servant for the purpose of meeting its obligations in this respect, so far as the public is concerned; but the lessee cannot be said to be the agent or servant of the lessor with respect to a contract with the employee of the former who enters his master's service moved solely by the inducements contained in the contract itself, and not because he finds that employer operating its trains over the lines of a road which he is by the necessities of business or travel impelled to use.

The lessee's position is different from that of one who, under a contract with the owning company, is engaged in work which can be carried on only under the charter of the latter. The contractor, in laying the track, is engaged in doing a work which he is specifically directed and required to do by the terms of his contract. The lessee of the track, in operating trains over the same, is enjoying a privilege accorded by the charter to the lessor; but it is not required by the contract, so far as the lessor is concerned, to operate any particular train or do any specific work. The contractor is much nearer to the owning corporation than is the lessee. The contractor is, under the immediate direction and control of the owner, bound to do specific work as required by the

contract with the owner, while, so far as any specific work is concerned—the running of any particular train or the using of any particular engine—the lessee exercises its own option.

On the principal question—that of the liability of the lessor—the reasoning of the court of last resort of Texas seems unanswerable. As there suggested, the landowner whose real estate adjoins the right of way, the traveler who uses the highway crossing the railroad track, the shipper of freight who must have his goods carried over the leased line, the passenger who finds it necessary to travel over the same line of road, are all brought into such relations as they occupy with the company operating the trains, without their consent. So far as they are concerned, the lessor has obtained from the state a charter to operate the trains, and then, without the consent of these persons, has constituted another in its stead to perform the duties and meet the obligations which it assumed by accepting its charter. The public had no voice in making the contract of substitution. They are compelled to deal with the lessee whether they will or not, and an enlightened public policy has therefore made the lessor company liable for all the wrongs visited by the lessee upon the public, which has been compelled to deal with an agency selected by the lessor alone. The employee of the lessee is in a different category. The making of the lease has not compelled him to enter the employ of the lessee. His relations with the latter result from the contract which he has voluntarily made with it, and not from the fact that his relations with it have been forced upon him by the acts of the lessor company, as is the case with the general public. His rights as such employee result wholly from the contract of employment which he voluntarily made, and which he was not obliged by circumstances resulting from the act of the lessor company to enter into.

The reasoning of the majority opinion, based upon the consideration of public policy, seems to us entirely untenable. The argument is that, because the public interest requires that the safest appliances should be used by the lessee company, the lessor company should be held liable for injuries resulting to the servants of the lessee from the negligence of the latter, that the lessor may thereby be induced to require the lessee to provide such appliances. The same reasoning leads to the conclusion that the lessor company should be liable for the wages of the employee, that the most efficient and faithful may be hired; that it should be liable to the builder, that cars and locomotives of the highest grade may be secured. But it has not yet occurred to the creditor of an insolvent lessee, seeking a debtor who can pay, to assert any such claim against a lessor company. It is only for the proper exercise of powers conferred by charter, and which can be exercised only under and by virtue of the

Tennessee Coal, Iron & R. Co. v. Jarrett

charter, that the lessor is responsible. Hiring a switchman or purchasing or repairing a locomotive requires the exercise of no such powers. Such things may be done by any one.

We therefore conclude that a railroad company owning a railroad track which, by a lawful contract, it leases to another, is not liable for damages resulting to the employee of the lessee from the negligence of the lessee alone.

On reason, we deem the judgment of the court below wrong, and the great current of authority, as shown by references hereinabove contained, certainly requires its reversal.

TENNESSEE COAL IRON & R. CO. v. JARRETT.

(Supreme Court of Tennessee, Aug. 30, 1904.)

[82 S. W. Rep. 224.]

Injury to Employee—Change of Employment—Hazardous Duties—Inexperienced Employee—Duty to Warn and Instruct.*

Plaintiff, a mature, though inexperienced, servant, was employed in a gang to do ordinary labor requiring no skill about defendant's iron plant. Just prior to his injury he was ordered to work in a carpenter gang in charge of an experienced carpenter boss, to assist in resetting certain iron columns under an elevated railroad track by means of a jack and timber, which work required skill and experience, and the exercise of precautions to avoid danger. The boss in charge of the work directed it to be done in a dangerous manner, and during its progress plaintiff was struck and injured by the buckling of the jack and timber: *held* that, defendant having commanded plaintiff to go outside his regular employment, which was not attended with special danger, and to assist in the performance of work which was dangerous, it was guilty of negligence in failing to instruct plaintiff as to the proper method of doing the work and to warn him of the danger involved.

Same—Same—Hazardous Duties—Duty to Warn and Instruct.

In an action for injuries to a servant, an instruction that, where there are several ways in which to do a particular piece of work, the owner is entitled to determine how the work shall be done, and is not responsible for injuries to workmen because he did not adopt the safest way to do the work, and that, if the master adopts a dangerous and hazardous way when there is a reasonably safe way known to him, and the servant does not know of the danger, it is the duty of the master to inform the servant of the danger, and, if the work is dangerous, and requires skill in its performance, and unskilled men are selected to do it, it is the duty of the master to instruct the servant as to the work to be done, was proper.

Instructions.

Where the court charged that if a servant knew as much concerning the danger by which he was injured as did the master, or if he could, by the exercise of ordinary diligence, have known it, then there was no obligation on the part of the master to warn him, such instruction sufficiently covered a request to charge that, if the servant was a mature man of ordinary intelligence when he was changed from one gang to another, and the danger of the work he was directed to do was obvious,

*As to the master's duty to warn and instruct employees, see footnote appended to *Central of Georgia Ry. Co. v. McClifford* (Ga.), 11 R. R. 457, 34 Am. & Eng. R. Cas., N. S., 457.

Tennessee Coal, Iron & R. Co. v. Jarrett

he was not entitled to warning or instructions, and was bound to exercise his mind to discover and avoid danger.

Same.

Where, in an action for injuries to a servant, the liability of a master did not depend on the question whether the act causing the injury was the result of the negligence of a fellow servant, but on whether plaintiff was ordered into a different sphere of employment by one having authority to do so, and whether plaintiff was instructed and warned, it was not error for the court to refuse to give an instruction that, if the injury resulted from the negligence of the boss of plaintiff's gang, such boss was plaintiff's fellow servant, for which defendant was not liable, which instruction ignored defendant's duty to warn.

Appeal from Circuit Court, Marion County; M. M. Allison.

Action by W. C. Jarrett against the Tennessee Coal, Iron & Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. D. Spears and J. Bright, for appellant.

B. A. Neard and Murray & Murray, for appellee.

McALISTER, J. This is a suit for personal injuries. The trial below resulted in a verdict in favor of the plaintiff for \$6,000. The trial judge, being of opinion that the verdict was excessive, suggested a remittitur of \$2,500, which was accepted by the plaintiff, and thereupon a judgment was pronounced in his favor for \$3,500. The defendant appealed, and has assigned errors.

The first assignment is that there is no evidence to support the verdict. It is insisted that upon the undisputed facts in the record plaintiff, as a matter of law, is not entitled to a judgment. The gravamen of the action as laid in the declaration is that the defendant company is engaged in the manufacture of iron, owning and operating an iron plant at South Pittsburg, in Marion county, Tenn., comprising furnaces, stockhouses, railroad tracks, etc., and that the plaintiff was employed in said plant in the capacity of a hand, and was a member of what was known as the "floating gang." The duties of the floating gang were to pick out castings, lift up castings, clean up the place, move the brick, move the iron, and similar duties, requiring no mechanical skill or experience. It is alleged that the plaintiff was changed from this employment to the more hazardous work of replacing columns in the stockhouse, which had become displaced. Plaintiff alleges that the accomplishment of this work, properly and safely, required knowledge, skill, and experience, and especially some familiarity with a mechanical instrument known as a "jack." Plaintiff further alleges that he had no experience whatever in mechanical work, and had never worked with the carpenter's gang until a few days before the injury. On that date, to wit, a few days before the injury, the boss of the floating gang directed the plaintiff to report to P. R. Jones, who was the boss of the carpenter's gang, and go to work with him. It is further alleged that both the

boss of the floating gang and the boss of the carpenter's gang well knew that plaintiff was not a mechanic, and had no experience whatever in that kind of work. It is alleged that the defendant company gave the plaintiff no warning advice and instructions as to how this work should be done, and that, on account of the negligence of the company's agent in executing the work, and the plaintiff's ignorance and inexperience as a workman, he sustained the injuries.

A more specific statement of the case is that at the defendant's plant was a stockhouse, over which ran elevated railroad tracks. The tracks were supported by upright columns about 20 feet high. Two of these columns had slipped out of their sockets, and leaned towards each other. On the day of the accident the boss of the carpenter's gang ordered the gang, including the plaintiff, to put said columns back in position. Accordingly, a double scaffold, with two floors, about 16 feet high, was erected under this elevated railway track. A piece of oak timber 8 by 8 inches and 12 or 13 feet long, called an "arrow," was placed horizontally against one of the leaning columns. The space between the two columns was 16 feet, and the intervening space between the end of the oak timber and the other leaning column was filled with a mechanical jack 25 or 30 inches long. A piece of iron was then employed as a lever, and the jackscrew was turned for the purpose of forcing the piece of timber and jack against the columns, and thus press them back in their proper places; but the pressure against the end of the timber was so great that it caused the jack and timber to buckle with such force and violence as to knock the plaintiff, Jarrett, off the scaffold, down on the iron ore, inflicting upon him very serious personal injuries.

The plaintiff bases his right to recover upon two grounds: First, that the defendant company, in directing him to cooperate in this hazardous service, failed to give him warning advice and instructions; second, that the mode adopted by the foreman for accomplishing this work was dangerous, and not the usual and customary method. The record shows that Jones, the boss of the carpenter's gang, was present superintending the work of replacing said columns, and directing how it should be done. It is insisted that neither the timber nor the jack were in any way supported or confined to their places, but were left entirely loose. There is proof tending to show that the proper and safe way to do this work required that the jack should be placed on the floor, the piece of timber on the jack, and the other end of the timber against the elevated railroad track, and that by the mechanical pressure or force of the jack, the railroad track should have been lifted, so as to allow the columns to be slipped back into their proper places, and the track then let down again. It is insisted that by this method the pressure on the columns would have been entirely relieved, and the process of adjust-

ing the columns in their proper places comparatively simple. Proof was introduced by the plaintiff tending to establish this theory, and also to show that plaintiff was inexperienced, and had no instructions from defendant's boss in respect of the proper manner to do the work. It is shown that the plan used for readjusting the columns was adopted by Jones, the boss of the carpenter's gang, and that plaintiff was simply complying with the directions of his superior when the accident happened. It is further shown that the plaintiff had no admonition as to the danger incident to this work, nor advice how to avoid it. The declaration alleges that the method employed for accomplishing the work was a dangerous and unusual method; that said Jones, the boss of the carpenter gang, knew this danger, and that the plaintiff did not know it, but, relying upon the superior knowledge of the foreman, plaintiff undertook to do the work in this way in obedience to orders so given, and by reason of the negligence of defendant in adopting this dangerous method the jack and timber gave way, inflicting the injury.

On behalf of the defendant company it is insisted that the master has the right to exercise his judgment in choosing methods of doing his work, and is not responsible in damages in selecting one less safe or more hazardous than another that might have been adopted. It is further insisted that plaintiff Jarrett was a matured man, and a man of intelligence; that he had had 11 years' experience in working around the furnace; that he was capable of knowing, and did know, all the dangers likely to result from the work. As a matter of law, it was insisted on behalf of defendant company, first, that this injury resulted from an ordinary peril incident to the service which the plaintiff assumed when he entered on the employment; and, second, if any negligence be shown, it was that of a fellow servant, for which the company is not responsible. The insistence made on behalf of the company is that the boss of the floating gang and the boss of the carpenter's gang were fellow servants of the defendant in error, W. C. Jarrett; that the injury was caused by the negligence of these fellow servants; and no liability, therefore, attached to the master. The court fully and correctly charged the law on both of these propositions. But the plaintiff below predicated his right to recover upon the following proposition, viz.:

"Where a master commands a servant to go outside of his regular employment to do work which is attended with special danger, and the servant does the work at the time and in the way directed, the fact that the servant knew that the work was dangerous does not exonerate the master, or make the servant guilty of contributory negligence, unless the character of the danger be so patent and glaring that no prudent man would attempt it. The servant does not assume the risk incident to the new service, but the implied obliga-

tion of the master is that he indemnifies the servant against the danger incident thereto. If the servant so transferred from one service to another is ignorant and inexperienced as to the work to be performed, or the danger incident thereto, the master is liable for the injury that may result therefrom, unless he properly instructs and warns the servant with reference thereto." 2 Bailey's Personal Injuries, 3475, 3479-3481, 3483, 3484, and authorities cited.

In *Sherman & Redfield on Negligence* (5th Ed.) § 219a, it is said, viz.:

"The principles governing the management of minors are, to a large degree, also applicable to the employment of inexperienced, ignorant, feeble, or incompetent servants. A master having notice of any such defect in a servant, no matter what his age may be, he is bound to use ordinary care to instruct the inexperienced, unskilled, or ignorant; avoid putting the feeble to work too heavy for their strength; and generally to refrain from exposing them to risks which they are not fit to encounter. When the master has notice of such ignorance, unskillfulness, or ignorance on the part of the servant as would make the ordinary risks of the business especially perilous to that servant, he must give the servant explicit warning of the danger, and not allow him to undertake work without a full explanation of its perils." *Brennan v. Gordon*, 118 N. Y. 494, 23 N. E. 810, 8 L. R. A. 818, 16 Am. St. Rep. 775.

In the last case the court says:

"This action is brought upon the theory that the plaintiff, being inexperienced in the running of an elevator, and that to the knowledge of the defendant, and that having been assigned by the defendant to perform this duty, the defendant was bound to qualify him for such service."

It appears that in that case the porter in the store had been transferred to the position of operating the elevator.

See, also, *Campbell v. Eveleth*, 83 Me. 53, 21 Atl. 784; *Leary v. Boston & Albany R. R.*, 139 Mass. 584, 2 N. E. 115, 52 Am. Rep. 733.

This question was considered very fully in an opinion by Judge Lurton in *Felton v. Girardy*, 104 Fed. 127, 43 C. C. A. 439. The facts of that case, as stated in the syllabus, are as follows:

"Plaintiff's intestate was employed as a boiler maker's helper in the repair shops of defendant railroad company. During a holiday, when most of the other employees were absent, he was directed by the foreman of the shops to go into the fire box of a locomotive engine, which had steam up, and tighten the plug in a leaking flue of a boiler. The plug was a screw plug, and in attempting to drive it with a hammer he broke the threads, so that the plug was forced out by the pressure, and he was scalded to death by the escaping steam and water. It was shown that two kinds of

plugs were used in locomotive flues, one being screwed into the flue and the other driven; but it did not appear that deceased knew such fact, and there is evidence tending to show that the repairing of such plugs was the work of an experienced boiler maker, who could have told which kind the one to be repaired was, and that it should have been tightened with a wrench. There is also testimony that the deceased objected to doing the work while the boiler was hot, saying he did not know how to do it, or what to do, but he was ordered back without instructions." Said Judge Lurton:

"A servant impliedly assumes the risks and hazards incident to the service he contracts to render, and, in the absence of knowledge to the contrary, an employer may assume, as between the master and servant, that one applying for a particular employment possesses the skill and judgment requisite to the safe and proper performance of his duty; but if the employment be one of a dangerous character, requiring skill and caution for its proper discharge with safety to the servant, and the master be aware of the dangers, and have reason to know that the servant is unaware of them, and that, from his youthfulness, feebleness, incapacity, or inexperience, he does not appreciate them, the servant cannot, even with his own consent, be exposed to such dangers, unless he be cautioned and instructed sufficiently to enable him to comprehend them, and, with proper care on his part, to do his work safely;" citing many authorities. "The rule is not materially different in principle when a servant is directed to do a temporary work outside of the work which he has engaged to do. If there is nothing peculiarly dangerous in the new work, and the master has no reasonable ground for believing that the servant is unaware of the dangers he will encounter, or has not the requisite skill and experience to do the work with safety to himself, the servant may well be regarded, if he obeys, with having assumed the usual and ordinary risks incident to the employment"—citing authorities. "But when a servant is ordered by one having authority over him to do a temporary work beyond the work which he had engaged to do, and the superior knows, or ought to know from all the circumstances of the case, that the work which the subordinate is directed to do is of a peculiarly dangerous character, and is aware, or under all the circumstances should be aware, that the risk and hazards of the work, or the proper mode of doing the work to avoid the incident risks, are not obvious or known and appreciated by the subordinate, by reason of his youth, incapacity, or inexperience, it is the duty of the superior to caution and instruct such disqualified servant to enable him to understand the dangers he will encounter, and how to do the work with safety, if he exercises due care himself;" citing authorities. "The principle is that, if the employer knows the servant will be

exposed to risks and dangers in any labor to which he assigns him, and is aware that the servant is, from any cause, disqualified to know, appreciate, and avoid such dangers—the dangers not being obvious—the master is guilty of a breach of duty unless he gives such reasonable cautions and instructions as should reasonably enable the servant, exercising due care, to do the work with safety to himself.” *Whitelaw v. R. R. Co.*, 16 Lea, 391, 1 S. W. 37; *Iron Co. v. Pace*, 101 Tenn. 476, 48 S. W. 232.

In the present case there is proof tending to show that skill and experience were required in readjusting the displaced columns, and, unless certain precautions were observed, there was danger attending the work. The proof is that, to be safe, the jack must be operated on a plumb line and square, and that it is dangerous to operate it when placed in any other position. This danger was not obvious, and would not be discernible to a common laborer, employed in what was known as a “floating gang.” But the foreman of the carpenter’s gang was chargeable, as a matter of law, with such knowledge, and it was his duty to acquaint inexperienced employees with the danger, and to give them warning advice and instructions how to avoid it. On this subject the court charged the jury in accordance with the well-established rule as follows, viz.:

“If the proof shows that the plaintiff was an unskilled workman, and that the work of adjusting these upright columns with a jack and piece of timber was dangerous, and required a skilled mechanic to perform, and the defendant company knew of these dangers, that the plaintiff had no experience in this kind of work, that he was ignorant of the dangers, and the proper way in which to do it; and if no notice of these dangers was given to the plaintiff, and no instructions given him as to how to do the work, which, if they had been given him and followed, would have prevented the accident; or if wrong instructions were given by the defendant, or by a superior servant, as to the way in which this particular work should have been done; and if plaintiff was injured while doing said work by reason of the negligence of the defendant in failing to warn him of the danger, or give him proper instructions, or by giving him wrong instructions—then the plaintiff would be entitled to recover.”

There can be no exception properly taken to the instructions given by the circuit judge as quoted above.

Again, it is alleged in the declaration that the method adopted by defendant’s foreman for readjusting the columns was not the usual, customary and safe way to do the work, but that it was dangerous and extrahazardous; and that defendant knew it was not the usual and customary way, and that it was dangerous and hazardous, but that the plaintiff did not know this fact, and could not have known it by the exercise of ordinary care. On this subject the court charged the jury as follows:

"Where there are several ways in which to do a particular piece of work, or where there is more than one way in which to do it, the owner has a right to say how the work shall be done, and will not be held responsible in damages for injuries resulting to his workmen, simply because he did not adopt the safest and best way to do the work. But if the master adopts a dangerous and hazardous way of doing the work, when there was a reasonably safe way known to him, and if the master knows of the danger, and the servant does not know of it, it is the duty of the master to inform the servant of the danger; and if the work is dangerous, and required skill in its performance, and unskilled men are selected to do it, it is the duty of the master to instruct the servant as to the work to be done."

We are of opinion that this instruction contained a correct exposition of the law on this subject.

The fifth assignment is that the court erred in refusing the following request submitted by counsel for the company after the delivery of the general charge, viz.:

"If you find that plaintiff was, at the time of the accident, a full-grown man, of ordinary intelligence, and that he was working with the floating gang, and that he was directed by the boss of the floating gang to go and work with the carpenter's gang, and you further find that the work with the carpenter's gang—especially the work that the plaintiff and others were engaged in at the time of the accident—was open, if the danger was obvious, and could be seen by plaintiff, or if, by the exercise of reasonable diligence, plaintiff could have seen it, then he was not entitled to warning or instructions. The plaintiff is bound to exercise his mind to discover and avoid danger, and, if he fails in this regard, he is negligent, and cannot recover."

We are of opinion that this request was properly refused, since it was substantially given in the general charge as follows:

"If the plaintiff knew as much about the danger of this work as the defendant did, or if he could, by the exercise of ordinary diligence, have known it, then there would be no necessity for any warning, and the plaintiff would not be entitled to recover on account of the failure of the defendant to warn him of this danger."

The sixth assignment of error is that the court erred in refusing the following instruction submitted by counsel for the defendant company, viz.:

"If you find that Jones, who was at the time of this accident to Jarrett in charge of carpenter's gang, and the foreman, and you further find that he had over him other agents of the company, who were his superiors at that time and place at the furnace, and that there were other bosses and gangs of men, viz., a boss of the floating gang, a boss of the stock-house gang, a foundry boss and gang, and they were all working at one place—the furnace—and all under the general superintendent of the furnace, and together were engaged to

Tennessee Coal, Iron & R. Co. v. Jarrett

accomplish the one end, viz., the making of iron, then I charge you that Jones, the boss of the carpenter's gang, would be a fellow servant with Jarrett, the man who received the injury, and that the defendant would not be liable for any accident to Jarrett while pressing these posts apart and placing them in position, resulting from the negligence of Jones in adopting a less safe of two methods in ordinary use in pressing these posts apart, or negligently giving orders to the men while executing the method adopted in replacing the posts in their proper positions."

It is insisted in support of this request that Jones was not a vice principal, but worked as a common laborer; that this particular work was done under the order of Porter Gaines, the superintendent; and that Jones had no power to hire or discharge the men. It is insisted that at most he was only the one designated as a leader to take the lead in doing the work, and was in no sense a vice principal; citing *Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390.

It will be observed that this instruction ignores the fact that plaintiff had been taken from his employment as a member of the floating gang, and ordered to work with the carpenter's gang—a position requiring mechanical skill and experience, and attended also with more danger. In such exigency it is incumbent on the master, as we have seen from the authorities, to give his employee warning advice and instructions, so as to enable him to perform his new duties with safety to himself. In such a case the liability of the master does not turn on the question whether the act causing the injury was the result of the negligence of a fellow servant, but depends on the question whether the injured servant was ordered into a different sphere of employment by one having authority to do so, and whether the injured servant was given warning advice and instructions. It is not denied that Jarrett was ordered to go into the stockhouse, and assist in readjusting the columns. It is claimed on behalf of the company that on the evening before the accident Porter Gaines, superintendent of the works, ordered Jones, the foreman of the carpenter's gang, to go into the stockhouse and put the pillars back in their places. Jones accordingly selected Jarrett and two other hands to assist him in the work. But the plan of accomplishing the work and its details were left entirely to the discretion of Jones. Mr. Gaines, the superintendent, was not present while the work was progressing, and did not assume any supervision or direction thereof. Hence we are of opinion there was no error in declining the request asked, first, because it ignored the duty of the company to give warning advice and instructions to an inexperienced employee about to enter upon a service outside of his regular employment.

We find no reversible error in the record, and the result is the judgment must be affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS *v.* FREEMAN et al.

(Supreme Court of Texas, March 7, 1904.)

[79 S. W. Rep. 9.]

Railroads—Hospitals for Employees—Negligence—Contagious Disease—Nurse going at Large—Infecting Persons—Death—Railroad's Liability—Statutes.*

Rev. St. 1895, art. 3017, provides that an action for death may be brought where it is caused by the negligence of the proprietor or owner of any railroad, or by the unfitness or negligence of his servants. Subdivision 2 provides for a recovery when the death is caused by the wrongful act, negligence, or default of another. A railroad maintained a hospital for the care of employees, and a surgeon employed by the road hired an incompetent nurse to care for a servant afflicted with smallpox, and the nurse went on the public streets without disinfecting himself, and communicated the disease to plaintiff's intestate, from which he died: *held*, that the railroad company was not liable for the death, as the negligence of the surgeon could not be regarded as the negligence of the road itself under subdivision 2 of the statute, and the first subdivision was not applicable, since the maintenance of the hospital was not peculiar to the carrier's business, but merely collateral thereto.

Brown, J., dissenting.

Error to Court of Civil Appeals of the Fifth Supreme Judicial District.

Action by Annie Freeman and others against the Missouri, Kansas & Texas Railway Company of Texas. A judgment of the Court of Civil Appeals (73 S. W. 542) modified a judgment in favor of plaintiffs, and defendant brings error. Reversed.

T. S. Miller and Perkins, Craddock & Wall, for plaintiff in error.

Evans & Elder, for defendants in error.

WILLIAMS, J. W. A. Freeman died from smallpox alleged to have been communicated to him by the negligence of the railway company, its servants and agents, and this action was brought by the defendants in error to recover damages for such death, and was prosecuted to the judgment brought in review by this writ of error.

It appears from the facts found by the Court of Civil Appeals that this railway company had agreed with its employees, in consideration of a monthly sum contributed out

*As to the liability of railroad companies for the negligence of physicians and others in charge of sick or injured persons, see *Sawdey v. Spokane Falls & N. Ry. Co.* (Wash.), 6 R. R. R. 283, 29 Am. & Eng. R. Cas., N. S., 283 (liability of company for malpractice in treatment of injured boy); *Mason v. Illinois Cent. R. Co.* (Ky.), 10 R. R. R. 287, 33 Am. & Eng. R. Cas., N. S., 287 (carrier not liable on account of case of smallpox communicated from occupants of its car in possession and control of public health officers); *Illinois Cent. R. Co. v. Gheen* (Ky.), 1 R. R. R. 402, 24 Am. & Eng. R. Cas., N. S., 402 (liability for refusal to give certificate of admission to hospital maintained by contributions of employees).

Missouri, etc., Ry. Co. v. Freeman

of their wages, to furnish them, when sick or injured, surgical and medical attention. In conjunction, it and a connecting carrier, the Missouri, Kansas & Texas Railway Company, a corporation of another state, maintained at Sedalia, Mo., a hospital in which care was taken of its sick and injured employees. One of its servants, Alonzo Dickson, was injured, and went to this hospital for treatment. There he was brought in contact with persons having smallpox, but left before there was any development of the disease on him, returned to Hunt county, Tex., and resumed work for his employer, the plaintiff in error. The smallpox soon made its appearance upon him, and those of its employees intrusted by plaintiff in error with such matters arranged for the detention and treatment of him and other servants similarly affected in a pest camp under the control of a local surgeon in the employment of the company. Upon this surgeon assuming this charge, the officials of Greenville having the care of the public health, and who were instituting quarantine measures for the isolation and detention of persons infected with smallpox, relinquished the custody of Dickson to such surgeon and his subordinates. The surgeon employed an incompetent and irresponsible person, and placed him in charge of Dickson in the camp. This person left the camp without having changed or disinfected his clothing, went upon the streets of Greenville, met Freeman, and communicated to him the disease from which he died. The courts below have found these facts, and the further one that, in selecting so unreliable a person to take care of the sick servants, the surgeon in charge by authority of the railway company was guilty of negligence in the performance of the duty assumed, which was the proximate cause of Freeman's death. This, in brief, is the state of facts upon which the judgment rests. A further statement will be found in the opinion of the Court of Civil Appeals and in the report of the case of M., K. & T. Ry. Co. v. Wood, 95 Tex. 223, 66 S. W. 449, 56 L. R. A. 592, 93 Am. St. Rep. 834.

The principal question involved is whether or not a right of action for a death thus caused is given by the statute. Right of action for death is given in the following provisions of article 3017, Rev. St. 1895: "(1) When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, hirer of any railroad, steamboat, stage-coach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence or carelessness of their servants or agents. (2) When the death of any person is caused by the wrongful act, negligence, unskillfulness or default of another." Article 3018 further provides: "The wrongful act, negligence, carelessness, unskillfulness or default mentioned in the preceding article must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury."

This statute was first adopted in 1860, was amended from time to time, revised in 1879, and again in 1895. The amendments do not affect the question before us. In the revision a different arrangement of the provisions was made, and some words were added. As thus revised, the statute has received a construction which materially enters into the present discussion. Whether or not the same construction would have been made of the original statute is a question beside the present purpose. The construction spoken of is that expressed in the case of *Hendrick v. Walton*, 69 Tex. 192, 6 S. W. 749, in which it was held that persons generally were not made liable by the second subdivision of the revision for deaths caused by the "wrongful act, negligence, unskillfulness or default" of their servants and agents; from which it follows that the only responsibility for deaths resulting from the misconduct of servants or agents is that declared in the first subdivision against the classes of persons there named. The difference between this statute and Lord Campbell's act and those of American states adopting its provisions is therefore obvious. Those statutes fix the liability upon all persons without discrimination when the death is caused by "wrongful act, neglect or default," such as would have given a cause of action to the person injured if he had lived, and make all masters and employers responsible for such misconduct of their servants or agents, while ours make none accountable for the misconduct of servants and agents except certain ones, classified according to the business in which they are engaged. This is not extended by either article 3018 or the original provision of which it is the revision. It gives no cause of action against any one not included in article 3017, but gives one against such as are included, when the injury which caused the death would have given one to the person injured had he lived. We think it clear, therefore, that no liability is shown in this case under the second subdivision of article 3017. Corporations may be responsible for deaths under this provision, but only where they result from "what may be deemed their own wrongful acts or omissions as distinguished from the acts or omissions of their servants or agents." *Fleming v. Texas Loan Agency*, 87 Tex. 241, 27 S. W. 126, 26 L. R. A. 250.

The negligence which, according to the findings, caused the death of Freeman, was that of the local surgeon, the agent or servant of the company, in intrusting the pest camp to the care of an unreliable nurse, who, by reason of his incompetency, communicated the disease. To make such negligence that of the employer requires the aid of the rule *respondeat superior*, and this, as we have seen, is eliminated by the statute from this class of actions, except to the extent it is made applicable to those falling within the first provision. Without that rule the negligence is to be viewed as merely that of the servant.

Missouri, etc., Ry. Co. v. Freeman

But it is suggested that the duty of selecting competent nurses was that of the company, and the failure to perform it was its negligence, notwithstanding its attempt to assign it to its agent or servant, and that hence the death was due to its "negligence, unskillfulness or default." There is a confusion here, resulting from an attempt to bring into consideration a principle of the law of master and servant which does not apply, the person whose death was caused not having been a servant. By the law regulating the relation of master and servant, unless modified by statute, the master is not responsible to the servant for an injury inflicted by a fellow servant, but the master is responsible for his own negligence resulting in injury to the servant. It is a duty of the master to the servant to use care to secure competent and reliable fellow servants, and an omission to perform that duty is, as to the servant to whom it is due, the master's omission or neglect, notwithstanding any attempt he may have made to have it performed by another, and an injury resulting to a servant from such omission is attributable to the master's negligence. It may be that the death of a servant thus caused would be one "caused by the wrongful act, negligence, unskillfulness or default" of the master. If so, it would be because the death resulted from a nonperformance by the master of the duty in favor of the servant growing out of their relation. This, however, is a question not now before us. These distinctions have no place in determining the liability of a master for injuries done by the negligence of his servant to a third person not a servant. For such injuries, other than death, the master is by the common law made responsible upon the principle *respondeat superior*, regardless of any question as to his care in selecting the servant, or as to the competency or fitness of the servant (3 Thompson Com. on Law Neg. § 3167); but the Legislature in giving the action for death has excluded that principle, except so far as it is introduced in the first provision of article 3017. To hold that a death from such neglect of a servant as that in question, in the management of his master's business, was caused by the negligence of the master, in the sense of the statute, would at once make the master responsible for all deaths caused by negligence of servants or agents. Of course, we are speaking only of mere servants and agents, and not of those who act for a corporation in its corporate capacity. *I. & G. N. Ry. Co. v. McDonald*, 75 Tex. 45, 12 S. W. 860; *H. & T. C. Ry. Co. v. Cowser*, 57 Tex. 306.

Plaintiff's action must be sustained, if at all, under the provisions of the first subdivision of article 3017. Its terms, taken literally, create a right of action against any persons who are the proprietors, owners, etc., of any of the species of property named, for deaths caused by the unfitness, negligence, or carelessness of their servants or agents, whether or not such service or agency, and the negligence therein,

and the resulting death, had any connection with or relation to such ownership. If this application were given to it, a person who owned a steamboat or stagecoach, and was also a farmer or merchant, would be liable for a death caused by the negligence, etc., of his servant or agent in the other business; or a railroad company, which has, as many in this state have, acquired lands by donation from the state or from individuals, which are not used in or in any way connected with the business of carrying goods or passengers, would be responsible for deaths caused by surveyors and other agents and servants employed about such lands, acting in the scope of their employment. If this were so, there would be no reason for the kind of classification made by the statutes under which liability for conduct of servants and agents depends upon the ownership of particular kinds of property for particular purpose. Those who are made accountable are designated as the owners, etc., of properties which are the means used for the conveyance of goods or passengers, and the class of persons meant are evidently carriers. It is to be observed that not merely railroad companies or persons operating railroads, as in the statutes of some states, but all persons, natural and artificial, who are the owners, etc., of any vehicles of conveyance of the specified kind, are included in the statute. The liability is given against the "owner" as such, and is based upon the ownership, because the properties are employed in the business of conveying goods or passengers. This inclusion of all who bear this relation to such properties, and exclusion of all others, force the conclusion that the nature of the business common to all constitutes the basis and reason for the classification. From this it follows that the servants and agents for whose misconduct liability is created are those engaged in prosecuting, in some way, that business; and, as in law one person acts as the servant or agent of another only when he acts in the scope of his employment, it follows, also, that the death contemplated by the statute must be caused by the servant while prosecuting the same business. Reasons may be seen why the Legislature may have thought it just and expedient to thus select carriers as a class, and impose upon them alone, in the conduct of their business, this responsibility; but none could be found for making a farmer or merchant accountable for the acts and omissions of his farm laborers or clerks merely because he happens to be the owner of a steamboat or stagecoach, when no such responsibility is laid upon other farmers and merchants. The same rule must determine the liability of all of the class mentioned in the statute, and, if that of the owner of one of the other vehicles is to be restricted to those deaths which occur in his business of conveying goods or passengers, it follows at the same limitation exists upon the liability of owners of railroads; the difference in its scope being only in degree, arising from a difference in the extent of the business.

A statute of Kentucky gave a right of action when "the life of any person, not in the employment a railroad company, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, or by the unfitness or negligence or carelessness of their servants or agents." In the case of *Claxton's Adm'r v. Lexington, etc., R. R. Co.*, 13 Bush, 636, it appeared that a corporation owning a railroad also owned and operated a mine connected by spurs with the railroad, and that a person had been killed by a car and by servants employed exclusively in the mining business. The case was held not to come within the statute, the court saying: "The Legislature has seen proper to invest this company with a two-fold character. For the purpose of constructing and operating a line of railway, it is a railroad company; but for the purpose of mining, and of delivering the products of its mines on the line of the railway for shipment, it is a mining company; and the tramways and cars in use at the time the alleged negligent killing was done are the usual and necessary attachments to mining operations, and were in no sense incidents to the railroad owned by the appellee. The agents and servants in charge of the tramway were engaged in mining operations, and not in managing, controlling, or operating the company's railway. It follows, therefore, that while the appellant is able to bring his case within the letter of the section in question, it is evidently a case not contemplated by its provisions. There is no more reason why the appellee should be compelled to answer, as the proprietor of a railroad, for an injury caused by the negligent management of a tramway attached to its mines, than that it should be required to answer for the death of a party resulting from the negligence of its agents or servants while engaged in prospecting for coal, iron, or other minerals on some of its lands wholly disconnected from, and not even bordering on, its line of railway." See, also, *Aikin v. Western Railroad Corp.*, 20 N. Y. 376. It will be seen that the statute here construed declared the liability against the proprietors of railroads in terms as broad as those sued in our statute with reference to the classes made liable for deaths.

In the cases of *Daley v. Boston, etc., R. R.*, 147 Mass. 113, 16 N. E. 690, and *Commonwealth v. Boston, etc., R. R.*, 126 Mass. 68, the statute of Massachusetts, the language of which is similar to but somewhat more definite than ours, was considered, and the actions were sustained, because in the first-named case the death occurred in "railroad operations," and in the second upon a track used by the railroad company which was "reasonably incident to the business in which the corporation was lawfully engaged." In the *Daley Case* the court uses this language: "The words 'operating a railroad' describe the kind of corporation intended to be subjected to the liability there imposed, and not the work immediately

Missouri, etc., Ry. Co. v. Freeman

in the process of performance by it. Even if they could be held to limit the liability to occasions where the railroads are being actually operated, they would not limit it to incidents occasioned by locomotives, moving trains, etc., or only upon its tracks. The handling of freight, the unloading and loading of its cars, or the transfer, as in the case at bar, of freight from a vessel to its cars, are railroad operations."

The decisions in these cases hold the companies responsible for deaths which were caused in connection with the business of railroading, and are not authority for a more extensive liability. The intimation that such a company is made liable merely because it is such for deaths that may occur entirely outside of and disconnected with its business as a railroad company, if that is the meaning of the opinion, was an obiter dictum, and, in our opinion, is not supported by the true construction of the statute. On the other hand, we regard it as equally clear that the court was right in saying that statutes like that of Massachusetts and Texas cannot be so construed as to limit the liability for deaths to such as are occasioned by locomotives, moving trains, etc., or only upon the tracks of the railroad. *Lipscomb v. H. & T. C. R. R. Co.*, 95 Tex. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804.

We are thus brought to the question whether or not the business in which the surgeon was engaged when he was guilty of the negligence assumed to have been the cause of Freeman's death was such as the statute contemplates. There was a remote connection between the keeping of a pest camp and the railroad business proper, consisting wholly in the fact that the railroad company was engaged in taking care of one of its servants. Servants are, of course, necessary to the prosecution of the railroad business; but contracts and arrangements such as that made by this company with its employees are not essential and not peculiar to that business, but collateral to it. It was not different in its nature from that which would exist between the business of a natural person, owning and operating vehicles for the conveyance of goods and passengers, and a lodging engaged by him for a sick servant in compliance with a contract to take care of servants when ill. If liability for death is imposed upon the railroad company in this case, it would, by the same rule, exist against the natural person in the case supposed for a death caused by his servant in managing such a lodging. It is doubtless to the interest of the railroad companies and commendable in them to have hospitals and similar places for the care of their servants. In a sense, this may be promotive of their business of operating their roads. So they might find it to their interest to have schools of instruction for the training of employees or libraries and places of resort for the cultivation of correct habits. For the extension of their trade they might think proper to have advertising

Missouri, etc., Ry. Co. v. Freeman

bureaus and like establishments. Any of these would have some connection with the railroad business, but would be only collateral aids to it. It would be difficult to suppose a business in which a railroad company might engage which would not have some sort of connection with its ownership of its railroad properties; but the statute, as we have seen, makes it responsible, not for all deaths which its servants may cause, but for such only as are so caused in its railroad business proper. That business is so comprehensive and embraces so many incidents, essential and nonessential that an attempt to state a more definite general rule, which would include all cases of liability, and exclude all others, would be hazardous. The doctrines of *ultra vires* would not furnish a solution for all cases. In the case of corporations, it would be easy to suppose instances in which, while acting beyond their lawful powers they would yet be liable for deaths caused by their servants while so acting, and others in which they would not be liable although the deaths were caused by the fault of servants while lawfully prosecuting some collateral undertaking. In the case of individuals the doctrine of *ultra vires* would, of course, have no application. Railroad companies as legal personages and owners of property, endowed with the power of contracting, may make many contracts and do many things which natural persons may do, but it does not follow that these are properly a railroad carrying business. Authorities which hold that such companies may lawfully do this or that thing have, therefore, little tendency to show that the conduct of their servants acting for them therein comes within the purview of this statute.

Without going further into detail, we think it evident that if such a relation as that which existed between this detention camp and the railroad were held to make the keeping of the camp a part of the proper business of the company as owner of the railroad conducting a carrying business it would be found impracticable to fix a limit at which we could stop, short of the broad proposition that such companies and individuals, merely because they own and operate railroads, or some of the vehicles mentioned in the statute, are responsible for all deaths caused by their employees in any business. Such a construction of the statute would, as we have seen, take away all foundation for the discrimination which the Legislature has made between those engaged in the business specified in the statute and other persons and corporations, making the former responsible for deaths occurring in the prosecution of collateral businesses when others engaged in like businesses are not held to a like accountability. The construction which limits the liability to deaths occurring in connection with the railroad business proper is by no means a narrow or strict one. On the contrary, a much narrower one than we as yet feel inclined to recognize

might be put upon the language of the statute. When the purpose of the Legislatures to give such actions only for deaths caused by employees of those engaged in a certain business is so plain, the courts have no right to include other cases; and the most liberal construction which, in our opinion, the statute justifies, is that which we have indicated. Any indefiniteness in the rule grows out of the indefiniteness of the statute. This is no justification for the courts to stretch the statute to cover cases not embraced by it. *Turner v. Cross*, 83 Tex. 218, 18 S. W. 578, 15 L. R. A. 262.

When our statute was first adopted the railroad business in this state was in its infancy, and many of its subsequent extensive developments were unthought of. Inland transportation was principally carried on by other instrumentalities. There is nothing in the statutes or the history of our legislation concerning railroads to indicate that when the Legislature spoke of "the proprietors, owners," etc., of "a railroad," it regarded as a part of the property specified, or as an incident of it or of the business for which it was employed, any such institutions as those here in question; and our statutes have indicated, with some particularity, too, many, at least, of the things which were regarded as coming properly within the scope of the business of such companies. Rev. St. 1895, arts. 4367, 4478, 4479, 4480, 4483. It is not intimated that the specifications of the statute are exclusive of everything not expressly mentioned, the purpose of this reference being to show that nothing in our legislation outlining the powers, rights, and duties of railroad companies shows any legislative contemplation of such undertakings as those under consideration as incidents of their business. In the case of this plaintiff in error against Wood (66 S. W. 449; 68 S. W. 802), in which questions were certified to this court and answered, there was set up a claim for the death of plaintiffs' child in addition to personal injuries to plaintiffs not resulting in death. Nothing was said in the certificate concerning the claim for death, and the questions certified were determined by this court wholly upon common-law principles governing actions growing out of torts, actionable by that law. When the cause again came before this court upon application for writ of error the question as to the right to recover for the death of the child, not being fundamental in that case, as it is here, was not so presented as to require a determination of it, and it was not in fact determined. The result of that case is not, therefore, regarded as a precedent to sustain this judgment.

In the *Lipscomb Case*, before referred to, the death for which the railroad company was sought to be made liable was inflicted by a guard alleged to have been employed in its depot for the protection of goods which it held as a carrier. Its duty as such was to safely keep and deliver to its

Hunt v. Illinois Cent. R. Co

owners goods so held. The business was therefore of the character which the statute defines. That here in question was not.

The plaintiff has no cause of action, and the judgment is therefore reversed, and the cause dismissed. Reversed and dismissed.

HUNT v. ILLINOIS CENT. R. CO.

(Supreme Court of Indiana, June 8, 1904.)

[71 N. E. Rep. 195.]

Master and Servant—Railroads—Injured Employees—Contract for Attention—Emergency—Authority of Conductor.*

Where a railroad company had provided ample facilities for treating, boarding, and caring for an injured brakeman at the place where he was injured, and on the day of the injury was ready and willing to have him treated by its surgeon, so far as any immediate and existing emergency required, but such servant requested to be taken to another city, where he had friends, there was no existing emergency at such city, nor any duty devolving on the railroad company to provide for his board, lodging, and nursing at that place, to authorize the conductor of the train on which he was injured to bind the company by a contract therefor.

Appeal from Circuit Court, Greene County; O. B. Harris, Judge.

Action by Horatio Hunt against the Illinois Central Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Transferred from Appellate Court, as authorized by Burns' Ann. St. 1901, § 1337u. Affirmed.

Slinkard & Slinkard, for appellant.

John T. & Will H. Hays, for appellee.

GILLET, J. Appellant sued appellee to recover for the board and room rent of one Noel Slusser, an employee of appellee, who had been injured upon its road, during the time that he was confined to the house as the result of the injury sustained by him and the operation which followed, and for the board and room rent of the father, mother, wife, and sister of said Slusser, who attended upon him as nurses at different periods during such time. The complaint was in three paragraphs. In each of the paragraphs the charge

*As to the duties and liabilities of railroad companies relating to the care of injured employees, see *Sawdey v. Spokane Falls & N. Ry. Co.* (Wash.), 6 R. R. R. 283, 29 Am. & Eng. R. Cas., N. S., 283 (liability of railroad for malpractice in treatment of injured boy); *Southern Ry. Co. v. Mississippi v. Brister* (Miss.), 1 R. R. R. 645, 24 Am. & Eng. R. Cas., N. S., 645 (authority of trainmaster to employ surgeon); note, 16 Am. & Eng. R. Cas., N. S., 378 (authority of officers and servants to bind railroad company by contracts for medical services; and ratification of authorized contract for medical services); *Adams v. Southern Ry. Co.* (N. Car.), 16 Am. & Eng. R. Cas., N. S., 369 (authority of conductor to employ physician).

Hunt v. Illinois Central R. Co

is that appellant was employed to perform such service by one James Borders, a freight conductor in the employ of appellee, and additional facts are charged relative to a claim of an emergency. There was a trial by jury, and a general verdict in favor of appellant. Upon answers returned by the jury to special interrogatories, the court rendered judgment in favor of appellee notwithstanding the general verdict. The propriety of this ruling is here in question.

Reduced to narrative form, the findings of the jury are, in substance, as follows: March 25, 1901, Noel Slusser was, and for about five months immediately prior thereto had been, a brakeman on one of appellee's freight trains running in and out of Switz City. At the time of his injury herein-after mentioned, and during all of the time aforesaid, Slusser boarded and roomed at appellant's hotel, in Switz City. He had many friends and acquaintances in said town. On the day aforesaid, while acting as a brakeman on said train, one of his legs was crushed, necessitating amputation. He received said injury in the city of Linton. He was taken from there to Switz City, some six miles further east, at his request, and upon his assigned reason that he had friends and acquaintances there. He gave no other reason for his request. During all of the time that he was in Linton he was perfectly conscious. Linton was at that time a city of 3,000 inhabitants. It had a good hotel, skillful physicians and surgeons, and ample facilities for treating, boarding, and caring for Slusser while he was suffering from his injury. Appellee had a surgeon there on said day, who was competent to treat said injury, and appellee was on said day ready and willing to have said injury treated by said surgeon, so far as any immediate and existing emergency required it. Slusser would have been left at Linton to be treated by Dr. Sherwood if he (Slusser) had not requested to be taken to Switz City. James Borders was the conductor of said train, and he and Dr. Sherwood accompanied Slusser to Switz City. The latter did not request to be taken to appellant's hotel. The only authority or employment ever given appellant was contained in the following requests made by said conductor of appellant: "Can we get a room to put Slusser in? He has had his foot mashed, and will have to have it cut off. The doctors are here to do the work." There was time and opportunity after Slusser received his injury, and before he left Linton on said day, for the conductor to telegraph to, and communicate with, the division superintendent and with the general officers of said appellee; and during such time communication was had between said conductor and appellee's superintendent relating to said injury, but the jury do not find further concerning such communication. Other facts are found which we incline to think cut off any possible theory of a ratification of Borders' act, but in view of the theory of each paragraph of

Hunt v. Illinois Cent. R. Co

the complaint that it was Borders, in his capacity as conductor, who made the contract, we need not consider as to the possibility that the general verdict might have been rendered as the result of evidence showing a ratification.

The first and leading case upon the subject of the authority of the conductor of a railroad train to employ surgical aid in an emergency for an employee of the company who has been injured by such train is *Terre Haute, etc., R. Co. v. McMurray*, 98 Ind. 358, 49 Am. Rep. 752. So far as concerns the questions as to the duty of the company and the power of the conductor in such circumstances, the decision mentioned foreclosed discussion in this court. Our duty in this case is but to determine whether a state of facts has been presented which brings the case within the above authority. It was said on the petition for a rehearing in that case: "We did not decide that a corporation was responsible generally for medical or surgical attention given to a sick or wounded servant. On the contrary, we were careful to limit our decision to surgical services rendered upon an urgent exigency, where immediate attention was demanded to save life or prevent great injury. We held that the liability arose with the emergency, and with it expired. We did hold that where the conductor was the highest representative of the corporation on the ground, and there was an emergency requiring immediate action, he was authorized to employ a surgeon to give such attention as the exigency of the occasion made imperiously necessary; but we did not hold that the conductor had a general authority to employ a surgeon where there was no emergency, or where there was a superior agent on the ground." It was declared in *Louisville, etc., R. Co. v. McVay*, 98 Ind. 391, 49 Am. Rep. 770, that the presumption was against the authority of a subordinate railroad employee to engage a hotel keeper to care for and nurse a servant of the company who had been injured in its employ, there being no emergency demanding immediate action. The complaint in the case of *Terre Haute, etc., R. Co. v. Brown*, 107 Ind. 336, 8 N. E. 218, was for professional services rendered as an assistant to Dr. McMurray in performing the operation which gave rise to the case first above mentioned. In holding that the plaintiff in the *Brown Case* could not recover, this court said: "The question is, can the judgment be maintained upon the facts stated? That it cannot is, in the view we take of the case, too clear for debate. If it be conceded that such an overwhelming emergency might arise as would create a necessity for immediate action in order to save life or prevent great bodily suffering, and that under such circumstances a state of affairs might exist, in the presence of which one employee would have the implied power to bind the employer, in his absence, for necessary medical or surgical aid bestowed on another employee who sustained an injury, it by no means follows that the

appellee was entitled to recover upon the facts in this case. If the emergency was such that we must assume that an imperious necessity existed, under which the conductor, from considerations of humanity, had authority to employ Dr. McMurray at the expense of the company, we cannot indulge the further presumption that it was necessary that he should have the power to authorize Dr. McMurray to employ other surgeons at the company's expense." To the same general effect is *Louisville, etc., R. Co. v. Smith*, 121 Ind. 353, 22 N. E. 775, 6 L. R. A. 320. In *Ohio, etc., R. Co. v. Early*, 141 Ind. 73, 40 N. E. 257, 28 L. R. A. 546, there was an attempt to recover from the appellant therein on the ground that it had negligently failed to furnish medical and surgical assistance to one of its employees who had received a dangerous injury while in the line of his employment. It appeared from the evidence that temporary assistance had been given to the man at the place of the injury. He was then placed upon a train to be conveyed to North Vernon, where preparations had been made to treat him. At his request, however, he was taken to Seymour, some 14 miles beyond North Vernon, necessitating a delay at North Vernon of 1 hour, and on the run from North Vernon to Seymour of 25 minutes more. There appears to have been hemorrhage, as a result of the wound, during the delay, and shortly after his arrival at Seymour the man died from loss of blood. In discussing the question as to whether the company was liable, this court, after adverting to the duty of a railroad company with respect to furnishing medical or surgical aid in an emergency to an injured employee, said: "This duty does not clothe the master with the power to dictate to the injured servant what particular physician or surgeon shall treat him, nor does it deprive such injured servant of the right of making a conscious and deliberate choice, while in the possession of his mental faculties, of the time, place, and person by whom, when, and where he will be treated. And if the master, yielding to such right, complies with the request to be so treated, and at the same time promptly places before him ample medical and surgical assistance, ready to be rendered to meet the emergency, which he declines, then such emergency has ceased, and the duty with it. And if the choice thus made in the conscious exercise of his own free will turns out to be a mistake, the company is not liable, because the duty ceased with the expiration of the emergency. * * *

There is no shadow of evidence showing negligence at Butlerville on the appellant's part. The evidence shows, without contradiction, that the appellant had taken every precaution to have Early treated at North Vernon by proper medical and surgical skill, and that he declined it all, except the brandy administered there by the physicians summoned in attendance by the appellant. There was no necessity or emergency after that, and therefore no legal duty resting on

Kentucky & I. Bridge & R. Co. v. Shrader

appellee afterwards to furnish medical or surgical aid. The evidence shows, without any conflict, that the appellant met the pressing emergency and urgent necessity at Butlerville, and discharged the duty thereby imposed; and conceding, without deciding, that such emergency continued till the injured servant was brought to North Vernon, the duty imposed by such emergency was fully met there, and there, at least, it expired."

We entertain no doubt as to the correctness of the ruling awarding judgment to appellant upon the jury's answers to interrogatories. If it were granted that an emergency existed while the injured employee was at Linton, yet this duty did not exist at the time that the conductor requested appellant to furnish the room. Appellee was prepared to deal with the situation at Linton, so far as there was any pressing emergency; but the wounded man having been afterwards removed, at his own request, to the town where he had friends and acquaintances, and to his own home, so to speak, it would be expanding the doctrine as to the power of the conductor to act in an emergency to an unwarranted extent to hold that he still had implied authority to contract for shelter and food on behalf of such employee. We are not advised that appellee was in any way responsible for the injury which its brakeman sustained, and, if it were, its responsibility for any service not comprehended within an emergency is to such employee, to be recovered as a part of his damages.

As before pointed out, appellant relies in his complaint upon the authority of the conductor, as such, to bind the company. The agency of the conductor being special, appellant was required to know the extent of the conductor's authority. *Davis v. Talbot*, 137 Ind. 235, 36 N. E. 1098.

It seems hardly necessary to add that the claim for room rent and board furnished the injured man's nurses must also fail, for the same general reason heretofore assigned.

Judgment affirmed.

KENTUCKY & I. BRIDGE & R. CO. v. SHRADER.

(Court of Appeals of Kentucky, May 25, 1904.)

[80 S. W. Rep. 1094.]

Injury to Street Car Passenger—Negligence—Leaving Brake Unguarded.*

Where plaintiff was struck by the handle of a street car brake as she was boarding the car, and the motorman admitted that after he had wound up and set the brake he abandoned it, and stepped back into the

*As to a carrier of passengers' duties with respect to vehicles, see foot-note appended to *St. Louis, etc., Ry. Co. of Texas v. Parks* (Tex.), 76 S. W. 740, 11 R. R. R. 688, 34 Am. & Eng. R. Cas., N. S., 688; *Leveret v. Shreveport Belt Ry. Co.* (La.), 9 R. R. R. 611, 32 Am. & Eng. R. Cas., N. S., 611 (carrier bound to know effect of time and weather upon its appliances); *Greenfield v. Detroit & M. Ry. Co.*

Kentucky & I. Bridge & R. Co. v. Shrader

vestibule of the car, in order to avoid being jostled by incoming passengers, leaving the brake unguarded, though it was apparent that it might be released by an awkward step of the passenger or by the jostling of the car, such admission constituted sufficient evidence of defendant's negligence.

Same—Excessive Verdict.

Plaintiff, a woman 25 years of age, had her nose broken by the revolving of a brake handle by which she was struck while attempting to board a street car. Her face was greatly disfigured, and her breathing was so much impaired that, unless she could be relieved by a surgical operation, her health would be permanently injured: *held*, that a verdict for \$2,250 was not excessive.

Evidence—Jurors—Prejudice.

Where, in an action for injuries to a passenger, one of the jurors propounded certain questions to defendant's motorman as a witness, which were not improper, the fact that they tended to show that the juror was not favorable to defendant's side of the case did not entitle defendant to have the jury discharged or to a new trial after an adverse verdict.

Negligence—Instruction.

An instruction that negligence means the failure to exercise such care as ordinarily prudent persons exercise under like or similar circumstances was not erroneous for failure to limit it to such care as ordinarily prudent persons "usually" exercise under like or similar circumstances.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by Carrie J. Shrader against the Kentucky & Indiana Bridge & Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Humphrey, Burnett & Humphrey, for appellant.

Bennett H. Young and Stottsenberg & Weathers, for appellee.

BARKER, J. The Kentucky & Indiana Bridge & Railroad

(Mich.), 8 R. R. R. 271, 31 Am. & Eng. R. Cas., N. S., 271 (it could not be held, as matter of law, that logs not chained were properly loaded on freight train carrying passengers); *Western Maryland R. Co. v. State*, 6 R. R. R. 904, 29 Am. & Eng. R. Cas., N. S., 904 (degree of care required in inspecting foreign freight cars upon which drover is carried); *McAllister v. People's Ry. Co. (Del.)*, 6 R. R. R. 957, 29 Am. & Eng. R. Cas., N. S., 957 (degree of care required in keeping appliances in safe condition); *Alabama Midland Ry. Co. v. Guilford (Ga.)*, 10 R. R. R. 472, 33 Am. & Eng. R. Cas., N. S., 472 (degree of care required in furnishing train with safe appliances); *Atlantic & B. R. Co. v. Anderson (Ga.)*, 8 R. R. R. 773, 31 Am. & Eng. R. Cas., N. S., 773 (duty to furnish means of boarding train as affected by custom unknown to passenger); *Herbert v. St. Paul City Ry. Co. (Minn.)*, 3 R. R. R. 152, 26 Am. & Eng. R. Cas., N. S., 152 (care required in keeping car steps free from ice and snow); *Davis v. Paducah Ry. & Light Co. (Ky.)*, 4 R. R. R. 684, 27 Am. & Eng. R. Cas., N. S., 684 (degree of care required of street railway company in inspecting cars); *Benedict v. Minneapolis & St. L. R. Co. (Minn.)*, 3 R. R. R. 701, 26 Am. & Eng. R. Cas., N. S., 701 (duty to furnish safe place to ride); *Sansom v. Southern Ry. Co. (C. C. A.)*, 1 R. R. R. 88, 24 Am. & Eng. R. Cas., N. S., 88 (liability for death of passenger caused by jerking of train as affected by failure to have solid vestibule train, as advertised).

Company is a corporation operating a railroad over its bridge across the Ohio river between the cities of Louisville, Ky., and New Albany, Ind. The appellee, Carrie J. Shrader, does business in Louisville, and lives in New Albany. On the 21st day of August, 1901, about 6 o'clock in the evening, appellee, while getting aboard an electric car owned and operated by appellant at its Fourth Street Station in Louisville, was struck by the handle of the car brake, with such force that her nose was broken, and other painful and serious injuries inflicted upon her, to recover damages for which this action was instituted, the jury rendering a verdict of \$2,250 against appellant. The claim for damages is based upon the alleged negligence of appellant's motorman in leaving his brake wound up in such manner that it came loose and reversed itself with such speed and velocity, just as appellee, a passenger, was boarding the car, that she was struck and injured in the manner indicated. The errors seriously argued by appellant are, first, that the negligence of its employee, the motorman, was not established by sufficient evidence; second, that the verdict was excessive; third, that one of the jurors was guilty of such misconduct as indicated hostility to appellant; and, fourth, that the court erred in its instruction defining negligence.

Without going into the evidence in detail, a careful reading of the record convinces us that the jury did not err in arriving at the conclusion that appellee's injuries were caused by the negligence of the motorman in charge of the car. By his own admission, after he had wound up and set the brake, in order to avoid being jostled by the incoming passengers, he abandoned it, and stepped back into the vestibule, leaving this dangerous instrument wholly unguarded, although it was apparent that an awkward step of a passenger, or even the jostling of the car, might unset it, and start the fly wheel of the brake upon its rapid and dangerous revolution. That appellee's injuries resulted by reason of the motorman's failure to hold the brake until the passengers were on, is shown by his own admissions. His familiarity with the brake was bound to teach him, but for his own negligence in failing to learn the lesson, the danger to incoming passengers in leaving the set brake unprotected and unguarded.

The appellee, who is a young lady of 25 years, had her nose broken by the accident, greatly disfiguring her face, and her breathing is so much impaired that, unless she can be relieved by a successful surgical operation, her health will undoubtedly be permanently injured. As to how far this operation can be successfully performed the evidence is contradictory, as it is also on the question of whether or not her lip is paralyzed. We think that the jury were the best judges of these questions, which were fairly submitted to them by the instructions of the court, and we are not willing to say that the verdict is excessive.

We are unable to agree with counsel in their claim that the juror whose conduct they criticise in asking questions of its witness the motorman showed hostility to it. The interrogation complained of is as follows: "Q. If you had stood up by the brake, and held your hand on the crank, would it have hit the lady? A. If I held my hand on it, it would not have hit the woman. Q. If you had stood by the brake, and held it, would you have been liable to be run over? A. They would have run over me if I had not gotten out of the way. Q. Would it not have been better for you to jump off the car, and let everything go? A. Just as well, because they crowded in on both sides." We do not perceive that these interrogatories deviated from the line of propriety. Perhaps the last question is subject to the criticism of being inconsequential, but certainly not of being improper. The learned trial judge, in overruling the motion for a new trial, in apt language expresses our views on the question in hand: "This case is before me on a motion for a new trial, and the only ground urged is misconduct of a juror during the trial. The misconduct complained of is that the juror indicated by questions asked by him and his manner in asking the questions that he was opposed to the defendant. At the time the questions were put, defendant moved to discharge the jury, and the motion was overruled, with an exception. I was of the opinion then, as I am now, that it would be very unwise for a trial judge to discharge a jury every time a juror asked a question which indicated which way he leaned. My own experience teaches me that there is nothing more deceptive than the manner of jurors during a trial. Jurors who seem to be your best friends turn out to be strongly against you, and vice versa. I see no misconduct in this case that would justify granting a new trial, and the motion is overruled."

It is insisted that the court erred in the second instruction, by which is defined "negligence": "Negligence, as used in the first instruction, means the failure to exercise such care as ordinarily prudent persons exercise under like or similar circumstances." It is insisted that the word "usually" should have preceded the word "exercise" in the last line of the instruction. The instruction, as written, gives substantially the law upon the question to which it is directed, and is not subject to the criticism made by counsel.

For the reasons indicated, the judgment is affirmed.

POWELL *v.* ERIE R. CO.

(Court of Errors and Appeals of New Jersey, June 22, 1904.)

[58 Atl. Rep. 930]

Trespassers—Right to Eject from Moving Train—Use of Force.*

A trespasser, detected in the act of attempting to climb upon a rapidly moving railroad train, may be ordered off, or his attempt resisted with reasonable force, while the train is still in motion. He cannot, by merely gaining a foothold upon the moving train, impose a duty upon the railroad company either to permit him to ascend or to stop the train for his convenience.

Same—Same—Same—Threats.

Where a trespasser, while attempting to board a moving railroad car, is opposed by a threat of improper and excessive force on the part of an employee of the railroad company, the force not being in fact exerted, and the trespasser yields to the show of force, and voluntarily releases his hold upon the car, and falls to the ground, and is injured, he has no action; it not appearing that in the necessary attempt to avoid physical injury he accidentally lost his hold upon the car, nor that he was so overcome with fear as to lose his presence of mind and self-control.

Contributory Negligence.†

A person injured while jumping on or off a train in motion is guilty of contributory negligence.

Hendrickson and Vroom, JJ., dissenting.

(Syllabus by the Court.)

Error to Supreme Court.

Action by Joseph Powell against the Erie Railroad Company. Judgment of nonsuit. Plaintiff brings error. Affirmed.

Alexander Simpson, for plaintiff in error.

Collin & Corbin, for defendant in error.

PITNEY, J. This was an action to recover damages for

*See foot-note appended to *Chicago City Ry. Co. v. O'Donnell* (Ill.), 11 R. R. R. 732, 34 Am. & Eng. R. Cas., N. S., 732; *Johnson v. Chicago, etc., Ry. Co.* (Iowa), 11 R. R. R. 629, 34 Am. & Eng. R. Cas., N. S., 629.

†As to whether it is contributory negligence to alight from a moving car, see foot-note appended to *Paganini v. North Jersey St. Ry. Co.* (N. J.), 11 R. R. R. 14, 34 Am. & Eng. R. Cas., N. S., 14 (passengers); foot-note appended to *Simmons v. Seaboard Air Line Ry.* (Ga.), 11 R. R. R. 454, 34 Am. & Eng. R. Cas., N. S., 454 (passengers); *Rutledge v. New Orleans, etc., R. Co.* (C. C. A.), 11 R. R. R. 488, 34 Am. & Eng. R. Cas., N. S., 488 (passengers); *Bishop v. Illinois Cent. R. Co.* (Ky.), 11 R. R. R. 328, 34 Am. & Eng. R. Cas., N. S., 328 (licensees); *Northern Pac. R. Co. v. Egeland* (U. S.), 4 Am. & Eng. R. Cas., N. S., 259 (servant alighting from moving train at command of superior); *Cowen v. Ray* (C. C. A.), 21 Am. & Eng. R. Cas., N. S., 531 (employee jumping from train to avoid danger); *Donahue v. Boston & M. R. R.* (Mass.), 20 Am. & Eng. R. Cas., N. S., 526 (employee jumping from moving engine); *Galveston, H. & S. A. Ry. Co. v. Zantzinger* (Tex.), 13 Am. & Eng. R. Cas., N. S., 840 (trespasser forced by pain and fear to jump from train).

As to whether it is contributory negligence to board a moving car, see note, 20 Am. & Eng. R. Cas., N. S., 304 (employees); *Chattanooga Elec. Ry. Co. v. Lawson* (Tenn.), 12 Am. & Eng. R. Cas., N. S., 669 (servant boarding moving car in obedience to foreman's order was not guilty of contributory negligence per se).

personal injuries. The trial judge at the close of the plaintiff's evidence directed that judgment of nonsuit be entered. Reversal of this judgment is now sought.

Taking a view of the evidence most favorable to the plaintiff, the facts of the case are as follows: The plaintiff, an able-bodied man about 21 years of age, on an afternoon in the month of July, undertook to steal a ride upon a combined freight and coal train operated by the defendant. He jumped upon one of the coal cars while the train was in rapid motion, seized the grab handle with both hands, and secured the footing with both feet upon the iron step at the side of the car. He had not reached a place of safety upon the train, but was in the act of climbing up. While he was in this position, the train having run only a few feet after he jumped upon it, a man whom he did not see, but whom another witness undertook to identify as one of the brakemen of the train, began throwing pieces of stove coal toward the plaintiff. The brakeman stood upon a coal car, about three cars ahead of the plaintiff. Three pieces of coal were successively thrown. None of them struck the plaintiff, but they all struck the car near to him. The third piece would have struck him if he had not "ducked" to avoid it. As he "ducked," he released his hold upon the grab iron and thereupon fell from the train, stumpled, and was thrown under the wheels. For the physical injuries thus sustained the present action was brought.

Assuming that the man who threw the coal was a brakeman in defendant's employ, and was authorized to represent the defendant in ejecting a trespasser, so as to render the defendant responsible for his acts, within the rule laid down in *West Jersey & Sea Shore R. R. Co. v. Welsh*, 62 N. J. Law, 655, 42 Atl. 736, 72 Am. St. Rep. 659, we still think the judgment of nonsuit was correct. The plaintiff, on his own showing, was engaged in committing a trespass, which by our statute is made a misdemeanor. P. L. 1898, p. 853, § 214. The defendant, therefore, owed to him no duty beyond refraining from acts willfully injurious to him. Excessive or improper force applied in the effort to eject him would of course be actionable; but no physical force was exerted. He was not touched by any of the pieces of coal. His case, therefore, must rest, if at all, upon the ground that he was so threatened with violence by the brakeman that either in the necessary attempt to avoid it he accidentally lost his hold upon the car, or that he was so overcome with fear that thereby he lost his presence of mind and self-control, and for this reason let go his hold. Neither ground is tenable in view of the evidence. It is not pretended by plaintiff either that he accidentally let go his hold, or that he lost his presence of mind. The rational explanation, and in our opinion the only rational explanation, of the evidence, is that the throwing of the coal gave notice to the plaintiff

Missouri, etc., Ry. Co. v. Harrison

that his attempt to climb upon the train had been discovered and would be resisted, and that thereupon he abandoned his attempt, voluntarily released his hold, and fell or jumped to the ground.

In view of the age of the plaintiff and the other circumstances disclosed in the evidence, the case is clearly distinguishable from *Ansteth v. Buffalo Ry. Co.*, 145 N. Y. 210, 39 N. E. 709, 45 Am. St. Rep. 607, and cases there cited. Cases more nearly in point are *Planz v. Boston & Albany Ry. Co.*, 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835, and *Mugford v. Boston & Maine R. R. Co.*, 173 Mass. 10, 52 N. E. 1078. It is entirely clear that the plaintiff voluntarily abandoned his attempt to board the car, and that, if the flying coal put him at all in fear, it did not cause him to lose his self-control. In effect it amounted to no more than a peremptory command to do that which the law itself commanded. The duty of jumping to the ground while the train was in motion was a duty that the plaintiff assumed by attempting to board the train while in motion. The one was to him no more dangerous than the other. Indeed, he was simply interrupted while still engaged in the hazardous operation of climbing upon the car. It is, of course, absurd to say that by merely gaining a foothold upon the moving train he could impose a duty upon the railroad company either to permit him to ascend or to stop the train for his convenience.

If a statute were needed as support for the proposition that a person injured while jumping on or off a train in motion is guilty of contributory negligence, such an enactment is to be found in P. L. 1869, p. 806, which was embodied in the revised act concerning railroads and canals, approved March 27, 1874 (Gen. St. p. 2680, § 178).

The judgment under review should be affirmed.

HENDRICKSON and VROOM, JJ., dissent.

MISSOURI, K. & T. RY. CO. OF TEXAS v. HARRISON.

(Supreme Court of Texas, May 23, 1904.)

[80 S. W. Rep. 1139.]

Carriage of Passengers—Transportation over Connecting Lines—
Coupon Ticket—Parole Evidence.*

Where a carrier's agreement to transport plaintiff over its own lines and those of connecting carriers was evidenced by a coupon ticket purporting to contain the entire contract in writing, it was incompetent, in an action for breach thereof, to add a stipulation by parol that plaintiff was to be carried to his destination in the same car.

*See generally, foot-note appended to *Ames v. Southern Pac. Co.* (Cal.), 10 R. R. R. 551, 33 Am. & Eng. R. Cas., N. S., 551, where all the preceding authorities in this series are collected.

Missouri, etc., Ry. Co. v. Harrison

Same—Same—Liability of Initial Carrier.†

Where an initial carrier contracted for through transportation over the lines of connecting carriers in a car furnished by such initial carrier, it was liable for injuries to passengers occasioned by its having furnished a car which was not capable of being made comfortably warm, without regard to whether the injuries occurred on its own line or on the line of a connecting carrier, for the negligence of which the transportation contract exempted such initial carrier.

Same—Same—Same—Failure to Heat Car.

Where a carrier advertised to run an excursion without change of cars from a point on its own line over the lines of connecting carriers to a certain destination, and the transportation contract provided that the initial carrier acted only as agent for the connecting carriers, and was not responsible beyond its own line, if such initial carrier provided a car intended to be transported through to the destination, which was properly equipped with heating appliances, such initial carrier was not liable for the negligence of connecting carriers in failing to use the highest degree of care to properly use such appliances in order to preserve the comfort of the passengers while passing over such connecting lines.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by P. E. Harrison against the Missouri, Kansas & Texas Railway Company of Texas. Judgment by the Court of Civil Appeals (77 S. W. 1036) affirming a judgment for plaintiff, and defendant brings error. Reversed.

T. S. Miller and Perkins, Craddock & Wall, for plaintiff in error.

Crosby & Dinsmore, for defendant in error.

GAINES, C. J. This suit was brought by the defendant in error against the plaintiff in error to recover damages for the discomfort and sickness of himself and of his wife alleged to have been caused by the failure to make comfortably warm the car in which they were being carried as passengers under a contract with the defendant company. The plaintiff recovered a judgment, which upon appeal was affirmed by the Court of Civil Appeals.

The plaintiff, in the month of December, 1901, bought of the defendant's agent, at the town of Winnsboro, Tex., round-trip tickets for himself and wife over the defendant's road and its connecting lines to the town of Geneva, in Georgia. On the afternoon of the 24th day of the month they accordingly took passage at Winnsboro on the train of the defendant company for their destination under the contract. About nightfall of that same day they reached Shreveport, the end of the defendant's line. The car on which they took passage and were being carried was there transferred to the next connecting carrier, and they proceeded in the same car in a continuous journey to Meridian, Miss., where it was dropped out, and they were transferred to another. So far

†See foot-notes appended to *Lehigh Valley R. Co. v. Dupont* (C. C. A.), 12 R. R. R. 83, 35 Am. & Eng. R. Cas., N. S., 83.

the evidence is not disputed. But as to the condition of the car with respect to its warmth from the time it left Winnsboro until its arrival at Shreveport the testimony is sharply conflicting. Neither is the testimony in accord as to its condition after leaving Shreveport, though there was much testimony tending to show that during the night, after leaving that place, it became quite cold, and that there was no attempt, except on part of the passengers, to heat it. The plaintiff and his wife each testified, in effect, that they suffered from the cold from the time they left Winnsboro until they reached Meridian, and that by reason of the exposure they were made seriously sick. There was evidence tending to show that the car contained a stove, and also pipes, presumably originally provided for the purpose of heating it; but that the pipes were broken, and that no fuel was provided by the servants of either of the companies to make a fire in the stove save some shavings and fragments of broken boxes. There was testimony, however, to the effect that after leaving Shreveport some of the passengers procured some coal from a coal car on the track and made a fire in the stove, and that this kept the car in a reasonably comfortable condition while the fire lasted. In reference to this matter we think the evidence was such as would have justified the jury in finding that the car could have been kept heated by providing and using the proper fuel for that purpose. The tickets which the plaintiff bought and upon which he and his wife were being carried were contract tickets, and were signed by him and his wife respectively, and each contained the stipulation that the defendant company should not be responsible beyond its own line. Testimony was admitted showing that the defendant, in advertising for the trip, stated that the passengers would be carried through without a change of car, and it was also testified that an agent of defendant made the same statement to a passenger while negotiating for the purchase of a ticket. Such being the testimony, the trial judge, in his charge to the jury, after defining the duty of a carrier of passengers, instructed them as follows: "Now, if you believe from the evidence that on December 21, 1901, the weather was cold and disagreeable, and you believe the servants of the defendant failed to provide the plaintiff and his wife with a reasonably warm and comfortable car to ride in from Winnsboro to Shreveport, and that on said trip to Shreveport the plaintiff and his wife were compelled to ride in a car that was cold and uncomfortable, and if you believe in consequence thereof the plaintiff and his wife, or either of them, became cold, and thereby suffered from being cold, and you believe the servants of the defendant were guilty of negligence (as that term is above defined) in failing to furnish plaintiff and his wife with a reasonably warm and comfortable car (if you find they so failed), and if you believe the negligence (if any) of the de-

defendant was the direct and proximate cause of the suffering (if any) of the plaintiff and his wife, or either of them, then you will find for the plaintiff such sum as will now in cash compensate the plaintiff for the pain and suffering (if any), of himself and wife, or either of them, in consequence of getting cold in said car; but unless you so believe you will find for the defendant. If you find for the plaintiff on the issue last above submitted, and you further believe that in consequence of getting cold in said car, from Winnsboro to Shreveport, the plaintiff and his wife, or either of them, contracted cold, and you believe such cold resulted in sickness to the plaintiff and his wife, or either of them, as alleged by the plaintiff, and you believe the cold and sickness of plaintiff and his wife, or either of them (if any), was directly and solely caused by the negligence (if any) of the servants of the defendant on its own line; or if you believe the employees of the connecting carriers, or either of them, failed to furnish the plaintiff and his wife with a reasonably warm and comfortable car to ride in after they left Shreveport, and you believe the plaintiff and his wife were compelled to ride in a cold and uncomfortable car after leaving Shreveport, and you believe the servants of the connecting carriers, or either of them, were guilty of negligence (as that term is heretofore defined) in failing to furnish the plaintiff and his wife with a reasonably warm and comfortable car (if you find they so failed); and if you believe the negligence (if any) of the defendant on its own line as above explained, concurring with the negligence (if any) of the connecting carriers, or either of them, was the cause of the sickness of the plaintiff and his wife, or either of them—then you will also find for the plaintiff such sum as will now in cash compensate the plaintiff for the physical pain and mental anguish (if any) that he and his wife, or either of them, suffered and will suffer in consequence of such sickness (if any) and the effect (if any) of plaintiff's sickness upon his ability to labor and earn money, and all necessary and reasonable sums he has paid or incurred for medicine and doctors' bills for himself and wife in consequence of such sickness. But if you believe from the evidence that the defendant furnished the plaintiff and his wife with a reasonably comfortable car to ride in from Winnsboro to Shreveport, then the defendant performed all the duty it owed plaintiff, and if you so believe your verdict will be for the defendant. Or if you believe the defendant did fail to furnish the plaintiff and his wife a reasonably comfortable car from Winnsboro to Shreveport, and was negligent, and that the plaintiff and his wife suffered with cold on the trip to Shreveport, yet you will find for the defendant on the issue of sickness, unless you further believe the negligence (if any) of the defendant on its own line contributed to cause and concurred in causing the sickness. Or if you believe the negligence (if any) of the connecting

Missouri, etc., Ry. Co. v. Harrison

carriers alone was the cause of the sickness, you will find for the defendant on the issue of sickness."

The contract in this case being in writing, we are inclined to the opinion that for its terms the writing alone should be looked to, and that it was not competent to import into the agreement by parol testimony a stipulation that the plaintiff and his wife were to be carried to their destination in the same car. But we also think that, if there was an agreement between the defendant company and the connecting lines for the use of the one car for the through trip, the initial carrier would be liable for the consequences of having furnished a car for the purpose which was not capable of being made comfortably warm. But it was the duty of its connecting carriers to use the highest degree of care to preserve the comfort of their passengers, and therefore we are of the opinion that, if the car furnished by the defendant company was capable of being made comfortable by such degree of care, it could not be held liable for their negligence in that particular. It follows, as we think, that as to the responsibility of the defendant for any injury the plaintiff and his wife may have received after leaving its line depended upon the character of the car in which they were carried. If it could have been heated by the exercise of that high degree of diligence demanded of the servants of its connecting carriers, the defendant would not be liable for the negligence of the latter. On the other hand, we are of the opinion that, if the car was not capable of being heated by the exercise of such diligence, the initial carrier would be responsible for the discomfort and any consequent injuries to the health of plaintiff and his wife accruing on that line. The latter part of the charge quoted seems to indicate that the learned trial judge had this distinction in view while instructing the jury. But, if so, in a previous portion of the charge he seems to have lost sight of the distinction. The instruction referred to is that which reads as follows: "Or if you believe the employees of the connecting carriers, or either of them, failed to furnish the plaintiff and his wife with a reasonably warm and comfortable car to ride in after they left Shreveport, and you believe the plaintiff and his wife were compelled to ride in a cold and uncomfortable car after leaving Shreveport, and you believe the servants of the connecting carriers, or either of them, were guilty of negligence (as that term is hereinbefore defined) in failing to furnish the plaintiff and his wife with a reasonably warm and comfortable car (if you find they so failed), and if you believe the negligence (if any) of the defendant on its own line as above explained concurring with the negligence (if any) of the connecting carriers, or either of them, was the cause of the sickness of the plaintiff and his wife, or either of them, then you will also find for the plaintiff such sum as will now in cash compensate the plaintiff for the physical pain and

Hudson v. Lynn & B. R. Co

mental anguish (if any) that he and his wife, or either of them, suffered and will suffer in consequence of such sickness (if any), and the effect (if any) of plaintiff's sickness upon his ability to labor and earn money, and all necessary and reasonable sums he has paid or incurred for medicine and doctors' bills for himself and wife in consequence of such sickness." This was capable of the construction (if, indeed, it admits of any other) that, if the defendant company failed to furnish a comfortable car to Shreveport, and if, after leaving that point, the connecting carrier also so failed, and the two causes combined and contributed to produce the sickness of which complaint was made in the petition, the defendant was liable for all the consequences of the combined neglect. We think that this was error.

Therefore the judgment is reversed, and the cause remanded.

HUDSON v. LYNN & B. R. CO.

(Supreme Judicial Court of Massachusetts, Essex, May 18, 1904.)

[71 N. E. Rep. 66.]

Wrongful Death—Right of Action—Application of Statute.

Pub. St. 1882, c. 112, § 212, giving a civil remedy for death by wrongful act, applies only to steam railroads.

Who Are Passengers—Failure to Pay Second Street Car Fare.*

A passenger on a street car ceases to be such on failing to pay a second fare when due.

Wrongful Death—Penal Statute—Due Diligence on Part of Deceased—Construction of Statute.

St. 1886, p. 117, c. 140, declaring that if, by reason of the negligence or carelessness of a corporation operating a street railway, or unfitness or negligence of its servants, the life of a passenger, or of a person being in the exercise of due diligence and not a passenger, is lost, the corporation shall be liable in damages to be recovered in an action of tort, is to be construed as if the proceeding were by indictment, as was the case in all the preceding statutes on the same subject, and the same proof of due diligence is required under this statute as would be required in a proceeding by indictment.

Same—Same—Same.

Where plaintiff's intestate was carried from defendant's street car in an unconscious condition, and laid by the side of the track, and afterwards run over by a car and killed, he was not in the exercise of due diligence within the meaning of St. 1886, p. 117, c. 140, authorizing the recovery of damages from a street railway company for negligence causing the death of any person not a passenger, being in the exercise of due diligence.

Report from Superior Court, Essex County.

Action by one Hudson, as administrator, against the Lynn & Boston Railroad Company. On report from the superior court. Judgment for defendant.

*As to who are, and are not, passengers, see foot-note appended to *Radley v. Columbia Southern Ry. Co.* (Ore.), 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153, where all the preceding authorities in this series are collected or referred to.

Hudson v. Lynn & B. R. Co

Frank D. Allen and W. L. Van Kleeck, for plaintiff.
Henry F. Hurlburt and Damon E. Hall, for defendant.

LORING, J. This is an action brought in 1898, under St. 1886, p. 117, c. 140, to recover a penalty for wrongfully causing the death of Joseph P. Pope, the plaintiff's intestate. The jury were warranted in finding that Pope took a car of the defendant at Scollay Square, Boston, for Lynn, about 8 o'clock in the evening of a day in September. He paid his first fare, and then fell into a stupor. When the car reached Revere, a second fare came due. The conductor tried to rouse him to collect the fare, without success, and, after collecting the other fares, in the language of one of the plaintiff's witnesses, "he came back to him, and shook him and kicked him, and couldn't wake him up." Thereupon the conductor and motorman put him off—"one took him by his head, and the other the feet"—and laid him down beside the tracks on the Lynn marshes. He was run over and killed by the same car on its return trip to Boston. Pope was a soldier in the regular army, quartered at Ft. Warren. The day of the accident was pay day, and Pope had been drinking on that afternoon. This was uncontradicted. But there was evidence from persons in the car with him that he did not appear to be intoxicated, and it may perhaps be assumed, if material, that the stupor could have been found not to be the result of drink.

The declaration contained six counts. Verdicts were directed for the defendant on the first three counts. The fifth count was a count for assault and battery. A verdict for the plaintiff in the sum of one dollar was returned on this count. With this the defendant is content. The fourth and sixth counts are stated to be counts under Pub. St. 1882, c. 112, § 212; but that act, so far as a civil remedy is given, applies to steam railroads only, and the corresponding act (St. 1886, p. 117, c. 140) is doubtless intended. In the fourth count the plaintiff alleges that his "intestate was then and there a person in the exercise of due diligence, and not a passenger," and in the sixth count that he was a passenger.

It is plain that the intestate ceased to be entitled to the rights of a passenger on failing to pay the second fare when due. That ends the plaintiff's right to recover on the sixth count.

It is also plain that there was no evidence of negligence in the operation of the car on its return trip, when the plaintiff's intestate was run over and killed; and the plaintiff, to recover, must recover on the defendant's negligence in putting the intestate off as he was put off, relying on the action of the car on its return trip as an instrument of injury which was the natural and probable result of his being put off. As to the case so made on the fourth count, the defendant asked the judge to direct a verdict for it. This was refused, and the case is here on a report as to the correctness of that,

among other rulings. A majority of the court are of opinion that this ruling should have been given.

At common law the death of a human being is not the subject of an action for damages. This was established in this commonwealth by the case of *Carey v. Berkshire Railroad*, 1 Cush. 475. In that case, which was decided in the year 1848, the difference is pointed out between the way in which the common law has been changed, and the wrongful death of a person has been dealt with, by Parliament in England, and by the Legislature of this commonwealth. It is first pointed out that in England, by a then recent act (9 & 10 Vict. c. 93, passed in 1845, and usually called "Lord Campbell's Act"), it was provided that if a person was killed under such circumstances that if he had been injured, and not killed, the defendant would have been liable, the executor or administrator of the person killed might bring an action for the benefit of the wife, husband, parent, or child, in which the jury might give such damages as they should think proportioned to the injury resulting from such death to the parties, respectively, for whose benefit the action is brought. It is then pointed out that in Massachusetts, by St. 1840, p. 224, c. 80, if the life of any passenger is lost through the wrongful act of a carrier, such carrier is made liable to a fine not exceeding \$5,000, nor less than \$500, to be recovered by indictment, to the use of the executor or administrator, for the benefit of the widow or heirs. This court then went on and said: "These statutes are framed on different principles, and for different ends. The English statute gives damages, as such, and proportioned to the injury, to the husband or wife, parents and children, of any person whose death is caused by the wrongful act, neglect, or default of another person; adopting, to this extent, the principle on which it has been attempted to support the present actions. Our statute is confined to the death of passengers carried by certain enumerated modes of conveyance. A limited penalty is imposed as a punishment of carelessness in common carriers. And as this penalty is to be recovered by indictment, it is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased. The penalty, when thus recovered, is conferred on the widow and heirs, not as damages for their loss, but as a gratuity from the Commonwealth." Indeed, the statute as to carriers (St. 1840, p. 224, c. 80) referred to in *Carey v. Berkshire Railroad*, was not the first act of the kind. The first act of this kind was a highway act passed a little over 50 years before the carrier act of 1840, p. 224, c. 80. That act provided that "if the life of any person shall be lost through the deficiency of the way, causeway or bridge, or for want of rails on any bridge, the county, town or persons, who are by law obliged

to repair and amend the same, shall be liable to be amerced in one hundred pounds, to be paid to the executor or administrator of the deceased, for the use of the heirs, devisees or creditors, upon a conviction before the court of general sessions of the peace, or Supreme Judicial Court, on a presentment or indictment of the grand jury." St. 1786, p. 250, c. 81, § 7, now Rev. Laws, c. 51, § 17.

The system of imposing a punishment for wrongfully causing death, in place of giving to the family of the deceased an action for compensation, has been adhered to and extended since the decision in *Carey v. Berkshire Railroad*, when it applied only to travelers on defective highways and to passengers of common carriers. In 1853 it was extended to cases where a steam railroad had wrongfully caused the death of "any person not being a passenger or employee * * * such person being in the exercise of due care and diligence." St. 1853, p. 622, c. 414, now Rev. Laws, c. 111, § 267. In 1864 the statute as to steam railroads was extended to street railways (St. 1864, p. 166, c. 229, § 37, now Rev. Laws, c. 111, § 267); in 1871, to collisions at grade crossings where the statutory signals were not given (St. 1871, p. 699, c. 352, now Rev. Laws, c. 111, § 268); and in 1883 employees of steam railroads were put on the same footing, in case they were killed by a steam railroad, as persons who were not passengers (St. 1883, p. 243, c. 243, now Rev. Laws, c. 111, § 267). Employees of street railways had been put on that footing by St. 1864, p. 166, c. 229, § 37, and in 1897 all persons and corporations were put on the same basis as steam railroads and street railways. St. 1897, p. 388, c. 416, now Rev. Laws, c. 171, § 2. It will be plain, from what is hereafter said, that the employer's liability act, in what is now Rev. Laws, c. 106, § 73, which was taken from the English act following Lord Campbell's act, is so far modified by section 74, in spite of what is now section 72, as to be a part of this system.

In *Commonwealth v. Boston & Lowell Railroad*, 134 Mass. 211, it was decided that, where a steam railroad wrongfully causes the death of a passenger, the case is within the act, and the railroad company is to be punished, although the passenger is not in the exercise of due care, and could not have recovered, had he been injured only, and not killed. This conclusion was reached on the ground that under the Massachusetts system the corporation is to be punished for wrongfully causing the death of a passenger or other person described in the several acts, and that in this respect it is entirely different from the English system, which generally has been followed in nearly all the states of the United States other than Maine and New Hampshire. The reason for the decision is summed up in this sentence, at page 213: "If the person whose negligence caused the death had been indicted for manslaughter, the negligence of the deceased

would not have been a defense. *Regina v. Longbottom*, 3 Cox, C. C. 439. *Regina v. Swindall*, 2 Car. & K. 230." It is also pointed out in the opinion in *Commonwealth v. Boston & Lowell Railroad* that the case of a death at a grade crossing, originally brought within the system by St. 1871, p. 699, c. 352, is another instance where the liability of the railroad to be punished is not coterminous with the right which the deceased would have had to damages, had he been injured only and not killed. In case of a death at a grade crossing, the railroad is punished, "unless it is shown that, in addition to a mere want of ordinary care, the person injured * * * was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury." In the year 1881, by St. 1881, p. 521, c. 199 (that is to say, after the system had been in operation and applicable to the death of a traveler on a defective highway for nearly 90 years, and had been made applicable to many other cases since 1840, when it was extended to carriers), a civil remedy was given, in addition to the remedy by indictment, in all cases except where death was caused by a street railway, namely, in case of steam railroads (section 1), grade crossing accidents (section 2), carriers (section 3), and defects in highways (section 4). And by St. 1886, p. 117, c. 140, under which the action now before us was brought, the omission of street railways from the act of 1881 was remedied. Before St. 1886, p. 117, c. 140, the only remedy in case of street railways was by indictment. *Holland v. Lynn & Boston Railroad*, 144 Mass. 425, 11 N. E. 674. Two years after it was established in *Commonwealth v. Boston & Lowell Railroad* that an indictment could be maintained for wrongfully causing the death of a passenger not in the exercise of due care, it was decided that an action of tort could be maintained, under St. 1881, p. 521, c. 199, for the death of a passenger who was not in the exercise of due care. *Merrill v. Eastern Railroad*, 139 Mass. 252, 29 N. E. 666.

This conclusion was reached on the ground that, so far as the liability of the defendant corporation is concerned, "no distinction can be made between an indictment and an action of tort under Pub. St. 1882, c. 112, § 212." *Merrill v. Eastern Railroad*, 159 Mass. 252, 257, 29 N. E. 666. This case was followed in *McKimble v. Boston & Maine Railroad*, 139 Mass. 542, 2 N. E. 97, and *Id.*, 141 Mass. 463, 5 N. E. 804. Before and since the decision in *Merrill v. Eastern Railroad*, it has been stated by the court that the effect of these two statutes (St. 1881, p. 521, c. 199, and St. 1886, p. 117, c. 140) is to give a civil remedy for the recovery of this penalty, which is imposed by way of punishment, in addition to the remedy by indictment. In *Kelley v. Boston & Maine Railroad*, 135 Mass. 448, 449, C. Allen, J., speaking

Hudson v. Lynn & B. R. Co

for the court, said: "But no criminal jurisdiction existing under the earlier statute [St. 1874, p. 396, c. 372, § 163] is taken away by St. 1881, p. 521, c. 199; and the purpose of the later statute was to give a new remedy to the party by a civil action, in addition to that already existing by indictment." In *Littlejohn v. Fitchburg Railroad*, 148 Mass. 478, 482, 20 N. E. 103, 104, 2 L. R. A. 502, Holmes, J., speaking for the court, said: "But the present action is statutory and penal in its character. The statute does not extend the liability for personal injuries to those injuries which cause death, as in *Little v. Dusenberry*, 46 N. J. Law, 614, 50 Am. Rep. 445, where, also, so far as appears, the defendant may have been negligent. It creates a liability of a different nature. The action which it gives to the administrator is merely a substitute for the indictment also provided for, and it is expressly enacted that the damages shall be 'assessed with reference to the degree of culpability of the corporation, or of its servants or agents.'" In *Doyle v. Fitchburg Railroad*, 162 Mass. 66, 71, 37 N. E. 770, 771, 25 L. R. A. 157, 44 Am. St. Rep. 335, Morton, J., in delivering the opinion of the court, said: "Originally the remedy was by indictment. Afterwards it was extended to an action of tort. St. 1871, p. 740, c. 381, § 49; St. 1874, p. 396, c. 372, § 163; St. 1881, pp. 521, 522, c. 199, §§ 1, 6. But only one of the remedies can be pursued by the executor or administrator. And whether the amount is recovered by indictment or in an action for tort, it goes in either case to the widow and children and next of kin, and the executor or administrator has no interest in it. It is in substance a penalty given to the widow and children and next of kin, instead of to the commonwealth, and as such the intestate could not release the defendant from liability for it." And finally, it was held in *Worcester & Suburban Street Railway v. Travelers' Ins. Co.*, 180 Mass. 263, 62 N. E. 364, 57 L. R. A. 629, 91 Am. St. Rep. 275, that a policy insuring the plaintiff "against loss from liability to every person who may * * * accidentally sustain bodily injuries * * * under circumstances which shall impose upon the insured a common-law or statutory liability for such injuries" did not cover sums paid by the railway for wrongfully causing the death of some of its passengers. The conclusion which has been reached as to the character of these two acts (St. 1881, p. 521, c. 199, and St. 1886, p. 117, c. 140) could not have been avoided. It had to be held that these acts gave a civil remedy for the recovery of a penalty imposed by way of punishment.

Where a plaintiff's rights are invaded by the wrongful act of a defendant, the question, and the only question, is, how great was the injury done to the plaintiff? But where a defendant is to be punished for a wrongful act done by him, the question, and the only question, is, how serious was the

defendant's wrongdoing? and the amount of injury inflicted upon the deceased, except so far as it gives character to the wrongdoing of the defendant, is altogether immaterial. At common law damages are given for the full amount of the injury done to the plaintiff, where he has an action for a violation of his rights. And where the amount recoverable in such an action is limited by statute, as it is in this commonwealth where a person is injured, but not killed, from a defect in a public way (Rev. Laws, c. 51, § 18), or where an action is given by the employer's liability act (St. 1887, p. 900, c. 270, § 3, now Rev. Laws, c. 106, § 74) for an injury short of death, the question for the jury is, what damages will compensate the plaintiff for the injury done him, not exceeding the limited amount which by statute can be imposed? Where a penalty is imposed by way of punishment in a criminal prosecution, the amount of the penalty is fixed by the presiding judge in passing sentence. In case of the statutes we have been considering, imposing a penalty for wrongfully causing death, no statutory provision was necessary as to how the amount of the penalty to be imposed in a particular case was to be ascertained, and none was made, so long as the only remedy provided was by way of indictment. As was stated in *Carey v. Berkshire Railroad*, 1 Cush. 475, 480, 48 Am. Dec. 616: "A limited penalty is imposed as a punishment of carelessness in common carriers. And as this penalty is to be recovered by indictment, it is doubtless to be greater or smaller, within the prescribed maximum and minimum, according to the degree of blame which attaches to the defendants, and not according to the loss sustained by the widow and heirs of the deceased." But when it was provided by statute that an action of tort could be maintained where death was caused through the wrongful act of the defendant, it thereby became the province of the jury to fix the amount of the penalty to be imposed, and it became necessary to specify how the amount of it should be assessed. It was provided that the amount to be recovered in the action of tort was "to be assessed with reference to the degree of culpability of said corporation, or of its servants or agents." That fixed the character of the action of tort under these two acts. St. 1881, p. 521, c. 199, and St. 1886, p. 117, c. 140. By that provision the effect of these two acts was to give a civil remedy for the recovery of a penalty imposed by way of punishment. It is not uncommon for an informer to be allowed by statute to maintain a civil action for the recovery of a penalty imposed as a punishment. An action under St. 1881, p. 521, c. 199, or St. 1886, p. 117, c. 140, is an action of the same kind; the only difference being that the penalty in these actions goes, not to an informer, but to the family of the deceased.

The character of these acts imposing a penalty for wrongfully causing death does not seem to have been present in

Hudson v. Lynn & B. R. Co

the mind of the court when it was assumed in *McCreary v. Boston & Maine Railroad*, 153 Mass. 300, 26 N. E. 864, 11 L. R. A. 359, that the corporation was liable under the statute where an employee who is on its tracks contrary to law is killed through the wanton and reckless acts of a steam railroad corporation, because under those circumstances he could have recovered, had he been injured, and not killed. The language of St. 1853, p. 622, c. 414, § 2, now Rev. Laws, c. 111, § 267, is to the contrary. See *Dillon v. Connecticut River Railroad*, 154 Mass. 478, 479, 28 N. E. 899. This assumption is repeated in *McCreary v. Boston & Maine Railroad*, 156 Mass. 316, 31 N. E. 126. In not one of these three cases was there any question of the effect of wanton and reckless acts, and the assumption was not necessary to the decision in any one of them.

Inasmuch as "no distinction can be made between an indictment and an action of tort," so far as the liability of the defendant is concerned, the question in the case at bar is this: If the defendant railroad had been indicted for causing the death of Joseph P. Pope, would the evidence introduced at this trial have warranted a finding that the government had proved the averment (which it must have made in the indictment) that Pope, when put off the car, was "in the exercise of due care and diligence"? By the testimony of the plaintiff's witnesses, Pope was then in such a stupor that he could not be waked up either by shaking or kicking. We are of opinion that a person in such condition could not have been found to have been "a person * * * in the exercise of due care and diligence," had an indictment been resorted to, and therefore cannot be found to have been "in the exercise of due diligence," as he was alleged to have been in the fourth count of the declaration in this action of tort. We use the words "due diligence" in place of the words "due care" found in the Revised Laws (Rev. Laws, c. 111, § 267) merely because those are the words of the count now in question (the fourth count), and of St. 1886, p. 117, c. 140, under which this action was brought, and not because there is any distinction between those words and the words of Rev. Laws, c. 111, § 267. Since the Massachusetts acts are exactly what Lord Campbell's act is not, it is of no consequence that, in states where Lord Campbell's act has been enacted, a recovery can be had under circumstances like those now in question. We refer to *L. & N. R. R. v. Johnson*, 108 Ala. 62, 19 South. 51, 31 L. R. A. 372; *Guy v. New York, Ontario & Western Railroad*, 30 Hun, 399; *Gill v. Rochester & Pittsburgh Railroad*, 37 Hun, 107; *Louisville & Nashville Railroad v. Ellis' Adm'r*, 97 Ky. 330, 30 S. W. 979; *Weymire v. Wolfe*, 52 Iowa, 533, 3 N. W. 541; *Southern Railway v. Webb*, 116 Ga. 152, 42 S. E. 395, 59 L. R. A. 109; *Haug v. Great Northern Railway*, 8 N. D. 23, 77 N. W. 97, 42 L. R. A. 664, 73 Am. St. Rep. 727; *Chicago City Railway v. O'Donnell*

(Ill.) 69 N. E. 882. In each of these states there are acts like Lord Campbell's act. See Civ. Code Ala. 1896, c. 2, §§ 26, 27; Rev. St. N. Y. (Birdseye) vol. 1, p. 934; Ky. St. 1899, § 6; 2 McClain's, Ann. Code Iowa, § 3731, and notes; 2 Code Ga. 1895, § 3828; Rev. Codes N. D. 1895, §§ 5974-5976; Rev. St. Ill. 1889, c. 70, §§ 1, 2. Neither are the cases of any assistance in which it has been held that a plaintiff could have recovered who had been injured without being killed, under circumstances like those now before us. See *Evans v. St. Louis, Iron Mountain & Southern Railroad*, 11 Mo. App. 463; *Kline v. Central Pacific Railway*, 37 Cal. 400, 99 Am. Dec. 282; *Conolly v. Crescent City Railroad*, 41 La. Ann. 57, 5 South. 259, 6 South. 526, 3 L. R. A. 133, 17 Am. St. Rep. 389. The Legislature deliberately did not adopt as the test whether the railroad is to be punished the liability which the defendant would have been under to make compensation, had the deceased been injured, only, and not killed. *Commonwealth v. Boston & Lowell Railroad*, 134 Mass. 211; *Merrill v. Eastern Railroad*, 139 Mass. 252, 29 N. E. 666. It is to be noted that no one of these cases goes further than to hold that in such a case the plaintiff can recover. None of them takes the further step that, when he does recover in such a case, he recovers on the ground that he was in the exercise of due care, and not on the ground that he is excused from alleging and proving due care by the fact that when insensible he was exposed to the danger in question by the wrongful act of the defendant. It is also to be noted that *Aiken v. Holyoke Street Railway*, 184 Mass. 269, 68 N. E. 238, is a case of direct injury through wanton and reckless acts. *Aiken v. Holyoke Street Railway* is an authority that in such a case a plaintiff need not allege or prove that he was in the exercise of due care. There is no case in which it is held that, where wanton and reckless acts indirectly cause damage to the plaintiff, the rule of *Aiken v. Holyoke Street Railway* applies.

We do not think it profitable to enter into a discussion of these two questions. The words which we have to construe are words used in a statute imposing a punishment to be inflicted originally only on an indictment being found, and words which are not to receive the same construction as if contained in an indictment. In addition to that, in construing these words it is settled that the test is not whether the deceased could have maintained an action, had he been injured, and not killed. The Legislature might have provided that steam railroads and street railways should be punished whenever they caused the death of a human being. But the Legislature did not choose to do that. It chose to confine the liability to persons (not passengers) who were "in the exercise of due care and diligence," to quote the words of the original act of St. 1853, p. 622, c. 414, § 1, and who are "in the exercise of due diligence," to quote the

Jones v. United Railways & Electric Co

words of the act now immediately in question (St. 1886, p. 117, c. 140), and the words of the fourth count of the declaration in the case at bar. If it be the fact that a person in such a stupor as Pope was in can be said to be, by legal intentment, negatively and constructively in the exercise of due care, within the meaning of those words when used in a declaration to recover compensation for an injury done to the plaintiff, we are of opinion that he cannot be held to be in the "exercise of due diligence," within the meaning of those words in St. 1886, p. 117, c. 140. It is settled that these words in that statute mean what they have meant and still mean in an indictment under St. 1853, p. 622, c. 414, § 1, now Rev. Laws, c. 111, § 267, and that they are not to be construed as invoking for the test of the defendant's liability under the statute its liability at common law in case of an action for compensation for an injury short of death. Construing these words in the light of what we have shown to be settled by decision, they cannot be held to mean what for the purposes of this discussion we assume, without deciding, that similar words mean by legal intentment in an action for compensation, but must be taken to have here their ordinary acceptation, and to mean that the person killed, if not a passenger, must have been actively and actually in the exercise of due diligence.

By the terms of the report, the entry must be, in the opinion of a majority of the court: Judgment for the defendant on the fourth and sixth counts.

JONES v. UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE.

(Court of Appeals of Maryland, March 22, 1904.)

[57 Atl. Rep. 620]

Injury to Passenger—Presumption of Negligence—Contributory Negligence—Burden of Proof.*

Where a passenger in an open street car was entirely within the car, though his elbow rested on a rail at the side, his injury by a collision with a passing wagon raised a presumption of negligence on the part of the street car company, and placed on it the burden of showing contributory negligence.

Same—Contributory Negligence—Opinion Evidence—Noise of Approaching Wagon.

In an action for injury to a passenger in an open street car, from being struck by a marble slab projecting from a passing wagon, a witness' testimony that, in his opinion, the noise of the wagon scraping

*Presumption of negligence from injury to passenger, see foot-note appended to *McCord v. Atlanta & C. Air Line R. Co.* (N. Car.), 10 R. R. R. 275, 33 Am. & Eng. R. Cas., N. S., 275, where all the preceding authorities in this series are collected or referred to; foot-note appended to *Peck v. St. Louis Transit Co.* (Mo.), 11 R. R. R. 16, 34 Am. & Eng. R. Cas., N. S., 16; foot-note appended to *Chicago City Ry. Co. v. Carroll* (Ill.), 11 R. R. R. 35, 34 Am. & Eng. R. Cas., N. S., 35.

Jones v. United Railways & Electric Co

against the car before the passenger was struck was loud enough to be heard by any one in the car who had any hearing, was admissible.

Same—Same—Duty to Look Out for Danger.†

A passenger in a street car is not bound to be constantly on the lookout for danger, but has the right to presume that the company will use the high degree of care for his protection which the law requires.

Same—Same—Noise of Approaching Wagon—Question for Jury.

Where, in an action for injury to the plaintiff while a passenger in an open street car, a witness testified that the wagon carrying the slab which struck plaintiff scraped the side of the car, making a noise that could be heard by any one in the car, before the accident, but the plaintiff testified that he did not hear it, it was a question for the jury whether he was guilty of contributory negligence.

Appeal from Superior Court of Baltimore City; Charles E. Phelps, Judge.

Action by Edward Jones against the United Railways & Electric Company of Baltimore. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, PAGE, PEARCE, SCHMUCKER and JONES, JJ.

John P. Poe, for appellant.

J. Pembroke Thom and George D. Penniman, for appellee.

SCHMUCKER, J. The appellant sued the appellee in the superior court of Baltimore City to recover damages for an injury suffered by him while riding in one of its electric street cars. At the close of the plaintiff's evidence the court granted the defendant's prayer instructing the jury that the uncontradicted evidence showed the plaintiff to have been guilty of negligence directly contributing to the accident, and directing them to render a verdict for the defendant. The verdict was rendered accordingly, and from the judgment entered thereon the plaintiff appealed.

The plaintiff testified in his own behalf as follows: About 5 o'clock on the afternoon of August 20, 1902, he got into the car at Govanstown, to go to his home in Baltimore, and paid his fare. The car was a long eight-wheeled one, with an aisle through its center, and the seats placed in pairs on the two sides of the aisle. The windows and sides of the car, with the exception of the upright posts, had been removed, so as to make it an open car. Between each two of the posts along the sides of the car there was a low wire netting with a narrow brass rail on top of it. All of the seats were double seats except those at the two ends of the car, where there was a double seat on one side of the aisle and a single seat on the other side. The plaintiff, on entering the car, took the single seat at its rear end. While sitting there, with his elbow on the brass railing, but entirely within the car, the upper part of his arm, near the shoulder, was struck and in-

†See foot-note appended to *Mease v. United Traction Co. (Pa.)*, 2 R. R. R. 272. 35 Am. & Eng. R. Cas., N. S., 272.

Jones v. United Railways & Electric Co

jured by a marble slab which projected from a passing wagon that collided with the car. His recollection was that the car and wagon were going in opposite directions at the time of the accident. He neither saw nor heard the wagon before the stone struck him, nor had he any warning of its approach.

John M. Russell, an eyewitness of the accident, testified for the plaintiff that he was sitting in the car on the opposite side from the plaintiff, and saw the latter struck by the stone slab. His description of the accident was as follows: "Well, going along up Fayette street I heard a screeching noise, which drew my attention—a kind rubbing noise until it got louder; and I noticed this piece of marble some distance from the colored man, and it was screeching along the car, and it was a wagon loaded with slabs of marble in it, and the slabs projected over the wagon, and this slab that was out must have been a little further than the others. I don't know whether they might have been all out. I didn't notice that; but when it got close I seen it when it caught the old fellow's arm and kind of pulled him around that way [indicates]; and after it crossed Calvert street I thought the conductor had seen it, too, for he was standing on the back platform." He further testified that as the marble slab passed along the posts at the side of the car it struck each post and made a loud screeching noise, "quite enough to attract anybody's attention on board that car; * * * anybody who had any hearing at all"; that the two vehicles were going in the same direction at the corner of Calvert and Fayette streets, and that "the car had stopped on Fayette street and started before it caught this wagon; the wagon was going on, and, of course, it got into the narrows; there was where it caught the car; it caught the wagon right in the narrows, and the further they both went the tighter they got"; that the conductor did not stop the car until it got to St. Paul street. The witness took the plaintiff from the car at Charles street, and assisted him to a hospital. He seemed to be in a dazed condition at the time.

The appellant, when injured by the collision of the car with the stone wagon, was a passenger in the car, had paid his fare, and was occupying one of the seats provided by the appellee for the use of its passengers. His elbow, although resting upon the brass rail at his side, did not project beyond the car. Under these circumstances the law in this state is clear that the occurrence of the accident by which he was injured raised the presumption of negligence on the part of the appellee, and the onus was cast upon the latter to show that the injury did not result from its negligence, or that the appellant was himself guilty of negligence directly contributing to its occurrence. *R. R. Co. v. State, to Use Mahone*, 63 Md. 135; *B. & O. R. R. Co. v. Hauer*, 60 Md. 462; *B. & P. R. R. Co. v. Swann*, 81 Md. 400, 32 Atl. 175, 31

Jones v. United Railways & Electric Co

L. R. A. 313; *Hewes v. P. W. & B. R. Co.*, 76 Md. 159, 24 Atl. 325.

The appellee offered no evidence in its own behalf, but asked the court to rule that the uncontradicted evidence offered on the part of the plaintiff established the fact that he was guilty of such contributory negligence as debarred his right to recover. The learned judge granted the prayer of the appellee, but we are unable to agree with his view of the case. The appellant distinctly testified that he neither saw nor heard the collision between the stone on the wagon and the side posts of the car, and was unaware of the approaching danger until he was struck and injured. There is no direct contradiction of this testimony. It is true that the witness Russell, who was on the opposite side of the car, both saw and heard the collision, and said that, in his opinion, it made a noise loud enough to be heard by any one in the car who had any hearing at all. This evidence as to the loudness of the noise, although in the nature of an opinion, was proper to be considered by a jury along with the other testimony, but it does not amount to a contradiction or disproof of the plaintiff's testimony already mentioned. We held in *Hogeland's Case*, 66 Md. 149, 7 Atl. 105, 59 Am. Rep. 159, as well as in more recent cases decided upon its authority, that one who is in a position of danger—as when nearing a railroad crossing—must exercise precautions appropriate to his situation, and must look and listen for approaching trains, and that under such circumstances it will not do for him to say that he looked and did not see, and listened and did not hear, the train, when the facts of the case show that, if he had looked or listened with the requisite care, he must have seen or heard it. But a passenger traveling in a street car is not bound as is a person approaching a dangerous crossing to keep all of his senses alert, and be constantly on the lookout for danger. He has, while exercising ordinary care and prudence on his own part, a right to presume that the railway company in whose cars he is traveling will discharge its duty towards him as its passenger and exercise that high degree of care for his protection which the law requires of it. It may be that, with all of the facts of the case before them, a jury would come to the conclusion that the appellant was guilty of such contributory negligence as to deprive him of the right of recovery, but, in our opinion, that fact does not at present appear from the uncontradicted evidence now in the case. The mere belief expressed by the one witness Russell that any one in the car could have heard the noise of the collision before the stone projecting from the colliding wagon reached the seat in which the appellant sat might not, in the opinion of the jury, be sufficient to destroy the value of the latter's testimony that he neither saw nor heard it before he was struck. The question of negligence in cases like this is primarily one

Marx v. Louisiana Western R. Co

for the jury under proper instructions from the court defining the degree of care required of each party. It is only where the facts are undisputed, or where but one reasonable inference can be drawn from them, that it is proper to take the case from the jury. *B. & O. R. R. v. Dougherty*, 36 Md. 366; *Cumb, Valley R. R. v. Maugans*, 61 Md. 60, 48 Am. Rep. 88; *Cooke v. Baltimore Traction Co.*, 80 Md. 558, 31 Atl. 327; *Con. Ry. Co. v. Rifcowitz*, 89 Md. 342, 43 Atl. 762.

We think appellant is entitled to have his case passed on by a jury, and we will therefore reverse the judgment.

Judgment reversed, with costs, and new trial awarded.

MARX v. LOUISIANA WESTERN R. CO.

(Supreme Court of Louisiana, May 23, 1904.)

[36 So. Rep. 862.]

Ejection of Passenger—Expiration of Ticket—Delayed Train.

When a railroad company fails to run its train on time, and the ticket holder boards the first passenger train thereafter, he is not to be ousted from the train on the ground that the limit of the ticket had expired.

Same—Same—Same.

The railroad company is without right to relief on the ground that the limit of the ticket had expired by limitation, it alone having caused the delay to the passenger.

Same—Same—Same.

The train due was late, and, in addition, passed the flag station without stopping as expected at the flag station. These were mishaps into which inquiry should have been made before ejecting the passenger.

Same—Same—Same.*

The passenger properly delivered his ticket, and explained why he was not on the first train. This was enough to place the one in charge on inquiry, and to stay expulsion until he could find out whether the passenger stated the truth or not.

Damages.

The amount of damages as fixed does not appear excessive.

Ejection of Passenger—Damages—Mental Suffering.†

The wrongful expulsion of a passenger from a train is not only a breach of contract, but an offense or tort, and the elements of damages include compensation for mental suffering arising from the humiliation and degradation of being expelled in the presence of other passengers. *Fetter, Carriers of Passengers*, vol. 2, p. 1341 et seq.

(Syllabus by the Court.)

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Edmund Denis Miller, Judge.

Action by Joseph Marx against the Louisiana Western

*See foot-note appended to *Brown v. Rapid Ry. Co.* (Mich.), 9 R. R. R. 802, 32 Am. & Eng. R. Cas., N. S., 802; *Norman v. Southern Ry. Co.* (S. Car.), 8 R. R. R. 307, 31 Am. & Eng. R. Cas., N. S., 307; *Saunders v. Southern Ry. Co.* (C. C. A.), 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596 (whether acceptance of ticket includes assent to its printed conditions).

†See foot-note appended to *Gillespie v. Brooklyn Heights R. Co.* (N. Y.), 12 R. R. R. 66, 35 Am. & Eng. R. Cas., N. S., 66; foot-note appended to *Schmidt v. Cleveland, etc., Ry. Co.* (Ky.), 12 R. R. R. 149, 35 Am. & Eng. R. Cas., N. S., 149.

Marx v. Louisiana Western R. Co

Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Denegre, Blair & Denegre and Pujo & Moss, for appellant.
Sompayrac & Toomer and Lyle Saxon, for appellee.

BREAUX, C. J. Plaintiff, Joseph Marx, brought this suit against the defendant for the sum of \$5,018.90 damages he alleges to have sustained by his ejectment from one of its cars by its conductor. Judgment was rendered by the district judge for plaintiff in the amount of \$250, with legal interest from date of judgment until paid.

The statement of plaintiff is that on the 19th day of August, 1903, wishing to take passage on defendant's train from Vinton to the town of Welsh, La., he called on the agent of the company at the station at Vinton at about 11 o'clock p. m., and bought from him a railroad ticket, for which he paid the sum of \$1.40.

That his intention at the time he bought the ticket was to leave on the east-bound train due at Vinton at 11:35; that is, about half an hour after he had bought his ticket for the trip.

The complaint of plaintiff, in short, is that he bought a passenger ticket from the defendant for the trip, and that no train was furnished him to ride on, from the place at which he bought this ticket to the place at which it was his purpose to go at the time that he bought it.

Further, that he took the first train that stopped after he had bought the ticket.

The defendant seeks to meet this complaint by urging, as relates to the facts, that the ticket in question was good only for one day, and that when tendered by plaintiff to the conductor it had expired by limitation; that the ticket on its face sets forth that it shall be void after the date stamped thereon.

Defendant charges plaintiff with having failed to meet the train that arrived on the night of August 19, 1903, and particularly avers "that on the next day, after said ticket had expired, he boarded another of defendant's trains, without requesting its agent that the price of the ticket be refunded, or that another issue in its stead."

The foregoing is an excerpt from defendant's answer.

Defendant avers that its conductor requested plaintiff to get off at Edgerly, a station that is but a few miles distant from Vinton, where plaintiff had boarded the train, and procure another ticket, and that he informed plaintiff that his ticket issued to him at Vinton would be redeemed at any station. This, defendant says, plaintiff absolutely refused to do. Defendant denies that plaintiff was violently ejected or subjected to humiliation.

It is amply shown—besides, the fact is not contested—that the train due at Vinton at 11:35 was late, and arrived at that

Marx v. Louisiana Western R. Co

place at 4:30 o'clock in the morning. It did not stop at all at that place. Although the local agent attempted to signal the train, in his energetic attempt he broke his lamp by striking it against an obstacle near him.

We will here state that Vinton is a flag station, at which the train will not stop unless it is flagged, or unless it has passengers for the place.

On this occasion plaintiff was informed that the train would surely stop, because there was a dead man aboard, consigned from Galveston to Vinton. It happened that the corpse was not aboard, as it was sent only the next day by another train, and in consequence of the mishap to the lamp and the delay in sending the corpse the train passed on without stopping.

Another train came on about 8 o'clock, which plaintiff boarded. When called upon for his ticket, he handed the ticket bought by him for passage on the 11:35, which the conductor accepted and punched. A little time afterward the conductor returned to where plaintiff was, and demanded the fare, and tendered back the ticket he had punched, as he states, in error. Plaintiff refused to receive the ticket tendered.

The conductor then said to plaintiff that he would have to get a new ticket or pay his fare. Upon arriving at Edgerly, plaintiff was ejected from the train in a manner, we infer, more emphatic than polite.

The conductor testified that he had the authority, had he so chosen, to let plaintiff go to his place of destination on the ticket which plaintiff held, and which he had already punched.

One of defendant's grounds is that plaintiff did not bring his ticket to the office of the local agent the morning following the day on which he bought it, to have it redeemed, in accordance with notices that are posted in the waiting room.

The poster in question affords no ground to escape from liability. It was incumbent upon the railroad to furnish transportation. This it failed to do.

Passengers who are delayed in some way may be informed that the carrier will not take advantage of their delay that they can have their tickets redeemed at the office.

It is different when the carrier fails to furnish the transportation for which the ticket calls.

True, a railroad company is not responsible in damages for ejecting a passenger when the ticket he tenders for his fare had expired.

Here, however, the passenger had done all that was necessary to be done by boarding the first train that stopped at the depot at which he was waiting the train, and should not have been ejected. The conductor knew that Vinton was only a flag station, and he should have had enough confidence in human nature to believe plaintiff's statement a

Marx v. Louisiana Western R. Co

sufficient length of time to enable him to find out whether or not the facts are as stated.

Had he been less hasty in expelling the passenger, and had he made needful inquiry, he would have found out that he was telling the truth.

The defendant railroad sets up that the passenger should have paid the cash, or that he should have gone out at Edgerly and procured himself a ticket in exchange for the one he held.

In view of the facts, it did not devolve upon the plaintiff to hurry out and nervously explain to the agent the plight in which he was, and to request him to please hasten and give him a ticket in return for the one he held.

The passenger had authority to stand on his right. He was in the train that the defendant company supplied after he had bought his ticket. It was not just to expect him to do some running or fast walking for another ticket under the circumstances.

For reasons stated, the judgment is affirmed.

On Rehearing.

(June 20, 1904.)

LAND, J. Defendant complains that the quantum of damages allowed by the jury and affirmed by this court is excessive.

Plaintiff sued for \$5,000 damages and recovered \$250. We affirmed the verdict and judgment applied from. We held that the ticket held by plaintiff entitled him to transportation to his destination, and that his ejection from the train at a way station was wrongful.

The contention on rehearing is that the quantum should be reduced to \$4.40, the actual pecuniary loss.

The defendant cites the *Judice Case*, 47 La. Ann. 255, 16 South. 816. In that case there was merely a passive breach of the contract of carriage, consisting of the failure of the conductor to stop the train at the station called for by the passenger's ticket.

In *Bader v. Southern Pacific Co.*, 52 La. Ann. 1060, 27 South. 584, cited by defendant, damages to the amount of \$250 was allowed by this court. In that case the passenger was put off at a station short of his destination, through an honest mistake of the conductor, and we held that the passenger could not recover for loss or injury which was not the consequence of the wrong done him, but of his own willful acts of omission or commission. The actual pecuniary loss in that case was trifling, as the passenger could have gone to his destination by the next train, and time was of no consequence to him. We said:

"The railroad company made a mistake, and they [it] must suffer the consequences. But the injury done to the plaintiff was not intentional.

Marx v. Louisiana Western R. Co

"There were no circumstances of aggravation connected with it, and the suffering of which the plaintiff complains was not so much the consequence of the mistake as of his willful purpose to make the situation worse instead of better."

Yet this court allowed \$250 as damages, not as pecuniary loss flowing from the breach of the contract, but as a reparation for a wrongful act.

We assume that the damages were allowed for mortification and humiliation resulting from the ejection from the train.

In *Dave v. R. R. Co.*, 47 La. Ann. 576, 17 South. 128, where the passenger was carried about 1,800 feet beyond his station on a rainy night, and was then ejected, he was allowed \$50.

Hence the authorities cited by defendant's counsel tend to show that, when a passenger is wrongfully ejected from a train or put off at an improper place, his right of recovery is not limited to actual pecuniary loss.

We have held that, where there has been no ejection, and the negligence consists simply of carrying a passenger beyond his station, "expenses occasioned" and "inconvenience" are elements of damages. *Airey v. Pullman Car Co.*, 50 La. Ann. 648, 23 South. 512. In that case \$50 were allowed.

Fetter in "Carriers of Passengers" states the generally accepted doctrine as follows:

"A passenger whose ticket is wrongfully refused on a train, and who is expelled on refusal to pay fare a second time, is entitled to recover the cost of a ticket from the place where he was ejected to the place of destination. He is also entitled to recover such damages as he may have sustained on account of the delay occasioned by the expulsion, and all additional expenses necessarily incurred thereby, as well as reasonable damages for the indignity to which he was subjected in being expelled from the train." *Id.* vol. 2, p. 1341. We applied this rule in *Bader v. Southern Pacific Co.*, 52 La. Ann. 1060, 27 South. 584.

The wrongful expulsion of a passenger from a train is not only a breach of contract, but an offense or tort, and mental suffering is an element of compensatory damages. Considering this as an element, we are not prepared to hold that the quantum of damages allowed by the verdict is excessive.

For the above reasons, the application for a rehearing is refused.

FOSTER v. SEATTLE ELECTRIC CO.

(Supreme Court of Washington, May 31, 1904.)

[76 Pac. Rep. 995.]

Carriers of Passengers—Degree of Care—Instruction.

In an action for injuries to one attempting to board a street car, a charge that defendant's servants were not required to exercise the highest degree of care possible to avoid an accident, but only the highest degree of care reasonably practicable under the circumstances, and consistent with the proper discharge of their other duties, and that by the term "highest degree of care" was meant the degree of care which would be exercised under like circumstances by careful and experienced employees, was not open to the objection of reducing the degree of care required of defendant's servants while looking after passengers to that of ordinary care, and of excusing the conductor from looking after plaintiff while he was engaged in performing his duties.

Same—Same—Street Railways.*

A street car company is not an insurer of the safety of its passengers, but, when it exercises towards them the highest degree of care consistent with the practical conduct of its business, it performs towards them its full legal duty, and is not liable even for injuries which might have been foreseen and prevented, if the means required to prevent them would involve a burden amounting to a practical prohibition of its business.

Same—Same—Same—Harmless Error.

In an action against a street railway company, a charge, without further qualification, that the duty of the conductor and motorman towards the passengers on the car is to exercise the highest degree of care consistent with the proper discharge of all their other duties, while incorrect, was not reversible error, where there was no evidence to the effect that the injury to plaintiff was caused by the fact that the conductor or motorman was engaged in the performance of another duty, and therefore could not look out for plaintiff.

Injury to Intending Passenger—Negligence of Motorman—Obedience to Conductor's Signals.

A motorman who obeys signals given him by the conductor, and who does not see or know that to obey such signals will result, or will be likely to result, in an injury to an intending passenger, is guilty of no negligence.

Same—Negligence of Conductor.†

It was negligence for a street car conductor, no matter what other duty he was performing, to start his car at the time an intending passenger was in such a position that he could have seen her in the act of boarding the car, had he looked in her direction.

Same—Same.

A street car conductor was not negligent in giving the signal to start the car, where he ceased other work while the car was stopped, and looked back to the entrance to ascertain if any one else was entering, or desirous of entering, and saw no one.

Same—Contributory Negligence.‡

A person who approached a street car from the rear in a crowded

*As to the degree of care required of a carrier of passengers, see foot-note appended to *Palmer v. Warren St. Ry. Co.* (Pa.), 10 R. R. R. 597, 33 Am. & Eng. R. Cas., N. S., 597, where all the preceding authorities in this series are collected or referred to.

†See generally foot-note appended to *Sharp v. New Orleans City R. Co.* (La.), 11 R. R. R. 668, 34 Am. & Eng. R. Cas. N. S., 668.

‡As to whether it is contributory negligence to board train or street car, see foot-note appended to *Hunterson v. Union Traction Co.*

Foster v. Seattle Electric Co

thoroughfare, out of the sight of the conductor, and did not reach it until after the signal to go ahead had been given and the car had started, and then seized the handrail and attempted to board, though others standing by appreciated her danger and sought to warn her by hallooing, was guilty of contributory negligence.

Same—Street Railways—Degree of Care.

Street railway employees are not required to exercise the highest degree of care to ascertain whether or not a particular person walking or standing on a public street desires to become a passenger, but ordinary care is all that is necessary in such cases.

Same—Who Are Passengers. §

One intending to board a street car, who approached it from the rear, and was in a position where the conductor, in looking out for intending passengers, would not ordinarily have seen her, and who was not seen by the conductor, who did look out towards the rear before giving the signal to start, was not a passenger.

Same—Negligence of Conductor.

In an action against a street railway company, the court charged that if the conductor was engaged in collecting fare or making change for a passenger, and, after the car had stopped, and before starting the same, was in a position where he could see the rear entrance of the car, and, before giving the signal to start, looked to see if there were any other persons about to board the car, and exercised reasonable care under the circumstances, and did not see plaintiff approaching the car or attempting to board the same, he was not negligent: *held* that, while the matter relating to the making of change for a passenger was not pertinent to the balance of the instruction, nor to any evidence in the case, the instruction was not objectionable as taking from the jury the question as to what is and what is not a proper time to take up fares.

Instructions.

The fact that the clause was not pertinent did not necessitate a reversal, as it was not prejudicial.

Boarding Moving Street Car—Assumption of Risk.

One who came running towards a street car from the rear, and seized the handle bar and attempted to board the car after the signal had been given and the car was starting forward in the usual manner, assumed all the natural risks incident to such an attempt to board the car, and could not hold the street railway company responsible for injuries caused thereby.

Appeal from Superior Court, King County; Geo. E. Morris, Judge.

Action by Azoa Foster against the Seattle Electric Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Benson & Hall, for appellant.

Struve, Hughes & McMicken for respondent.

FULLERTON, C. J. The appellant was injured while attempting to board one of the respondent's street cars in the city of Seattle, and brought this action to recover for her injuries, averring that they were caused by the negligence of

(Pa.), 8 R. R. R. 927, 31 Am. & Eng. R. Cas., N. S., 927; foot-note appended to Illinois Cent. R. Co. v. Glover (Ky.), 8 R. R. R. 911, 31 Am. & Eng. R. Cas., N. S., 911.

§As to who are, and who are not, passengers, see foot-note appended to Radley v. Columbia Southern Ry. Co. (Ore.), 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

Foster v. Seattle Electric Co

the agents and servants of the respondent. The trial resulted in a verdict and judgment for the respondent.

The car which the appellant was attempting to board was a large, vestibuled car, having but one place open at the time of the accident where passengers could board the same, which was at the right-hand side of the rear platform. As the car proceeded along its route, it passed westerly along Pike street to the intersection of Second avenue, where it turned south, stopping at a few feet south of Pike street. The evidence of both sides agrees that, while the car was standing where it had stopped, two passengers entered it, and that the conductor thereupon signaled the motorman to proceed, and that the car started just as the appellant was in the act of boarding the same. The appellant's evidence tended to show that she was following immediately after the two passengers who did enter the car in safety—so close, in fact, that she was compelled to wait an instant for the last one—and that she was in a position, when the conductor signaled the car to start, that he could have seen her, had he looked in that direction. The defendant's evidence tended to show that the conductor was in a position where he could plainly see the entrance when the car came to a stop on Second avenue. He testified that when the car stopped he ceased the work he was engaged in, and looked back to the car entrance, and saw the two passengers enter; that, when the second one got on, he looked to ascertain if any one else was entering or desirous of entering, and, seeing no one, gave the signal to go ahead, and began again his regular duties. There was evidence tending to corroborate the conductor, and evidence also to the effect that the appellant approached the car from the rear, out of the sight of the conductor, reaching it after the signal to go ahead had been given, and just as the car started; that others standing by saw and appreciated her danger, and sought to warn her by hallooing; that the place where the accident occurred was a busy thoroughfare; and that more than the ordinary number of people were there at that time, owing to the fact that some social gathering had been held during the evening at the Masonic Temple, which stood near this place, and people were then leaving that place.

The court, in charging the jury, gave, among others, the following instructions:

"(2) I instruct you, second, that if you believe from the evidence in this case that the plaintiff, in her efforts to get upon the defendant's car at the time and place and manner alleged in her complaint, acted as an ordinarily prudent woman generally acts under circumstances entirely similar to all those which then surrounded the plaintiff; and if you believe, from a preponderance of the evidence, that the plaintiff attempted to get upon the defendant's car while the same was standing still, and immediately after the other passengers

Foster v. Seattle Electric Co

had boarded the train, and that the defendant's servants started said car without having exercised the highest degree of care reasonably practicable under the circumstances and conditions existing at the time and place in question to see that all persons who were in the act of boarding the said car were in places of safety, and that the negligent starting of the said car threw the plaintiff to the pavement and injured her as alleged in the complaint—then and in that event your verdict will be for the plaintiff.

"(3) If you find for the plaintiff, you will by your verdict award her one such gross sum, not exceeding the demand of her amended complaint, which is fifteen thousand dollars, as will, in your opinion, from the evidence, justly, fairly, and fully compensate the plaintiff for all suffering, if any, which she has necessarily endured, as well as all that she will necessarily endure in the future, if any, for all time which the plaintiff has necessarily lost, if any, and all which she will necessarily lose, if any; for all permanent impairment of health, if any, which she has sustained; for all medical treatment, if any, for which she has become obligated: provided, however, that you will not permit the plaintiff to recover for anything which was not the proximate, natural, and necessary result of the negligent acts complained of in the plaintiff's complaint.

"(4) Contributory negligence is pleaded as a defense in this case, and the burden of proving the same is upon the defendant. To sustain this defense, it must appear to you, by a fair preponderance of the evidence, that the plaintiff contributed to her own injury by failing to act as ordinarily prudent women generally act under circumstances entirely similar to all those which surrounded the plaintiff at and just prior to her injury. Every person who rightfully attempts to board a street car as a passenger, at a place where such car usually receives passengers, has a right to assume that the men in charge of such car will exercise the highest degree of care reasonably practicable under the circumstances for the safety of all persons upon the said car, or who may be lawfully attempting to get upon the same; and no passenger should be held guilty of contributory negligence because he or she failed to anticipate negligence, if such there was, upon the part of the men in charge of the car which he or she was attempting to board."

"(6) With respect to the degree of care owed by the defendant to its passengers, you are instructed that the duty enjoined by the law upon its conductor and motorman does not require the exercise of the highest degree of care possible to avoid an accident, but only the highest degree of care reasonably practicable under the circumstances and conditions existing at the time and place in question, and consistent with the proper discharge of all the other duties of such employees. By the term 'highest degree of care,' used

Foster v. Seattle Electric Co

in these instructions, is meant that degree of care which would be exercised under like circumstances by careful, prudent, and experienced conductors and motormen generally.

"(7) The plaintiff in this case would not be a passenger, within the meaning of the law, unless you find from the evidence that plaintiff, in the exercise of reasonable care and prudence on her part, was actually attempting to board the said car, or so near thereto and in such a position as to indicate her intention so to do, in such manner as reasonably careful and prudent persons ordinarily board cars under like circumstances, and that the conductor either saw, or in the exercise of reasonable care should have seen, her intention so to do before giving the signal for said car to start.

"(8) If you believe from the evidence that plaintiff came up to the said car from the rear, and was in a position where the conductor, in the exercise of ordinary care in looking for intending passengers at the rear entrance of his car, would not ordinarily see plaintiff; and if you further find that the said conductor, in the exercise of such care, did look, and did not in fact see the plaintiff, and at once gave the signal to go ahead, and the car thereupon started—then there can be no recovery in this case, and your verdict will be for the defendant.

"(9) You are further instructed that if you find from the evidence that the conductor of said car at the time of arriving at the corner of Pike street and Second avenue was engaged in collecting fare or making change for a passenger, and after said car had stopped, and before starting the same again, he was in a position where he could plainly see the rear entrance of said car, through which passengers are permitted to board the same; and if you further find from the evidence that, before giving the signal to his motorman to start said car, he did in fact look to see whether there were any other persons about to board said car, and if, in so doing, he exercised the degree of care and prudence that would be employed by reasonably careful conductors under like circumstances, and did not see that plaintiff was approaching said car, or was about to attempt to board the same, before giving his signal—then you should not find him guilty of negligence.

"(10) If you find from the evidence that the car in question stopped on Second avenue, on the south side of Pike street, for the purpose of receiving passengers in the usual way; and if you further believe from the evidence that the plaintiff came running towards said car from the rear thereof across the intersection of Pike street, and grabbed the handle bar and attempted to board said car after the signal had been given and the said car was starting forward in the usual manner—then plaintiff assumed all the natural risks incident to such attempt to board the car, and under such circumstances she cannot hold defendant responsible therefor.

Foster v. Seattle Electric Co

"(11) You are further instructed that if you find from the evidence that while said car was standing still, waiting to receive passengers, on the south side of Second avenue, the plaintiff ran diagonally across Pike street towards the rear of said car; and if you believe that after the signal had been given to start said car the plaintiff caught hold of the handle bar of said car, and attempted to board the same after it was in motion, and that in so doing she did not exercise the degree of care and prudence that would be exercised by ordinary persons under like circumstances—then it will be your duty to return a verdict for the defendant."

The assignments of error are all based on the instructions. It is urged that the sixth instruction is erroneous because it reduces the degree of care required of the appellant's servants, while looking after the safety of its passengers, to that of ordinary care, and because "by it the conductor was practically excused from looking after the plaintiff at all during such times as he was engaged in performing any duty for the defendant." It seems to us these criticisms are not well founded. It is evident that the court was endeavoring by this instruction to define the phrase "highest degree of care," used in the second instruction above quoted, and to explain to the jury its applicability to the case before them. Leaving out the clause with reference to the other duties of the employers, the rule there laid down is not inconsistent with the rule as we have heretofore announced it in *Sears v. Seattle, etc., Street Ry. Co.*, 6 Wash. 227, 33 Pac. 389, 1081, and *Payne v. Spokane Street Ry. Co.*, 15 Wash. 522, 46 Pac. 1054. It is not the rule that a street car company is an insurer of the safety of its passengers. There are dangers attending on their transportation which it seems no human prudence can foresee, while there are others which can be foreseen, but which cannot be effectually guarded against, because to do so would make the conduct of the business so burdensome as to prohibit it altogether. Hence, when a street car company exercises towards its passengers the highest degree of care consistent with the practical conduct of its business, it performs towards them its full legal duty, and is not liable even for injuries which might have been foreseen and prevented, if the means required to prevent them would involve a burden amounting to a practical prohibition of the business. The instruction is consistent with these principles, and therefore is not erroneous.

With reference to the remaining part of the objection, it is doubtless incorrect to say, without further qualification, that the duty of the conductor and motorman of an electric street car towards the passengers thereon is the highest degree of care consistent with the proper discharge of all the other duties of such employees, yet we do not think it reversible error in this case. There was no evidence to the effect that the injury to the appellant was caused by the fact

that the conductor or motorman was engaged in the performance of another duty, and therefore could not look out for the appellant. As to the motorman, no blame at all can be attached to him. He obeyed the signals given him by the conductor, and it is not in evidence that he saw or knew that to obey such signals would result, or was likely to result, in an injury to the appellant. The negligence, if any, was on the part of the conductor, and as to negligence on his part there was a sharp conflict in the evidence. If the appellant's evidence was to be believed, then he was guilty of negligence in starting the car at the time he did start it, no matter what other duty he was performing at the time, and the court practically so told the jury. On the other hand, if the evidence on behalf of the respondent was to be believed, the conductor performed towards her his full duty, and the injury was the result of the conduct of the appellant herself, rather than the result of negligence on the part of the conductor. Under these circumstances, the error could not have been prejudicial, and, as we have repeatedly held, error without prejudice is not cause for reversal.

Instruction numbered 7 is objected to because it is said that it reduces the degree of care required of the respondent's servants to that of ordinary care, while the true rule is that the highest degree of care reasonably practical under the circumstances should be exercised. But the rule contended for by appellant is applicable only after one has become a passenger. The company is not required to exercise the highest degree of care to ascertain whether or not a particular person walking or standing on a public street desires to become a passenger on its car. Ordinary care is all that is necessary in such a case. The instruction here complained of was intended to define the degree of care required of the respondent's servants in ascertaining whether or not a particular person desired to become passenger, and is a correct statement of the rule in that regard.

The eighth instruction is objected to for the same reason, but we think the instruction without error. "To give rise to the relation of passenger and carrier, there must be not only an intent on the part of the former to avail himself of the facilities of the latter for transportation, but also an express or implied acceptance by the latter of the former as a passenger." 6 Cyc. 538. Under the conditions described in the instruction, the appellant had not yet become a passenger, and, as we said in answer to the last objection, the servants of the company owed her only the duty of ordinary care. *Gaffney v. St. Paul City Ry. Co.*, 81 Minn. 459, 84 N. W. 304.

It is objected to the ninth instruction that it took from the jury one of the material issues of fact, in that it did not leave to them the question what is and what is not a proper time to take up fares, but we think the appellant misinterprets it.

McNeill v. Durham & C. R. Co

The matter relating to the making of change for a passenger could well have been omitted, as it was neither pertinent to the balance of the instruction, nor to any of the evidence in the case, but it takes no question of fact from the jury. Nor does it require a reversal of the judgment because it is not pertinent. Mere abstract error is never sufficient for that purpose. It must be prejudicial.

The tenth and eleventh instructions are so clearly free from error as not to require comment.

The judgment is affirmed.

DUNBAR, ANDERS, MOUNT, and HADLEY, JJ.,
concur.

MCNEILL v. DURHAM & C. R. CO.

(Supreme Court of North Carolina, June 1, 1904.)

[47 S. E. Rep. 765.]

Injury to Passenger—Riding on Illegal Pass—Liability—Application of Statute.

Conditions printed on the back of a pass which was void because in violation of Laws 1891, p. 277, c. 320, § 4, forbidding discrimination, have no application in an action by the holder of the pass against the railroad company for injuries received while riding on the pass.

Same—Who Are Passengers.*

Laws 1891, p. 277, c. 320, § 4, provides that, if a common carrier charge any person a greater or less compensation than it charges any other person for a like service, the carrier shall be deemed guilty of unjust discrimination liable to fine. Plaintiff was injured by the negligence of the railroad company while riding on a pass which was void under the statute: *held*, that he was a passenger, and entitled to recover as such, not being in *pari delicto* with the company in the violation of law.

Clark, C. J., and Montgomery, J., dissenting.

On Rehearing. Petition allowed, and judgment below affirmed.

For former opinion, see 44 S. E. 34.

DOUGLAS, J. This is a rehearing of the case originally decided in 132 N. C. 510, 44 S. E. 34, 95 Am. St. Rep. 641. We fully concur in our former opinion as to the illegality of the contract by which the defendant agreed to give to the plaintiff free personal transportation to an unlimited extent in consideration of certain advertising. The only ground on which we allow the petition is that the plea in *pari delicto*, applying solely to the contract of carriage, is not a defense to an action for personal injuries caused by the negligence of the defendant.

*See note on the subject of "Who Are Passengers," 20 Am. & Eng. R. Cas., N. S., 121, where some authorities will be found bearing on the question embraced in the second headnote of the principal case.

As to who are, and who are not, passengers, see generally, foot-note appended to *Radley v. Columbia Southern Ry. Co. (Ore.)*, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

The plaintiff testified as follows: "Marshburn called on me for my ticket. I told him I had a pass for 1899, and showed it to him, and told him I would pay the regular fare if he wanted it. He said it was all right. I was the editor of the Carthage Blade, a newspaper published at Carthage. In 1899 I made a contract with the defendant to publish its time-table in my paper as the consideration for the pass. I did publish the time-table, and the defendant agreed to continue the contract and renew the pass for 1900. The contract was not in writing."

The superintendent of the defendant company testified that there was no such contract, but that the pass was a gratuity. This raised a question of credibility, which in the view we take of the case becomes of no practical importance. In any event it would be a question of fact for the jury. The contract for transportation was rendered absolutely void by the statute, founded upon public policy, whether based upon no consideration or upon the inadequate consideration of printing a time-table. The pass, issued in pursuance of an illegal contract and for the purpose of carrying out its unlawful purpose, inherits its invalidity. The defendant was free at all times to decline to carry the plaintiff except upon the payment of the usual fare, and to eject him from its train upon his refusal to pay. The fact that the pass had expired makes no difference, as, in its character as a contract, it never had any legal existence. Being without legal existence, it was equally devoid of legal effect, and, conferring no rights upon the plaintiff, imposed upon him no obligations which the law will enforce. A void contract is thus defined in Lawson on Contracts, § 350: "A void contract is one destitute of legal effect. It is a mere nullity, and good for no purpose whatever. It is binding upon neither party, and may be attacked as invalid by strangers. It does not require any disaffirmance to avoid it, but may be simply disregarded, and it cannot be ratified and made valid."

The pass itself being worthless, the conditions on the back thereof could have no application. They were not independent contracts, and, if they had been, were totally wanting in a legal consideration. Therefore this case does not come within the principle laid down in *Northern Pac. R. v. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 L. Ed. —, where the pass was recognized as a lawful and valid contract for free transportation. By citing and distinguishing that case, decided by a divided court, we do not mean to express our approval of its argument or conclusion. It is not necessary for us to consider it in the case now before us.

We may here repeat that it is not the unlawful contract for free transportation which renders a railroad company liable to the penalty, but it is the transportation itself. In the view of this statute a fee pass is a mere incident, as the same

result could be obtained by issuing a thousand-mile ticket or one in ordinary form. The offence consists in the free carriage of a passenger, whether with or without a pass or ticket; and the offense is complete when such passenger is carried any appreciable distance. The railroad company may have issued to him a free pass or ticket from Raleigh to New York with impunity, but would become liable to the full penalties prescribed by the statute as soon as it had transported such passenger to the first station out of Raleigh. In using the term "free transportation," we mean to include all transportation which justly comes within the forbidden principle of discrimination. A mere colorable consideration will neither evade the penalties of the statute upon the one hand, nor confer any rights upon the other.

We must bear in mind that while the statute renders absolutely void any contract for free transportation, so that neither party thereto can acquire any rights thereunder, it imposes the penalty only upon the transportation company. The act of free transportation alone is criminal. The party accepting such transportation is not guilty of a criminal act, whatever moral blame may attach to the reception of unlawful favors. Therefore, in contemplation of law, the parties cannot be considered in *pari delicto*. This difference is well expressed by Pearson, C. J., speaking for the court in *Melvin v. Easley*, 52 N. C. 356. That was an action for deceit and false warranty in the sale of a horse on Sunday by a horse trader, in violation of Rev. St. c. 118, § 1. The court says, on page 358, 52 N. C.: "It is said that the plaintiff knew the defendant was a horse trader and concurred in his violation of the statute, and, consequently, was *particeps criminis*. Does this consequence follow? In crimes, there are accessories; in misdemeanors, all who aid or concur are held to be equally guilty, and are subject to like punishment with the party who commits the offense. This plaintiff is not guilty of violating the law, and is not subjected to a penalty, so he cannot be *particeps criminis* in the legal sense of the term. He is not in *pari delicto*, and it is against the policy of the law, and will defeat its object, so to consider him. The court will not aid any person who violates the law; therefore the defendant could not maintain an action. This rule is adopted on the ground of policy, for the purpose of preventing a violation of the law, and, if confined in its operation to the actual offender, its application will be salutary; but if it be extended to the party who is not an offender, so far from checking, it will encourage a violation of it, by letting it be known to 'horse traders,' 'shopkeepers,' and 'all whom it may concern,' that they may cheat with impunity, provided always it may be done on the Lord's Day."

The plaintiff was lawfully upon the defendant's train, and testifies that he offered to pay his fare if required by the conductor. The conductor permitted him to ride free, not

as a personal favor to him, but in furtherance of a contract between him and the company itself, acting through its superior officers. There is no suggestion that the plaintiff was seeking to defraud the company in any manner, or that there was any collusion between him and the conductor. He was in every respect a bona fide passenger, and entitled to all the protection incident thereto, unless deprived thereof by the acceptance of free transportation.

The cases relied on to sustain the defense of *in pari delicto* are chiefly of two classes, those involving a violation of the Sunday laws, and those growing out of the relation of the plaintiff towards the national government during the Civil War. The latter class, evoked from conditions now happily passed away forever, furnishes no criterion for the determination of the case at bar. It is enough to say that in both classes of cases the plaintiffs were actually engaged in the performance of an act expressly denounced as criminal by the law of the land, as construed by the courts in which the actions were necessarily brought. The following are illustrative cases: *Turner v. Railroad*, 63 N. C. 522; *Martin v. Wallace*, 40 Ga. 52; *Wallace v. Cannon*, 38 Ga. 199, 95 Am. Dec. 385; *Railroad v. Redd*, 54 Ga. 33; *Connolly v. Boston*, 117 Mass. 64, 19 Am. Rep. 396; *Smith v. Railroad*, 120 Mass. 491, 21 Am. Rep. 538; *Lyons v. Desotelle*, 124 Mass. 387; *Holcomb v. Danby*, 51 Vt. 428. While entertaining the highest respect for the Lord's Day, the Sunday of the new law, we have not deemed it our duty to enforce its observance, so as to make it the shield of wrong. *Rodman v. Robinson* (at this term) 47 S. E. 19.

In the case at bar the plaintiff is certainly neither a tramp nor a trespasser, as both of those terms imply an unlawful presence against the will of the owner. Hence it is needless to examine the cases dealing with such relations. If the plaintiff's evidence be true, he was not a gratuitous passenger in the full sense of the term, inasmuch as he printed in his paper the schedule of trains in consideration of his otherwise free carriage. This was an inadequate consideration which rendered the contract void as an unlawful discrimination, but it was none the less a consideration of some actual value. But while this might, as between the plaintiff and the defendant, bring the case within the principle of *N. Y. C. R. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, we deem it proper to treat the plaintiff as a gratuitous passenger, in view of the unlawful consideration, and will cite the able opinion in that celebrated case only in so far as it relates to this view of the case at bar.

It is often said that one becomes a passenger by virtue of a contract. This is not always so. A contract is a voluntary agreement between two parties, a coming together of two minds to a common intent, and yet a passenger may become such without a contract, and, indeed, against the will of the

carrier. A common carrier has no right to refuse a passenger without sufficient reasons, and such reasons so rarely occur, and are so exceptional in their nature, as to vary the general rule too slightly for practical consideration. Suppose the carrier without legal excuse should refuse to sell a ticket to one having the bona fide intention of becoming a passenger, and that the passenger should then enter the carrier's train in an orderly manner, take his seat in the proper car, and tender his fare to the conductor, would the refusal of such fare deprive him of his legal status as a passenger? Assuredly not. He would be a passenger in the fullest meaning of the term, entitled to all the rights, privileges, and protection attaching to that relation, and yet there would be no actual contract between him and the carrier. But it may be said that the law raises an implied contract. Even if we accept that form of expression, it simply means that the law imposes upon a common carrier certain duties and liabilities which adhere to the nature of his calling. We prefer to adopt the more direct expression and say that those duties and liabilities are imposed by law upon common carriers upon considerations of public policy independent of contract, and arise from the nature of their public employment. Contracts may be made with the carrier, but into all such contracts certain conditions are written by the hand of the law. One such condition is the inherent liability of the carrier for all injuries proximately resulting from its own negligence or that of its servants. But as we have already said, in the case at bar there was no legally existing contract, which is equivalent to saying there was no contract at all. Viewing the plaintiff as a gratuitous passenger, and it appearing from the verdict that he was injured through the negligence of the defendant, we think that he is entitled to recover.

We have given this case most careful consideration, and have examined a very large number of authorities, but will cite those only which directly bear upon the case in the view we take of it, omitting needless repetitions from the same state. Neither time nor space will permit the discussion of cases having no essential relation to that at bar.

It is significant that the greater weight of authority is to the effect that a passenger may recover for injuries received from the negligence of a common carrier or its servants, even when unlawfully traveling on Sunday, or on a lawful pass with conditions indorsed thereon releasing the carrier from all liability. In both cases the cause of action is attributed to injuries resulting from the breach of a public duty. A fortiori the plaintiff can recover for such negligence when the defendant alone is in the commission of an unlawful act, and when there is no release of liability.

We will begin our citations from the Supreme Court of Pennsylvania, a court which is not addicted to emotional jurisprudence, and has never shown any disposition to burden

railroad management with unnecessary conditions or restrictions. In *Railroad v. Butler*, 57 Pa. 335, the intestate was killed while riding on a free pass on which a release was indorsed. Sharswood, J., speaking for the court, says on page 337: "The first error assigned has been properly abandoned, as it is too well settled to be now controverted that a stipulation by a common carrier that he shall not be liable for damages does not relieve him from responsibility for actual negligence by himself or servants." This case is cited with approval upon the same point in *Burnett v. Railroad*, 176 Pa. 45, 34 Atl. 972, the latest case upon the subject.

In *Carroll v. Railroad*, 58 N. Y. 126, 17 Am. Rep. 221, where the plaintiff was traveling on Sunday, contrary to the statute, it was held that: "The duty imposed by law upon the carrier of passengers to carry them safely, as far as human skill and foresight can go, exists independently of contract. For a negligent injury to a passenger in action lies against the carrier, although there be no contract, and the service he is rendering is gratuitous; and, whether the action is brought upon contract or for failure to perform the duty, the liability is the same. One violating the statute prohibiting travel upon Sunday (1 Rev. St. [Edmond's Ed.] p. 628, pt. 1, c. 20, tit. 8, § 70) is not without the protection of the law. The carrier owes to him the same duty as if he were lawfully traveling, and is responsible for a failure to perform it, the same in the one case as in the other." The court says, on pages 133, 134: "But we deem it unnecessary to decide the question, which was argued with great ability by counsel, touching the liability of the defendant in the action, treating it as founded upon the contract between the parties. The gravamen of the action is the breach of the duty imposed by law upon the carrier of passengers to carry safely, so far as human skill and foresight can go, the persons it undertakes to carry. This duty exists independently of contract, and although there is no contract in a legal sense between the parties. Whether there is a contract to carry, or the service undertaken is gratuitous, an action on the case lies against the carrier for a negligent injury to a passenger. The law raises the duty out of regard for human life, and for the purpose of securing the utmost vigilance by carriers in protecting those who have committed themselves to their hands. The liability of the carrier is the same, whether the action is brought upon contract or upon the duty, and the evidence requisite to sustain the action in either form is substantially the same, and when there is an actual contract to carry, it is properly said that the liability in an action founded upon the public duty is coextensive with the liability on the contract. This case, therefore, is not within the principle of many of the cases cited, which forbid a recovery upon a contract made in respect to a matter prohibited by law, or for a

cause of action which requires the proof of an illegal contract to support it."

In *Railroad v. Trautwein*, 52 N. J. Law, 169, 19 Atl. 178, 7 L. R. A. 435, 19 Am. St. Rep. 442, it was held that the plaintiff could recover although unlawfully traveling on Sunday, the court saying, on pages 171, 172, 52 N. J. Law, page 179, 19 Atl., 7 L. R. A. 435, 19 Am. St. Rep. 442: "A contract to carry, made on Sunday, or to be performed on Sunday, is, by force of the statute, illegal and void. No action could be maintained for the breach of such a contract, nor for services performed under it, where the right of action rests exclusively upon a contract, express or implied. It is also clear that a plaintiff will fail where, to make a cause of action, he is compelled to rely upon an illegal contract. But the duty of persons engaged in these public employments to safely and securely carry is independent of contract. It is a duty imposed by law from considerations of public policy, and arises from the fact that persons or property are received in the course of the business of such employments. Nor was the plaintiff's violation of the Sunday law, in a legal sense, the cause of her injury. It was only the occasion for an injury by the defendant's wrongful act, and hence her wrongdoing did not contribute to the injury in such a sense as to deprive her of her right of action; it was merely a condition, and not a contributory cause of the injury."

In *State, Use of Abell, v. Railroad*, 63 Md. 433, it was held that "when a carrier undertakes, without any special contract, to carry a passenger gratuitously, the passenger is entitled to the same degree of care as if he had paid his fare." The court says, on page 443: "The principle announced in this decision, that the duty of the carrier to convey safely does not result from the consideration paid, but is imposed by law, has been recognized by this court on the motion to reargue the case of *Baltimore City Pass. Railway Co. v. Kemp and Wife*, 61 Md. 619, 48 Am. Rep. 134, where the court says that a common carrier who accepts a party to be carried owes to that party a duty to be careful, irrespective of contract, and this court illustrates the principle by the example of a child from whom no fare is charged, but who could recover in case of injury, the result of negligence."

In *Lemon v. Chanslor*, 68 Mo. 340, 30 Am. Rep. 799, a gratuitous passenger injured by the breaking down of a hack was allowed to recover. The court says, on page 357: "This, we think, was sufficient to authorize the instruction. The principle announced in it, that, although plaintiff might have been a gratuitous passenger, such fact constituted no defense, is supported by all the authorities which have come under our observation. While in some of them intimations are made that in the case of a gratuitous passenger the carrier may only be liable for gross negligence, it has not been held in any of them that such fact would exempt the carrier

from all liability. On the contrary, the weight of authority favors the doctrine of holding the carrier of passengers to the same degree of diligence in all cases where one has been received as a passenger, on the principle that if a man undertakes to do a thing to the best of his skill, when his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence."

In *Jacobus v. Railway*, 20 Minn. 125 (Gil. 110), 18 Am. Rep. 360, it was held that the plaintiff could recover although riding on a pass, as the same degree of care was required of the common carrier as if the plaintiff had been a passenger carried for hire. The court says, on page 129: "In the case at bar, however, the plaintiff was not merely a gratuitous passenger, i. e., a passenger carried without payment of fare or other consideration. He was a passenger upon a free pass expressly conditioned that the defendant should not be liable to him for any injury of his person while he was using or having the benefit of such pass. Does this circumstance distinguish his case from that of a merely gratuitous passenger? * * * There are two distinct considerations upon which the stringent rule as to the duty and liability of carriers of passengers rests. One is a regard for the safety of the passenger on his own account, and the other is a regard for his safety as a citizen of the state. The latter is a consideration of public policy growing out of the interest which the state or government, as *parens patriæ*, has in protecting the lives and limbs of its subjects. * * * So far as the consideration of public policy is concerned, it cannot be overridden by any stipulation of the parties to the contract of passenger carriage, since it is paramount from its very nature. No stipulation of the parties in disregard of it, or involving its sacrifice in any degree, can, then, be permitted to stand. Whether the case be one of a passenger for hire, a merely gratuitous passenger, or of a passenger upon a conditioned free pass, as in this instance, the interest of the state in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised, and the more approximately perfect the safety of the passenger. Any relaxation of the rule as to duty or liability naturally, and, it may be said, inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier. We can conceive of no reason why these propositions are not equally applicable to passengers of either of the kinds above mentioned."

In *Tibby v. Railway Co.*, 82 Mo. 292, the intestate was killed while riding on a free pass on top of a cattle car. The plaintiff was allowed to recover, the court saying, on page 300: "The contract of exemption from damages was properly excluded. A common carrier is not permitted to stipulate against its own negligence. (Citing cases.) This rule

in its application to the carriage of passengers has never been relaxed."

In *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. 575, the plaintiff, unlawfully traveling on Sunday, was permitted to recover. The court says, on page 128, 30 Minn., page 576, 14 N. W.: "It is further contended that the deceased was, by accepting passage upon the steamboat, engaged in an unlawful act, and was particeps criminis with the defendants and their agents in violating the Sunday law. It is a sufficient answer to this objection that the defendants on that day occupied the relation of common carriers of passengers, and their general obligation to use such care and diligence as the law enjoins is not limited by the contract with the passengers, nor with the person who engaged the use of the boat and the services of the crew for that day, but is governed by considerations of public policy. That the undertaking was unlawful does not touch the question. *Carroll v. Staten Island R. Co.*, 58 N. Y. 126, 134; *Jacobus v. St. Paul & Chicago Ry. Co.*, 20 Minn. 125 (Gil. 110) [18 Am. Rep. 360]. As remarked by the court in that case, "any relaxation in the rule as to duty or liability naturally, and, it may be said, inevitably, tends to bring about a corresponding relaxation of care and diligence upon the part of the carrier."

In *Rose v. Railroad*, 39 Iowa, 246, it was held, quoting the headnote, that: "The payment of fare is not necessary to create the relation of common carrier and passenger. A railroad company was held to be liable for causing the death of a passenger by the negligence of its employees, notwithstanding he was at the time riding upon a free pass, upon which was a stipulation, signed by himself, releasing the company from all liability for injury to his person or property while using the same." In its opinion the court adopts the language used in *Railway Co. v. Derby*, 14 How. 468, 14 L. Ed. 502.

In *Russell v. Railroad*, 157 Ind. 305, 61 N. E. 678, 55 L. R. A. 253, 87 Am. St. Rep. 214, the release from liability given by a Pullman porter was held valid on the ground that he was not a passenger. but the court uses the following language on page 309, 157 Ind., page 679, 61 N. E., 55 L. R. A. 253, 87 Am. St. Rep. 214: "The decisions of this state firmly establish that a common carrier of goods or passengers cannot contract with a customer for a release of the carrier from liability resulting from the latter's negligence. (Citing cases.) The grounds upon which this prohibition rests are variously stated by the court. It has been said that such exemptions are against public policy, that the public is interested in the exercise of care and diligence on the part of the carrier, that it is unreasonable for any person or corporation to contract for the privilege of being negligent, and that the public is concerned with the life and security of every citizen. The fundamental reason, however, for holding com-

mon carriers, such as the appellee, liable for the results of their negligence, notwithstanding contracts exempting them therefrom, is that the state has granted them privileges which they exercise for the benefit of the public; in return for these, the common carrier impliedly undertakes to use due care and diligence in the transportation of both goods and passengers. This being a main inducement for the grant of its special rights, the carrier cannot by any special contract rid itself of the burden of responsibility, which is one of the conditions of its creation. Were it permitted to escape liability by entering into exonerating agreements, its position of advantage over its patrons would in almost every instance enable it to force from them such stipulations as it desired, and the object of the state in creating the carrier would be virtually defeated, the carrier thus being able to abandon the duty imposed upon it by the state. As said in the case of Louisville, etc., R. Co. v. Faylor, 126 Ind. 126, 25 N. E. 869, at page 130, 126 Ind., page 869, 25 N. E.: 'A stipulation that the carrier shall not be bound to the exercise of care and diligence is in effect an agreement to absolve him from one of the essential duties of his employment, and it would be subversive of the very object of the law to permit the carrier to exempt himself from liability by a stipulation in his contract with a passenger that the latter should take the risk of the negligence of the carrier or of his servants. The law will not allow the carrier thus to abandon his obligation to the public, and hence all stipulations which amount to a denial or repudiation of duties which are of the very essence of his employment will be regarded as unreasonable, contrary to public policy, and therefore void.' In Cleveland, etc., R. Co. v. Curran, 19 Ohio St. 1, 2 Am. Rep. 362, at page 12, 19 Ohio St., 2 Am. St. Rep. 362, the court says: 'Carriers, of the class of the plaintiff in error, are creatures of legislation, and derive all their powers and privileges by grant from the public. They are created to effect public purposes, as well as to subserve their own interest. They are intended, by the law of their creation, to afford increased facilities to the public for the carriage of persons and property, and, in performing this office, they assume the character of public agents, and impliedly undertake to employ in their business, the necessary degree of skill and care. This obligation arises from the public nature of the employment, and is founded on the policy of the law for the protection of the persons and property of the public, which must of necessity be committed to a very great extent to the care of public carriers. It cannot be denied that pecuniary liability for negligence promotes care, and, if public carriers in conducting their business can graduate their charges so as to discharge themselves from such liability, the direct effect will be to encourage negligence by diminishing the motives for diligence.' " In

McNeill v. Durham & C. R. Co

Davis v. Railway Co., 93 Wis. 470, 67 N. W. 16, 33 L. R. A. 654, 57 Am. St. Rep. 935, it was held: "A stipulation in a contract for the carriage of a passenger, exempting the carrier from liability for injuries caused by its negligence or the negligence of its agents or employees, is void as against public policy;" the court saying, on page 479, 93 Wis., page 18, 67 N. W., 33 L. R. A. 654, 57 Am. St. Rep. 935: "It is very well established in this state that a contract for such an exemption from liability of a common carrier is void as against public policy. The defendant could not by any agreement, however plain and explicit, wholly relieve itself from liability for injuries caused by its negligence or the negligence of its agents or employees."

In *Railway Co. v. McGown*, 65 Tex. 640, it was held, quoting the headnotes, that: "A common carrier of passengers cannot by contract relieve itself from responsibility, or even limit its liability, for injuries to a passenger resulting from the negligence of itself or its employees or agents in the scope of their employment; and this is so with reference as well to passengers traveling free of charge as to those paying full fare. The liability of the carrier of passengers does not depend on the fact that compensation for the passenger has been paid to it, but the same degree of care is incumbent on the carrier in the case of a passenger traveling on a free pass as in the case of one paying full fare." The court says, on page 646: "The relation of passenger and carrier is created by contract, express or implied, but it does not follow from this that the extent of liability or responsibility of the carrier is in any respect dependent on a contract. In reference to matters indifferent to the public, parties may contract as they please, but not so in reference to matters in which the public has an interest. For the purpose of regulating such matters, rules have been established, by statute or the common law, whereby certain duties have been attached to given relations and employments. These duties attach as matter of law, and without regard to the will or wish of the party engaged in the employment, or of the person who transacts business with him, in the course thereof; and this is so for the public good. Duties thus imposed are not the subject of contract. They exist without it, and cannot be dispensed with by it. The violation of such a duty is a tort. The law declares that it is the duty of a public carrier of passengers to use the highest degree of care to insure their safety. Why was not this left to be settled by the contract of the carrier and passenger? Certainly for no other reason than that the employment itself was of such a nature as to make it a matter of public concern. None could be of greater public concern at the present day than these employments by which men, women, and children are transported by millions, by agencies of a most dangerous character, and with a speed heretofore unknown."

McNeill v. Durham & C. R. Co

In *Railroad v. Crudup*, 63 Miss. 291, it was held that a mail agent traveling on a "free ticket" could recover, the court saying, on page 302: "The court properly excluded the evidence proposed by the defendant to show that the deceased had accepted a 'free ticket,' by which he relieved the company from liability for the negligence of its servants. By their contract with the government the company received compensation for transporting both the mail and its custodians, and there would have been no consideration for the obligation entered into by the deceased to waive damages; and in addition to this it may be added that such a contract is against public policy. The duty which common carriers owe to all persons carried by it, viz., not to be guilty of negligent injury, is one against the breach of which they may not protect themselves by private contract."

In *Railroad v. Hopkins*, 41 Ala. 486, 94 Am. Dec. 607, the court says: "We do hold, however, that it makes no difference whether the service is performed gratuitously or not, in regard to the obligation to perform it well, after it is once entered upon; for ever since the decision of the leading case of *Coggs v. Bernard*, 2 Smith's Lead. Cas. 82, it has been regarded as sound law that 'the confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.' And we hold, further, that, in undertaking the performance of gratuitous transportation, the common carrier can no more stipulate for exemption from liability for damage occasioned by the negligence, or willful default, or tort of himself or his servants, than he can when he receives a reward for the service to be performed; both are alike prohibited by a sound public policy, which also forbids a gratuitous bailee, not bound by the considerations of public duty attached to the office of a common carrier, from stipulating that he may be fraudulently negligent or safely dishonest. Railroad companies are incorporated in part, at least, from public considerations, and for the public good. As carriers of persons and property, it has been held they may be considered as acting in a public capacity, and as a kind of public officers. The exercise of honesty, care, and diligence by them or their agents and employees is a public duty resulting from their position, the obligation to perform which cannot be thrown off by contract. If thus thrown off, the effect would be to relax or modify the performance of the duty, and to promote a relaxation of proper care in the selection of agents and servants for its performance."

In *Waterbury v. Railroad* (C. C.) 17 Fed. 671, it was held that: "The right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely. It suffices to enable him to maintain an action for negligence if he was

being carried by the railroad company voluntarily, although gratuitously, and as a mere matter of favor to him." Wallace, C. J., says, on page 672: "A careful examination of the evidence shows quite satisfactorily that the case did not justify the assumption, in any aspect of it, that the plaintiff was entitled to be carried as a passenger, as an implied condition of the contract to carry his cattle. The most that can be fairly claimed for the plaintiff upon the evidence is that he was riding upon the engine permissively. If he was riding there with the consent of the defendant, express or implied, it is not material, so far as it affects the defendant's liability for negligence, whether he was there as a matter of right or a matter of favor, as a passenger or a mere licensee. It suffices to enable him to maintain an action for negligence if he was being carried by the defendant voluntarily. If the defendant undertook to carry him, although gratuitously, and as a mere matter of favor to himself, it was obligated to exercise due care for his safety in performing the undertaking it had voluntarily assumed. *Philadelphia, etc., R. Co. v. Derby*, 14 How. 468 [14 L. Ed. 502]; *Steamboat New World v. King*, 16 How. 469 [14 L. Ed. 1019]. The carrier does not, by consenting to carry a person gratuitously, relieve himself of responsibility for negligence. When the assent to his riding free has been legally and properly given, the person carried is entitled to the same degree of care as if he paid his fare. *Todd v. Old Colony, etc., R. Co.*, 3 Allen, 18 [80 Am. Dec. 49]. As is tersely stated by Blackburn, J., in *Austin v. Great Western Ry. Co.*, 15 Wkly. Rep. 863: 'The right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being there creates a duty on the part of the company to carry him safely.'"

In *Railroad v. Derby*, 14 How. 468, 14 L. Ed. 502, it was held that a gratuitous passenger could recover, the court saying, on page 484, 14 How., 14 L. Ed. 502: "The liability of the defendants below for the negligent and injurious act of their servant is not necessarily founded on any contract or privity between the parties, nor affected by any relation, social or otherwise, which they bore to each other. It is true, a traveler by stagecoach or other public conveyance, who is injured by the negligence of the driver, has an action against the owner, founded on his contract to carry him safely. But the maxim of 'respondeat superior,' which, by legal imputation, makes the master liable for the acts of his servant, is wholly irrespective of any contract, express or implied, or any other relation between the injured party and the master. If one be lawfully on the street or highway, and another's servant carelessly drives a stage or carriage against him and injures his property or person, it is no answer, to an action against the master for such injury, either that the plaintiff was riding for pleasure, or that he was a stock-

holder in the road, or that he had not paid his toll, or that he was the guest of the defendant, or riding in a carriage borrowed from him, or that the defendant was the friend, benefactor, or brother of the plaintiff. These arguments, arising from the social or domestic relations of life, may in some cases successfully appeal to the feelings of the plaintiff, but will usually have little effect where the defendant is a corporation, which is itself incapable of such relations or the reciprocation of such feelings. In this view of the case, if the plaintiff was lawfully on the road at the time of the collision, the court were right in instructing the jury that none of the antecedent circumstances or accidents of his situation could affect his right to recover. * * * This duty does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. 'The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it.' See *Coggs v. Bernard*, and cases cited in 1 *Smith's Lead. Cas.* 95. It is true, a distinction has been taken in some cases between simple negligence and great or gross negligence, and it is said that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference (if it be capable of definition), as the verdict has found this to be a case of gross negligence. When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" The citations of this celebrated case will be found in 5 *Rose's Notes (U. S.)* 275-284.

In *Steamboat New World v. King*, 16 *How.* 469, 14 *L. Ed.* 1019, *Curtis, J.*, speaking for the court, says, on page 474, 16 *How.*, 14 *L. Ed.* 1019: "In the *Philadelphia & Reading Railroad Company v. Derby*, 14 *How.* 468 [14 *L. Ed.* 502], which was a case of gratuitous carriage of a passenger on a railroad, this court said: 'When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of "gross."'" We desire to be understood to reaffirm that doctrine, as resting, not only on public policy, but on sound principles of law."

In the celebrated case of *Railroad v. Lockwood*, 17 *Wall.*

McNeill v. Durham & C. R. Co

357, 21 L. Ed. 627, than which there are few opinions more able or more widely cited and approved, it was held, quoting the language of the court at the conclusion of its opinion on page 384, 17 Wall., 21 L. Ed. 627, that: "First. That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter. Fourthly. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire. These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire." The plaintiff was traveling on what was called a "drover's pass," which expressly stipulated that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The court held that, while the pass was professedly gratuitous on its face, it was in fact given as part of the original contract for shipping the cattle. The case is treated as a carriage for hire, but the reasoning of the opinion clearly applies to all classes of passengers. Justice Bradley, speaking for the court, says, on page 376, 17 Wall., 21 L. Ed. 627: "It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character and becomes an ordinary bailee for hire, and therefore may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee; and he is an ordinary bailee because he has made the contract. We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest." Again the court says, on page 377, 17 Wall., 21 L. Ed. 627: "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the

other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment. And to assert that he may do so seems almost a contradiction in terms." And again, on page 381, 17 Wall., 21 L. Ed. 627: "Hence the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law." The extent to which this case has been cited and approved will be shown by reference to 8 Rose's Notes U. S. 48.

In *Railway Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535, the court says, on page 660, 95 U. S., 24 L. Ed. 535: "Since, therefore, from our view of the case, it is not necessary to determine what would have been the rights of the parties if the plaintiff had been a free or gratuitous passenger, we rest our decision upon *Railroad Company v. Lockwood*, supra. We have no doubt of the correctness of the conclusion reached in that case. We do not mean to imply, however, that we should have come to a different conclusion had the plaintiff been a free passenger instead of a passenger for hire. We are aware that respectable tribunals have asserted the right to stipulate for exemption in such a case, and it is often asked, with apparent confidence, 'May not men make their own contracts, or, in other words, may not a man do what he will with his own?' The question, at first sight, seems a simple one. But there is a question lying behind that: 'Can a man call that absolutely his own, which he holds as a great public trust, by the public grant, and for the public use as well as his own profit?' The business of the common carrier, in this country at least, is emphatically a branch of the public service; and the conditions on which that public service shall be performed by private enterprise are not yet entirely settled."

In *Railroad v. Sullivan*, 120 Fed. 799, 57 C. C. A. 167, 61 L. R. A. 410, it was held that: "Riding in the coach set apart for colored passengers, contrary to the rules of the carrier and provisions of the statute, is not negligence on the part of a white person which will prevent a recovery for his death through the negligence of the carrier, although he would not have been injured had he not been in that coach."

In the earlier English reports the doctrine was uniformly held that an action to recover damages for negligent injury by a common carrier arose from a breach of duty imposed by the common law, and needed no contract to support it. In course of time, by some unexplained change of judicial senti-

McNeill v. Durham & C. R. Co

ment, the courts began to recognize stipulations for release of liability, until, finally, common carriers were practically allowed to absolve themselves, by stipulation, from liability for all negligence, however gross. This led to the passage of the act of 1854, called the "Railway and Canal Traffic Act," declaring that railway and canal companies should be liable for the negligence of themselves or their servants, notwithstanding any notice or condition, unless the judgment or court trying the cause should adjudge the condition just and reasonable. The practical effect of this statute was to bring the law back to its original status. However, all the cases seem to hold that there is no implied release in the absence of written stipulations or fraudulent concealment of material facts. This is shown by the following cases, which are typical of others: In *Bretherton v. Wood*, 7 E. C. L. 345, the court says, on page 348: "This action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey their goods or passengers safely and securely, so that, by their negligence or default, no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it."

In *Marshall v. Railway Co.*, 11 C. B. E. C. L. 73, *Jervis, C. J.*, says, on page 661: "But upon what principle does the action lie at the suit of the servant for his personal suffering? Not by reason of any contract between him and the company, but by reason of a duty implied by law to carry him safely." In the same case *Williams, J.*, says, on page 663: "I am of the same opinion * * *. It seems to me that the whole current of authorities, beginning with *Govett v. Radnidge*, and ending with *Pozzi v. Shipton*, establishes that an action of this sort is, in substance, not an action of contract, but an action of tort against the company as carriers. That being so, the question is whether it was necessary to allege any contract at all in the declaration. The earliest instance I find of an action of this sort is in *Fitzherbert's Natura Brevium*, *Writ de Trespass sur le Case*, where it is said (9b): 'If a smith prick my horse with a nail, etc., I shall have my action upon the case against him, without any warranty by the smith to do it well, for it is the duty of every artificer to exercise his art rightly and truly as he ought.' There is no allusion there to any contract. That being so, it seems to me to follow that the allegation of a contract in a case of this kind is altogether unnecessary."

In *Austin v. Railway Co.* (1867) 2 Q. B. 442, it was held that a child over the free age prescribed by statute, and having no ticket, and no fare having been asked or paid, could recover for injuries received. *Blackburn, J.*, concurring, says, on page 444: "I am also of opinion there should be no

senger, to entitle him to all the care which the law requires of the passenger carrier; and the same vigilance and circumspection must be exercised to guard him against injury when he is carried gratuitously, as upon what is known as a free pass, or by the carrier's invitation, as when he pays the usual fare." See, also, sections 565 and 567.

In Wharton's Law of Negligence it is said, in section 355: "Is a free passenger to be placed in a different position, so far as concerns his rights to protection from neglect, from a pay passenger? This question, also, was at one time answered in the affirmative, the courts being led astray by the mistaken view of mandates which will be hereafter pointed out. But there is now an almost uniform acquiescence in the true view that a person who undertakes to do a service for another is liable to such other person for want of due care and attention—the *diligentia* of the *bonus et diligens paterfamilias*—in the performance of the service, even though there is no consideration for such undertaking. Or, as the question is elsewhere put, the confidence accepted is an adequate consideration to support the duty. Eminently is this the case with what are called 'free' passengers on the great lines of common carriage. As has been already observed, there is, in such cases, not merely confidence tendered and accepted, but some sort of business consideration, though this be a mere courteous interchange of accommodations. For these and other reasons noticed under the last head, the carrier is bound to exhibit the same diligence and skill towards passengers of this class as he is to passengers who pay money for their tickets." Again, the same author says, in section 354: "But if a trespasser take his seat openly in a carriage, in the place assigned to passengers generally, there is no reason why a different standard of care should be applicable to him than is applicable to other passengers. Waiving for the present the point elsewhere discussed, that even a trespasser, supposing him to continue such, is not withdrawn from the protection of that law which requires that no man shall negligently injure another, the carrier, if he permits such trespasser to continue in the carriage, cannot regard him, after such permission, as a trespasser. The carrier has a right to expel the trespasser at once from the carriage. If the carrier omits to do this, and if the person in question remains voluntarily with the carrier's assent, then the trespass passes into a quantum meruit contract of carriage. On the one side, the person so entering the carriage is bound to the carrier for reasonable pay for the carriage. On the other side, the carrier is bound, from the time he assents thus to carry such person, to exercise towards him the diligence, prudence, and skill of a good carrier in that particular kind of transport; in other words, the particular kind of diligence, prudence, and skill which the carrier is bound to exercise towards all other passengers."

In *Watson on Dam. for Personal Injuries*, it is said, in section 230, p. 279: "At the outset it may be stated, as a general rule, that the mere fact that the plaintiff, at the time of the injuries received, is engaged in the commission of an unlawful act, is not sufficient to relieve the author of the wrong of liability in damages therefor. The question how far a person can defend an otherwise indefensible act,' it has been said, 'by showing a criminal or unlawful act on the part of the party injured, has of late years been fully discussed in the courts of this country and England. The result, generally reached, is that no man can set up a public or private wrong committed by another as an excuse for a willful, or unnecessary, or even negligent injury to him or his property. This principle is defended on the grounds of morality and law, and it reaches and determines a great variety of cases.'" The same author further says, in section 238: "The liability of the owners of a steamboat for injuries to a passenger is not affected by the fact that the person injured was, at the time the injuries were received, engaged in an excursion with other passengers upon defendants' steamboat in violation of the Sunday law. One traveling on Sunday in violation of a statute prohibiting is not, by reason thereof, without the protection of the law. The carrier owes him the same duty as if he were lawfully traveling, and is liable in damages for personal injuries resulting from a failure to perform it." In section 231 the author adopts the language of an able and elaborate opinion by Dixon, C. J., in *Sutton v. Wauwatosa*, 29 Wis. 27, 9 Am. Rep. 534, as follows: "Himself guilty of a wrong, not dependent on nor caused by that charged against the plaintiff, but arising from his own voluntary act or his neglect, the defendant cannot assume the championship of public rights, nor to prosecute the plaintiff as an offender against the laws of the state, and thus to purpose upon him a penalty many times greater than what impose laws prescribed. Neither justice nor sound morals require this, and it seems contrary to the dictates of both that such a defense should be allowed to prevail. It would extend the maxim, 'Ex turpi causa non oritur actio,' beyond the scope of its legitimate application, and violate the maxim equally binding and wholesome, and more extensive in its operation, that no man shall be permitted to take advantage of his own wrong. To take advantage of his own wrong, and to visit unmerited and overrigorous punishment upon the plaintiff, constitute the sole motive for such defense on the part of the person making it."

In 3 Thompson's Law of Neg. § 3326, it is said: "It is thoroughly settled in the American law that a common carrier of passengers cannot, by a contract with one who is a passenger for hire, relieve himself from liability for damages caused by the negligence of himself or his servants." The same author says, in section 3328: "The principle is

well settled that a carrier owes the same duty of protection to a simply gratuitous passenger as to a passenger for hire."

In *Buswell on Law of Pers. Injuries*, the author, in laying down the rule that a breach of public duty is the foundation of the action for personal injuries, says, in section 3: "The custom of the realm of England, long made a part of the common law, imposes upon common carriers of passengers certain public duties in respect of such passengers, for a breach of which a passenger injured may have his remedy by an action of tort." Again, the author says, in section 116: "In the United States the weight of authority is in favor of the rule that, as to passengers for hire, the stipulation by a common carrier that he will not be liable for damages in case of injury to the passenger will not relieve him from responsibility for the results of the negligence of himself and his servants." Again, the same author says, in section 117: "If a common carrier accepts a person as passenger, there being no contract to relieve the carrier from the legal consequences of his negligence in the case of accident, it is held generally, in the United States, that the carrier remains liable for such negligence, although the plaintiff was to be transported gratuitously. For, having admitted the plaintiff to the rights of a passenger, the defendant is not permitted to deny that he owes to him the duty which, as carrying on a public employment, he owes to all his passengers."

In 2 *Parsons on Contracts*, the author, after referring to various authorities, says, on page 222: "Whether a common carrier is liable to a passenger to whom he has given passage, and from whom he has therefore no right to demand fare, is not so certain; but he would certainly be liable for gross negligence, and probably liable for any negligence. He is certainly not excused by mere nonpayment, unless payment has been demanded and refused." In note "x" it is said: "It is now quite generally held that for negligence there is the same liability to persons riding on free passes as to those who pay full fare."

In 2 *Wood on Railroads* it is said, on page 1207: "In all cases where the company is required by law to carry a person free, or where he is riding free by the consent of the company fairly obtained, he is a passenger, and entitled to all rights and privileges as such. In the case of a free pass the carrier is under the same obligations as to care and vigilance as he is to a passenger for hire, and as to passengers to whom passes are given which are predicated upon any consideration he cannot absolve himself from liability for injuries resulting from gross negligence by any notice to that effect printed upon the pass, as such conditions are against the policy of the law. It has been held, however, that, when tickets or passes are purely gratuitous, the person receiving may by special agreement assume all risks of the journey incident to the mere negligence of the company."

McNeill v. Durham & C. R. Co

In Whitaker's Smith on Negligence, while the text does not seem to treat the subject, there are full notes on page 309 showing that the rule is that a common carrier "must exercise the same care and attention in the transportation of gratuitous passengers as of those who have paid their fares, and is liable to the same extent for negligence."

These authorities tend to show that this rule is generally held even in the face of express stipulations of exemption, and universally so in the absence of such stipulations.

In 4 Elliott on Railroads it is said, in section 1497: "The rule, supported by the weight of authority, is that a common carrier cannot by any kind of a contract exempt itself from liability as such for loss or injury occasioned by its own negligence or that of its servants. This rule 'rests upon considerations of public policy, and upon the fact that to allow the carrier to absolve himself from the duty of exercising care and fidelity is inconsistent with the very nature of his undertaking.' The employment of a common carrier is a public one, and the fundamental principle upon which the law of common carriers was established was to secure the utmost care and diligence in the performance of their duties. For this reason they are held to the extraordinary liability of insurers. To permit them to contract against liability for their own negligence or that of their servants would be contrary to the whole spirit and policy of the law governing common carriers, and would, in effect, authorize them to abandon the most essential duties of their employment. When we also consider that the parties do not stand upon an equal footing, and that railroad companies are given many special privileges as corporations for the very reason that they have such duties to perform for the public, there can be no doubt of the justice of this rule, especially as applied to such corporations." The same author says, in section 1578: "We think it is safe to say that the general rule is that every one on the passenger trains of a railroad company, and there for the purpose of carriage, with the consent, express or implied, of the company, is presumptively a passenger. * * * Persons who pay a consideration for passage, no matter in what form, are generally regarded as passengers." And again, in section 1004, he says: "The general rule is that a person riding on a railway train on a free pass, the possession of which was lawfully and rightfully obtained, is a passenger. The possession of the pass must be lawful, for, if it was obtained by fraud or the wrong of the person attempting to use it, he is not a passenger, and the carrier owes him no duty as such." And again, in section 1606, he says: "But where the person riding on a pass is regarded as a passenger, the carrier usually owes to him the same degree of care that it owes to a passenger paying full fare." Again he says, in section 1608: "Passes usually contain a stipulation which in terms exempts the carrier from

liability for negligence. As to the validity of such stipulations the authorities are not agreed, some holding that they are valid and binding upon the persons using the pass, others that they are not. In the majority of the states the courts hold that such a stipulation is void and not binding upon the person using the pass, and that the carrier is liable for injuries negligently inflicted upon a person using a pass containing such a stipulation." Again he says, in section 1609: "The relation which the person using the pass bears to the railroad company is also an important element in determining the liability. If he is regarded as a passenger, then the company is bound to use the highest practical degree of care, and for a failure to use such care it will be liable for all injuries approximately caused thereby. But where the person using the pass is an employee, then the carrier will only be liable for such injuries as result from negligence in failing to perform the duties owing to such employees. * * * The general rule is that, where the holder of the pass is to be regarded as a passenger, any act of negligence may give a right of action."

We cannot better close these citations than by the following clear and terse statement of the principles from 2 Shearman & Redfield on Negligence, which is fully sustained by the authorities we have examined. The eminent authors say, in section 491: "It is well settled that, in the absence of a special contract, a passenger traveling gratuitously has a perfect right of action for injuries suffered by him through the carrier's negligence. The fact that a traveler who ought to pay has not paid and does not intend to pay his fare does not, in the absence of actual fraud, deprive him of redress for injuries. There is no practical difference between the degree of care which a free passenger has the right to claim, and that to which a paying passenger is entitled."

To our minds these authorities, taken in connection with the cases cited in them, are conclusive of the questions before us. The greater weight of authority is decidedly in favor of the doctrine that a common carrier cannot in any event stipulate against its own negligence, including that of its servants, while it is overwhelming to the effect that, in the absence of such stipulations, it owes to a gratuitous passenger the same degree of care that it does to those that pay. In the case at bar the plaintiff appears to have been a bona fide passenger, and was so recognized by the conductor in charge of the train. Both are conclusively presumed to have known that the contract for a pass was illegal and void, but there is no evidence that either acted in fraud or bad faith. There is evidence that the plaintiff gave some consideration, although legally inadequate; but in any event the worst position in which he can be placed is that of simply a gratuitous passenger. There were no existing stipulations of exemp-

tion between him and the defendant. None had ever existed, except the conditions on the back of the pass. These conditions can have no effect, because, in the first place, the pass had expired, and, secondly, had no legal existence before its expiration. A condition, like the leaf on a tree, must be attached to something from which it can draw its life and strength. By practically all the authorities, in the absence of such express conditions, the plaintiff is held entitled to recover. What would have been the legal effect of such conditions if they existed is not strictly before us. We have shown that the decided weight of authority is against their validity, but we did so to show that, if the liability of a common carrier to a gratuitous passenger could not be waived by an express stipulation, it certainly existed in the absence of any such stipulation. Even those courts that hold it may be waived, necessarily admit its existence in the absence of waiver. If it exists in the absence of contract, and cannot be waived by contract, it must necessarily owe its existence to the policy of the law.

It is contended in behalf of the defendant that there was error in the court below refusing to charge "that there is no evidence to support the plaintiff's allegation [in the complaint] that he was traveling on the defendant's road, on the occasion complained of, as a passenger for hire or compensation." We see no error in its refusal, as, in our view of the case, it was immaterial.

The defendant also contends that its exception to the following charge of the Court should be sustained, to wit: "If, when the plaintiff was called on for his fare, he produced to the conductor the pass which had been exhibited in evidence, and the conductor accepted it, the plaintiff was a passenger on the train." We think that whatever error may be found in this instruction is harmless. The pass was in legal effect a blank piece of paper. It had expired by its own limitation, if that can be said to have expired which has never legally existed. Its only effect could have been to convince the conductor of the truthfulness of the plaintiff's statement that he had a contract with the company under which he was entitled to ride free. The result seems to have been his acceptance as a passenger by the conductor, who, being in control of the train, is in the very nature of things the only officer or servant of the company who can accept a passenger. He is charged with that duty by the defendant, who must therefore abide the consequences of his act, especially as there is no evidence of fraud or deception on the part of the plaintiff. The evidence tends to prove that the plaintiff was on the train as a bona fide passenger under an agreement for so-called "free transportation," but ready to pay his fare if demanded. The fact that the previous contract was illegal, and no fare was either demanded or paid, can have no further

Rowdin v. Pennsylvania R. Co

effect than to reduce the plaintiff to the condition of a merely gratuitous passenger, having no binding contract, and therefore subject to no limitations of liability. As such we now think he was entitled to recover. The petition to rehear is allowed, and the judgment below affirmed.

Petition allowed.

ROWDIN v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, April 11, 1904.)

[57 Atl. Rep. 1125.]

Who Are Passengers.*

Where an employee accompanies live stock in transit, and his transportation has been included in the price paid by the owner, he is a passenger within the meaning of Act April 4, 1868 (P. L. 58), which relieves a railroad company from liability for injuries received by any person not a passenger.

Injury to Person Accompanying Stock—Release—Burden of Proof.†

Where a drover accompanying live stock on a railroad, whose transportation had been included in the price paid as freight on the stock, is injured by a collision between his car and another on defendant's track, he sufficiently sustains the burden of proof to show negligence in order to relieve him from the effects of the release on the back of the contract of shipment, by which he assumed all risks of accident or damage to his person.

Appeal from Court of Common Pleas, Philadelphia County.

Action by J. B. Rowdin against the Pennsylvania Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed.

The court below charged as follows (Beitler, J.):

"The plaintiff here was riding upon what was equivalent to a free pass; that is to say, he had paid no fare, and was not, in the ordinary sense of the word, a passenger upon the road of the Pennsylvania Railroad Company. He had signed a contract—or, rather, I do not know whether he had signed it—but he was upon the road of the Pennsylvania Railroad Company as the consequence of a written contract in which he, as a shipper, agreed to relieve the Pennsylvania Railroad Company of all liability for accident to the man in charge of the horses, whether due to the negligence of the railroad company or to other causes. Now, in point of fact, our Supreme Court has held that that contract is against public

*As to who are, and are not, passengers, see foot-note appended to *Radley v. Columbia Southern Ry. Co. (Ore.)*, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

†Presumption of negligence from injury to passenger, see foot-note appended to *McCord v. Atlanta & C. Air Line R. Co. (N. Car.)*, 10 R. R. R. 275, 33 Am. & Eng. R. Cas., N. S., 275, where all the preceding authorities in this series are collected or referred to; *Palmer v. Warren St. Ry. Co. (Pa.)*, 10 R. R. R. 597, 33 Am. & Eng. R. Cas., N. S., 597 (presumption of negligence where street railway passenger is injured).

Rowdin v. Pennsylvania R. Co

policy, and is not, in its entirety, a contract that the law will uphold, even though the railroad company and the shipper deliberately make it, put it in writing, and sign it; and the Supreme Court has held that it is against public policy for a transportation company to contract to relieve itself of its negligence. And hence, even in the case of a man who is traveling upon a free pass, or given transportation free as a part of any other contract he makes with a railroad company, he can still recover from the railroad company if he proves that he was injured by the negligence of the railroad company. In that respect his position is changed from that of a passenger in the ordinary acceptance of that term. A passenger upon a railroad has, to state the case very broadly, only to prove that he was injured to recover from the railroad company, unless the railroad company can show that the cause of the injuries was something absolutely outside and beyond its control; as, for instance, an act which is termed by the law an act of God. But the making of a contract such as was made in this case shifts the burden of proof from the defendant to the plaintiff. It takes away from the defendant the burden of proving that it was not guilty of negligence, and puts upon the plaintiff the burden of proving that the defendant was guilty of negligence, because only in case he can prove that the railroad company was guilty of negligence can he recover against it, and that is in spite of the contract in which it is said he could not recover, even though the defendant company was negligent. Now, in this case the plaintiff has not shown that the railroad company was negligent. He has shown a crash. He has not shown the cause of it. He has not shown the ownership of the thing that caused the crash. He has not shown that which is entitled to go to the jury to base a verdict upon that the defendant was guilty of negligence. In stating the case in this way I have done it simply that the plaintiff's counsel may have the benefit of my views on the record, so that if the plaintiff, seriously injured, seriously crippled and seriously hurt, desires to overturn the decision either of the court in banc or in the Supreme Court, he may have every chance to do it. I might add that there is a very grave doubt whether this case does not fall within the case which has been termed here the 'Price Case,' 96 Pa. 256, and whether it is not governed by the act of 1868 (P. L. 58). That act provides that where a man is lawfully upon the railroad, but not a passenger, that he shall have no other rights than the rights of a railroad employee. This man was lawfully upon the railroad. He was a man in charge of Quinton's horses. He was put there by the contract that Quinton made—that is to say, he was put there because he was the caretaker of Quinton's horses, looking after them in transit; and it seems to me that it can be well argued that he was lawfully on the railroad, but not a passenger, and therefore that the act of

Rowdin v. Pennsylvania R. Co

1868 applies." I put the case on the other point, believing that that is the point about which there is no doubt. I direct a verdict in this case for the defendant."

Argued before DEAN, FELL, BROWN, MESTREZAT, and THOMPSON, JJ.

Theo. Cuyler Patterson, Samuel Dickson, and Richard C. Dale, for appellant.

John Hampton Barnes, for appellee.

MESTREZAT, J. J. B. Rowdin, the plaintiff, was employed by C. E. Quinton to accompany and superintend the shipment of two horses over the defendant's road from Wissahickon Heights, in Pennsylvania, to Trenton, N. J. On the morning of August 26, 1901, the horses were put in a car at Wissahickon Heights, and were taken to Chestnut Hill Station on defendant's road. Here the plaintiff alighted from the car, and a bill of lading was given him by the defendant's agent, in which it was "mutually agreed, in consideration of the rate of freight hereinafter named," that the defendant company would carry from Wissahickon Heights, Pa., to Trenton, N. J., two horses, with "1 man in charge free." The horses were consigned to C. E. Quinton. At the time he received the bill of lading, the plaintiff signed a release indorsed on the back of a contract known as the "Uniform Live Stock Contract," and therein, "in consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge further than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract," he voluntarily assumed all risk of accidents or damage to his person or property, and released the defendant from all claims for any personal injury or damage of any kind sustained by him by reason of the negligence of the defendant or of any of its employees. The car with the plaintiff and the horses in it was taken from Chestnut Hill over the defendant company's road to Germantown Junction, where it was placed on a siding by itself to await the arrival of one of the defendant's freight trains, which was to take it to Trenton. After the car had been on the siding a short time, and while the plaintiff was in it trying to quiet one of the horses, frightened by a passing train, another freight car on the same track, loaded with oil collided with it. This is clearly a reasonable inference from the evidence, and the jury would have been warranted in finding it as a fact. The collision was so violent that it knocked off the door of the car containing the horses and placed the other car in a lopsided position so that the "oil was running out of it." The plaintiff was thrown to the corner of the car and seriously injured. He brought this action to recover damages for the injuries he sustained, alleging that they were caused by the defendant company's negligence.

Rowdin v. Pennsylvania R. Co

At the conclusion of the testimony the trial judge affirmed defendant's point that "under all the evidence the verdict should be for the defendant," and withdrew the case from the jury. His reason for giving binding instructions was that the release imposed "upon the plaintiff the burden of proving that the defendant was guilty of negligence," and that he had failed to show that his injuries resulted from defendant's negligence. The learned judge also intimated that the plaintiff might be prevented from recovering by reason of the act of April 4, 1868 (2 *Purd. Dig.* p. 1604, pl. 6), which relieves a railroad company from liability for injuries received by any person, not a passenger or its own employee, while engaged or employed about its road or cars.

In *Pennsylvania Railroad Company v. Price*, 96 Pa. 256, a passenger is defined to be "one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as payment of fare, or that which is accepted as an equivalent therefor." The plaintiff, when injured, was being carried by the defendant company for a consideration under a contract which made him a passenger, and was not "riding upon what was equivalent to a free pass," as suggested by the court below. The learned judge also says: "He [plaintiff] had paid no fare, and was not, in the ordinary sense of the word, a passenger upon the road of the Pennsylvania Railroad Company." The contract and the release show that the consideration for the transportation of the plaintiff was included in "the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract." For this consideration the plaintiff was to be carried from Wissahickon Heights, Pa., to his destination at Trenton, N. J. By the terms of the contract the "shipper is at his own risk and expense to load and take care of, and to feed and water, said stock whilst being transported." It therefore became necessary for the shipper to have some person accompany the horses, and this person was required to be on the train carrying the stock. Recognizing the necessity of some person being in charge of the horses and of his having to travel on the same freight train, and desiring to relieve itself from liability for any injuries sustained by him, the defendant company inserted in the contract for transportation the stipulation "that in consideration of the premises, and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers, without charge other than the sum paid or to be paid for the transportation of the live stock," the shipper would indemnify the carrier against all claims for injuries sustained by the person in charge of the stock. The language of *Read, J.*, in *Pennsylvania Railroad Company v. Henderson*, 51 Pa. 315—an action by a person injured while in charge of stock and riding on a "free ticket"—is pertinent and applicable to the case in hand. He says:

Rowdin v. Pennsylvania R. Co

"As it is absolutely necessary, in carrying stock, that the persons who have charge of them should be carried by the company, the price paid for the freight includes the cost of transporting the drover, who is not, therefore, a gratuitous, but a paying, passenger; and the word 'free' is therefore only true so far as that the conductor is not entitled to charge him separately for his passage." The same principle is announced in *Hanover, etc., Railroad Co. v. Anthony*; 3 Walker's Rep. 210. And it is immaterial that the consideration for the plaintiff's transportation is paid to the defendant company by his employer. The rights of a passenger as against the carrier are not affected by reason of the fact that his fare is paid by another than the passenger. *Marshall v. The York, Newcastle & Birmingham Railway Co.*, 11 C. B. 655. Aside from the effect of the release upon the contract of carriage of the plaintiff, to be noticed hereafter, he was, therefore, a passenger while traveling on the defendant's road at the time he received his injuries, and was entitled to the rights and protection of a passenger as against the carrier company.

We do not agree with the intimation of the court and the contention of the defendant "that the plaintiff was in the relation of an employee to the defendant under the provisions of the act of April 4, 1868, and was not a passenger." As we have already observed, the plaintiff, at the time of the collision between the cars resulting in his injuries, was being carried under a contract as a passenger for hire on the defendant's road to his destination on the company's line at Trenton, N. J. This clearly relieves him from the provisions of the act of 1868, and brings him within the proviso that "this section shall not apply to passengers." As suggested in *Pennsylvania Railroad Company v. Price*, supra, it would certainly be paradoxical, if not unsound, that a party should be within the letter of the act and at the same time be within the exception. Being a passenger, he cannot be at the same time an employee or a quasi employee within the provisions of the act. The proviso covers all classes of persons bearing the relation of passenger to the carrier, and when that relation is shown to exist the carrier is not in a position to invoke the provisions of the act for its protection. We think this construction of the act of 1868 is in accord with our former decisions. In *Pennsylvania Railroad Company v. Henderson*, supra, a drover who had paid freight for carrying his live stock was given a drover's pass or "free ticket" for the transportation of the person in charge of the stock, which entitled him to travel on the same train with the stock. There was no consideration paid for the ticket other than the freight paid for the transportation of the stock, and that was the same whether the shipper sent a person in charge of the stock or not. The drover was injured while traveling on this ticket, and in an action against the railroad company

Rowdin v. Pennsylvania R. Co

for damages by reason of its alleged negligence it was held that he was not "a gratuitous, but a paying, passenger." In *Hanover, etc., Railroad Co. v. Anthony*, supra, the plaintiff was a cattle shipper, and "paid the company thirteen dollars per car load, and this payment, under his agreement with the company, entitled him to go with his stock, and return home again on one of their passenger trains." He was given a pass called a "Drover's Return Ticket," and while traveling on it en route home on a passenger train was injured. This court held that the plaintiff "clearly came within the contract relation of a paying passenger," and that "a drover who accompanies a car of cattle on a railroad has a passenger's right of action against the company for an injury sustained, and is not within the purview of the act of April 4, 1868 (P. L. 58)." There the trial judge of the court below whose judgment was affirmed by this court, in his opinion on the reserved question whether the act of 1868 relieved the railroad company from liability said: "When this point was presented to us, we indicated our purpose to refuse it, because we could not conceive that one who traveled upon the company's trains under a contract relation could be other than a passenger, and hence not within the scope of the act of assembly referred to. As no case was cited at the time which seemed to decide the question, we reserved the point for more careful consideration. Since that the case of the *Pennsylvania Railroad Company v. Henderson*, 51 Pa. 315, has been found, and is directly in point. It was argued, however, that that decision is modified by the act of April 4, 1868 (P. L. 58). That this is not the effect of that act seems clear enough from the language of the Supreme Court in the case of *Pennsylvania Railroad Company v. Price*, 96 Pa. 256."

The cases cited and relied upon by the defendant wherein a postal clerk was held not to be a passenger and within the provisions of the act of 1868 are clearly distinguishable from the case at bar. A postal clerk is carried by a railroad company by virtue of the act of Congress, which provides that the company shall carry him without extra charge. Neither he nor his employer, the United States government, contracts with the company for his transportation. As said by Paxson, J., in *Pennsylvania Railroad Company v. Price*, supra: "This act [Act Cong. June 8, 1872, c. 335, § 213, 17 Stat. 309; U. S. Comp. St. 1901, p. 2719] makes it the duty of the company to carry the mail agent without extra charge, but it no more makes him a passenger than it does the mail matter of which he has the care. The company have no control of him as they have over passengers, for whose safety they are responsible. He is not bound to observe any of the rules prescribed for the protection of passengers." In this case the court, in commenting on *Pennsylvania Railroad Co. v. Henderson*, supra, and noting the distinction between a

Rowdin v. Pennsylvania R. Co

mail agent and a person traveling with stock by virtue of a contract with the railroad company, says: "There the plaintiff was a drover, transporting his live stock upon the cars of the company. He had paid the freight on his stock, and at the same time received a pass for himself. He was traveling with his stock, and was as much a passenger as if he had been traveling with his trunk. He had a direct contract relation with the company. He was under the control of the conductor, and was bound to conform to the reasonable rules of the company, the same as other passengers. I see little analogy between such a case and that of a mail agent, who has no contract relation with the company, and who is not in any sense under its control." Nor does *Miller v. Cornwall Railroad Company*, 154 Pa. 473, 26 Atl. 779, rule the case in hand against the plaintiff. There the plaintiff was injured while he was in charge of the cars of his employer which were run over the defendant's road, under a traffic agreement between the parties. He was clearly "engaged or employed on or about the road," of the defendant company in contemplation of the act of 1868.

As stated above, the court granted a nonsuit on the ground that the plaintiff had failed to show that his injuries resulted from defendant's negligence. It is well settled, and was conceded by the trial judge, that the release signed by the plaintiff did not relieve the defendant company from its own or its servant's negligence. Assuming, as we will, that the burden was on the plaintiff to show negligence, we think the facts, as disclosed at the trial, were sufficient to send the case to a jury on the question of the defendant's negligence. In not developing the facts more fully at the trial, the plaintiff took the chances of the jury finding against him, but that did not warrant the court in withdrawing the case from the jury. The plaintiff was injured while he was being carried by the defendant company over its railroad as a passenger, his injuries resulting from a violent collision between his car and another car on the defendant's track. These facts are not consistent with care and prudence in operating the defendant's road. The only inference arising from the facts is that the collision was caused by defective appliances of transportation, or by the negligent operation of the cars on the defendant's road, for either or both of which the company is responsible. A railway company has control of its road, and presumably of the cars and trains that are operated on it. When, therefore, a collision occurs between trains or cars, and injury results to a passenger, the happening of the collision is evidence of, or raises an inference of, the carrier's negligence, and in an action by the injured person against the carrier the question of the defendant's negligence is for the jury. *Camden & Atlantic Railroad Company v. Bauch* (Pa.) 7 Atl. 731; *Buffalo, Pittsburg & Western Railroad Company v. O'Hara*, 3 Penny. 190; *Crary v. Lehigh Valley*

Duchemin v. Boston Elevated Ry. Co

Railroad Company, 203 Pa. 525, 53 Atl. 363, 93 Am. St. Rep. 778, 59 L. R. A. 815. While in the Crary Case the facts did not bring it within the rule just stated, yet the opinion clearly recognizes the rule and its enforcement by the decisions of this court, including the other two cases cited above. We are of opinion that the plaintiff sustained the burden of proof put upon him by the release, and that, therefore, the learned trial judge erred in withdrawing the case from the jury.

The judgment is reversed, with a venire de novo.

DUCHEMIN *v.* BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Sept. 7, 1904.)

[71 N. E. Rep. 780.]

Street Railways—Passengers—Persons Approaching Car.*

A pedestrian on the highway, who, for the purpose of boarding it, is approaching a street car stopped to receive him as a passenger, is not, before he actually reaches the car, entitled to the rights of a passenger, even so far as concerns defects in the car, in respect of the extraordinary degree of care due passengers from common carriers, and the railway owes him no duty other than that it owes to any person on the highway.

Exceptions from Superior Court, Suffolk County; Chas. U. Bell, Judge.

Action by one Duchemin against the Boston Elevated Railway Company. Verdict for plaintiff. Defendant brings exceptions. Exceptions sustained.

Arthur H. Russell, for plaintiff.
Choate & Hall, for defendant.

BARKER, J. The action is for a personal injury occasioned by the fall of a trolley pole and car sign. The case stated in the declaration is that, as the car approached the plaintiff, he went toward it for the purpose of entering it, having given the motorman in control notice of his intention so to become a passenger, and that as he was about to get on the car the trolley pole fell, striking a sign upon the car, and the pole and sign struck the plaintiff; he being in the exercise of due care, and the defendant negligent. At the trial the testimony of the plaintiff and of one passenger on the car tended to show that when the pole and sign fell the car was stationary, and the plaintiff in the act of boarding it, having either one foot or both feet on the running board. On the other hand, the testimony of one passenger who was called as a witness by the plaintiff, and of seven other persons who were on or near the car and were called as wit-

*As to who are, and are not, passengers, see foot-note appended to *Radley v. Columbia Southern Ry. Co.* (Ore.), 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

Duchemin v. Boston Elevated Ry. Co

nesses on the part of the defendant, tended to show that when the pole and sign fell the car was not stationary, but was going slowly around a curve at a street corner, where there was a crosswalk. Of these seven the motorman testified that he did not see the plaintiff until after the fall of the pole and sign, and that the plaintiff was then standing on the crosswalk, within three or four feet of the car. The conductor testified that he saw nobody in the act of getting on; that he saw the plaintiff struck by the sign; and that, after being struck, the plaintiff was from three to five feet from the car. Two others of the defendant's witnesses, policemen of Cambridge, testified that they were together standing on the street within a few feet of the plaintiff, who was standing on the crosswalk as though waiting for the car to go by, and that he made no movement or attempted to get on the car. The other three witnesses for the defendant were passengers on the car, and testified that they saw no one attempting to get on the car. Eight witnesses in all testified that the car was in motion around the curve when the accident occurred.

The defendant requested the court to instruct the jury (1) that the plaintiff was not a passenger, and that the defendant did not owe him the degree of care owed to passengers, and (2) that the defendant was required to exercise only that degree of care towards the plaintiff which a reasonably prudent person would exercise under the same circumstances. The court instructed the jury, in substance, that a person desiring to ride upon a street car may have the rights of a passenger before he actually takes his place upon the car; that where he has signaled the motorman to stop, and the motorman has stopped to receive him, thereby making an offer to be received and an acceptance of that offer, he is entitled to the rights and protection of a passenger as he approaches that car to get upon it, at least so far as any defect in that car is concerned.

After a verdict for the plaintiff, the case is before us upon the defendant's exception to the refusal of the court to give the rulings requested, and upon an exception to the portions of the charge which stated that a person may have the rights of a passenger as he approaches a street car, and the degree of care owed to a person under those circumstances. The tenor of the parts of the charge so excepted to was as follows: "Now, gentlemen, I want to say, before I go into the evidence—to explain what I said I would explain about being a passenger. A man becomes a passenger—or at least it may be a more accurate way to say that he has the rights of a passenger—before he actually takes his place upon the car. He may do so. A man who comes to a steam railroad which has depots, when he has bought his ticket, and as he is approaching the car, may have all the rights of a passenger, although he has not yet reached the car or taken his seat

Duchemin v. Boston Elevated Ry. Co

upon it. And the person desiring to ride upon the street car, where he has signaled the motorman to stop, and the motorman has stopped to receive him, thereby making an offer to be received and an acceptance of that offer, he is entitled to the rights and protection of a passenger as he approaches that car to get upon it; at least so far as any defect in that car is concerned. He is within his rights and within the contract under those circumstances as he approaches that car; for instance, if anything falls, as in this case, from the car, and strikes him." "They owed him the duty to use the highest degree of care which is reasonably practical in running such a road; the utmost care which is consistent with the nature and extent of the business in which it is engaged, and such as a prudent man would use to guard them against every possible contingency, every possible danger, so far as it was practicable. They are not an insurer, but they owe a good deal more than the ordinary degree of care. A passenger intrusts his person, sometimes his life, to these companies, and is obliged to trust them for the precautions which shall be used for it; and the law has been long settled that he is entitled to call upon them, as I have said, for the highest practical degree of care in executing such an enterprise as running a street railway. That they must do for him; and the question is whether they failed in that duty, because in the failure of that duty is the plaintiff's case. If they performed that duty, they owe no further liability to the plaintiff. He may have been injured by one of those inevitable accidents for which no remedy exist, and which we all have to bear as they come to us in the course of human life."

It should be noted that in the charge the jury were instructed that the suit was not brought as in the right of a person upon the street; that the standards of care are quite different in the case of a passer-by upon a street struck by apparatus falling from a car; and that, if the plaintiff had not become a passenger, he could not recover. We assume that this portion of the charge was understood to mean that, if the car had not stopped to receive the plaintiff, or if he was attempting to go to it or to board it when it had stopped for some other purpose than to receive passengers, and he had made to those in charge of the car no sign that he intended to take the car, or had received from them in return no indication of assent to such a signal, or if he was attempting to reach or board the car while it was yet in motion, he could not recover. This leaves as the turning point of the case the question whether a foot traveler on the highway, who is approaching a street car stopped to receive him as a passenger, and before he actually has reached the car, is entitled to the rights of a passenger in respect of that extraordinary degree of care due to passengers from common carriers of passengers, at least so far as any defect in that

Duchemin v. Boston Elevated Ry. Co

car is concerned. In other words, the question is whether the jury should have been instructed that the defendant owed to the plaintiff the same high degree of care while he was approaching the car, and had not yet reached it, that it would owe to a passenger. It is apparent that a person in such a situation is not in fact a passenger. He has not entered upon the premises of the carrier, as has a person who has gone upon the grounds of a steam railroad for the purpose of taking a train. He is upon a public highway, where he has a clear right to be independently of his intention to become a passenger. He has as yet done nothing which enables the carrier to demand of him a fare, or in any way to control his actions. He is at liberty to advance or recede. He may change his mind, and not become a passenger. Certainly the carrier owes him no other duty to keep the pavement smooth, or the street clear of obstructions to his progress, than it owes to all other travelers on the highway. It is under no obligations to see that he is not assaulted, or run into by vehicles or travelers, or not insulted or otherwise mistreated by other persons present. Nor do we think that as to such a person, who has not yet reached the car, there is any other duty, as to the car itself, than that which the carrier owes to all persons lawfully upon the street. There is no sound distinction as to the diligence due from the carrier between the case of a person who has just dismounted from a street car and that of one who is about to take the car, but has not yet reached it. In the case of each the only logical test to determine the degree of care which the person is entitled to have exercised by the street railway company is whether the person actually is a passenger, or is a mere traveler on the highway. We think that a present intention of becoming a passenger as soon as he can reach the car neither makes the person who is approaching the car with that intention a passenger, nor changes as to him the degree of care to be exercised in respect of its cars as vehicles to be used upon a public way with due regard to the use of the same way by others. The defendant incurs no responsibility to exercise extraordinary diligence by making an express contract, but only by its exercise of the calling of a common carrier; and its obligation as such does not arise until the intending passenger is within its control. We are unwilling to go farther than the doctrine stated in *Davey v. Greenfield Street Railway Co.*, 177 Mass. 106, 58 N. E. 172, that, when there has been an invitation on the part of the carrier by stopping for the reception of a passenger, any person actually taking hold of the car and beginning to enter it is a passenger. See *Gordon v. West End Street Railway Co.*, 175 Mass. 181, 183, 55 N. E. 990, and cases cited. If the instructions allowed the jury to find for the plaintiff only in case the car had reached a usual stopping place, and had stopped to receive him, there was error in ruling that under

Birmingham Ry., Light & Power Co. v. Bynum

those circumstances, and before he had actually reached the car, he had a right to have the defendant exercise as to him that extraordinary degree of care due to passengers. So long as he remained a mere traveler on the highway, although walking upon it for the sole purpose of taking the car, the defendant did not owe him any other duty than that which it owed to any person on the highway. Whether one just has dismounted from a street car, or just is about to board one, he does not have the rights of a passenger.

Exceptions sustained.

BIRMINGHAM RY., LIGHT & POWER CO. v. BYNUM.

(Supreme Court of Alabama, Feb. 10, 1904.)

[36 So. Rep. 736.]

Injury to Passenger—Evidence—Frequency of Cars Becoming Uncoupled.

In an action against a street railway company for injuries sustained by a passenger owing to cars becoming uncoupled because of defective couplings, it appearing that the couplings used were the same as those used at a time when a witness was employed by defendant, it was proper to permit him to be asked how often in his experience couplings had become uncoupled or broken loose.

Who Are Passengers—Riding on Platform.*

Where a train of street railway cars was so crowded inside the cars as not to admit of others entering, but it continued to stop at each stopping place, and others were allowed to get on, a person who got on the car and stood outside the vestibule was a passenger, though he had not been seen by the conductor, and though his fare had not been collected.

Same—Same—Degree of Care.†

The fact that a passenger on a street car assumes a dangerous position does not alter his character as a passenger, or alter the degree of care that the carrier owes to him.

Injury to Passenger—Defective Coupling—Contributory Negligence—Riding in Dangerous Place—Proximate Cause.

Where a passenger on a street car, which was so crowded that he could not enter the car proper, stood on a projection outside of the vestibule, and was injured owing to a car in the rear of that on which he was being carried riding up onto the rear of such car owing to the braking of a defective coupling, the question whether plaintiff was guilty of contributory negligence which proximately contributed to his injury was one for the jury.

Same—Negligence—Question for Jury.

The question of the carrier's negligence in failing to provide a safer coupling was one for the jury.

Comparative Negligence.

The doctrine of comparative negligence does not obtain in Alabama.

*As to who are, and who are not, passengers, see foot-note appended to *Radley v. Columbia Southern Ry. Co. (Ore.)*, 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153.

†As to the degree of care required of a carrier of passengers, see foot-note appended to *St. Louis S.W. Ry. Co. of Texas v. Parks (Tex.)*, 11 R. R. R. 688, 34 Am. & Eng. R. Cas., N. S., 688.

Birmingham Ry., Light & Power Co. v. Bynum

Effect of Contributory Negligence.

In an action for injuries, any want of care, however slight, on the part of the injured person, contributing proximately to cause of injury, defeats his recovery.

Appeal from City Court of Birmingham; Chas. A. Senn, Judge.

Action by John Bynum against the Birmingham Railway, Light & Power Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

The facts of the case and the rulings of the court upon the evidence are sufficiently shown in the opinion. Upon the introduction of all the evidence, the defendant requested the court to give to the jury, among other, the following written charges, and separately excepted to the court's refusal to give each of the several charges requested by it: "(4) The court charges the jury that a person intending to take passage on the defendant's car, and for whom the car stopped to allow him to take passage, must enter the car by the usual and customary mode of entering the car and at the place provided for that purpose, and that if he gets upon the car at an unusual place, and attempts to ride by holding on some parts of the car, he is not a passenger, unless some agent of the defendant knew he was riding at such unusual place, or by the exercise of reasonable care ought to have known that he was so riding. (5) If the jury believe from the evidence that the plaintiff was guilty of negligence which proximately contributed, even in the slightest degree, to his injury, they must return a verdict for the defendant." "(10) If the jury believe the evidence, they must find for the defendant." "(15) The court charges the jury that if they believe from the evidence that plaintiff did not board or attempt to board defendant's car by the means and at the place provided for that purpose, and that he got upon the board or bumper at the end of the car without the knowledge or consent or permission of defendant or its agent, and that his position upon the bumper or board was not known to defendant's agent in charge of the car, and that his being at said place contributed proximately to his injury, then he was guilty of negligence which will bar his recovery." There were verdict and judgment for the plaintiff, assessing his damages at \$895.82. The defendant appeals, and assigns as error the several rulings of the trial court to which exceptions were reserved.

Walker, Tillman, Campbell & Walker, for appellant.
Saml. Will John, for appellee.

HARALSON, J. Will Patty, a witness for the plaintiff, testified, that he had run on the defendant's road as a conductor and motorman for over three years, up to February, 1901, and that the company were still using the same kind of cars they did when he was on the road. The evidence

tended to show, that the accident by which the plaintiff was injured, occurred from two cars becoming uncoupled. The witness had stated fully the coupling apparatus of the cars; the bars used for the purpose, where they were attached to the cars and how; the kind of pin used for the purpose; the drawheads of the cars, and the dangers connected with the manner of their coupling. He was asked, when testifying as a witness, "How often in your experience and operation of those cars, did they come uncoupled or break loose on account of this peculiar coupling that you speak about?" The defendant objected to the question, because the evidence called for was incompetent and irrelevant. There was no error in overruling the objection. While he did not see the accident, nor the car on which plaintiff was riding at the time, he did testify, that the company were now using the same cars that were in use when he was on the road, and that he had ridden on one of them just before this trial. In argument, the only ground of irrelevancy insisted on is, that he did not see the coupling in use, at the time of the accident. But that was of little importance, if the evidence tended to show, as it did, that the one in use was the same kind he was familiar with, and had testified about.

2. The main insistence for error is, that the court refused to give the general charge for defendant. This proceeds upon the grounds as argued, that the relation of passenger and carrier was not established, in that there was no contract express or implied, upon which such relation existed; that the plaintiff got on the car and rode some 400 feet, and did not see the conductor, nor did the conductor see him, and he had not paid or been called on for his fare, up to the time he was hurt. It was not necessary for plaintiff to have paid his fare, to become a passenger. *Hutchinson on Carriers*, § 365. The train consisting of two cars, was going into Birmingham, and, as the evidence tended to show, was so crowded, inside the cars, as not to admit of others entering them; but still, it continued to stop at each of the street stopping places, and continued to allow others, without any protest or dissent, to get on and stand where they could,—on steps, in the vestibule, and, as with plaintiff and others with him, on the projection outside the vestibule. Under such conditions, it cannot be said that as a matter of law, plaintiff was not a passenger. He had gotten on the car in good faith, with the implied invitation or consent of the company's agent, to take passage with the intention of paying fare, as the proof tends to show, and this was all that was necessary to establish the relation. 23 Am. & Eng. Enc. Law (1st Ed.) 1004; 5 Am. & Eng. Enc. Law (2d Ed.) 492; *Hutchinson on Carriers*, *supra*; *Cooley on Torts*, p. 77; *Patterson's Railway Accident Law*, § 218; *N. B. R. Co. v. Liddicoat*, 99 Ala. 549, 13 South. 18.

3. It is contended that the plaintiff, in taking his place where he did on the car, assumed a dangerous position thereon,

and, as a matter of law, should be held to have contributed proximately to his own injury. It cannot be denied, that the evidence, which was without contradiction, points in that direction. But a sufficient reply is, that a passenger does not lose his character as such, and the care the company owes him, to transport him safely, by negligently assuming a dangerous position on the train. The company would not be excused absolutely from liability on this account. But whether he was guilty of such negligence as proximately contributed to his injury was one proper, under the evidence, for the determination of the jury. As applicable to the facts of this case, we quote the text, supported by many adjudications, as found in 23 Am. & Eng. Enc. Law (1st Ed.) 1013, 1014: "Standing on the platform of the car does not necessarily constitute contributory negligence, in the absence of special circumstances showing it to be such, and the question is one to be submitted to the jury in all cases which admit of a reasonable doubt. But the circumstances may show riding in such a position to be negligent, and in general it seems that riding in such a position, when there is room inside the car, creates a presumption of contributory negligence at least, and imposes the burden of proof upon the plaintiff to show that his riding in that position did not contribute to the injury. If the car is so crowded that there is no room except upon the platform, and the conductor stops and allows the passenger to get on, the presumption of the passenger's negligence does not exist; the company must assume all risk when it requests its passengers to ride in such a place."

Mr. Beach, to the same effect says: "It is an equally well established rule that the mere fact of riding on the platform of a street car is not conclusive evidence of negligence. 'The seats inside are not the only places,' said the Supreme Judicial Court of Massachusetts, 'where the managers expect passengers to remain; but it is notorious that they stop habitually to receive passengers to stand inside till the car is full and then to stand on the platform till they are full, and continue to stop and receive them after there is no place to stand except on the steps of the platform. Neither the officers of these corporations, nor the managers, nor the traveling public, seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained on account of its danger. There is, therefore, no basis upon which the court can decide upon the evidence reported that the plaintiff did not use ordinary care.' (He was injured while standing on the platform.) 'It was a proper case to be submitted to the jury upon the special circumstances which appeared in evidence.'" Beach on Contributory Negligence, § 293; Meesel v. Lynn R. Co., 8 Allen, 234; H. A. & B. R. Co. v. Donovan, 94 Ala. 299, 10 South. 139; Montgomery & E. R. Co. v. Mallette, 92 Ala. 209, 9 South. 363.

Birmingham Ry., Light & Power Co. v. Bynum

4. The same thing may be said touching the alleged negligence of defendant, in having the cars properly coupled. "The law imposes upon common carriers the duty of exercising the highest degree of care, skill and diligence in the transportation of passengers, and holds them responsible for the consequences of the slightest negligence resulting in injury to persons sustaining that relation to them." A. G. S. R. Co. v. Hill, 93 Ala. 520, 9 South. 722, 30 Am. St. Rep. 65. Moreover, "if injury suffered at the hands of a common carrier, the law, in the absence of all explanation, presumes it was the result of the carrier's fault, and casts on the latter the burden of overturning the presumption, or of showing that diligence and a careful observance of duty could not have prevented the injury." L. & N. R. Co. v. Jones, 83 Ala. 376, 3 South. 902; Ga. P. R. Co. v. Love, 91 Ala. 434, 8 South. 714, 24 Am. St. Rep. 927.

In this case the evidence tends to show, that plaintiff's injury resulted, from negligence on the part of defendant's agent, in not providing a safer coupling of the two cars, in consequence of which, the trailer, or rear car, ran against and mounted the rear of the front car and caught and injured the plaintiff's foot, while standing on the projection of the latter car. The question of negligence in failing to provide a securer or safer coupling was one, like that of plaintiff's alleged contributory negligence, proper for the determination of the jury, under proper instructions.

5. From what has been said, it will appear, that charges 4, 10 and 15, the only ones insisted on as erroneous, were properly refused.

6. Charge 5 instructed, that if the jury believe from the evidence that the plaintiff was guilty of negligence which proximately contributed, even in the slightest degree, to his injury, they must return a verdict for the defendant. The doctrine of comparative negligence does not obtain in this state. Frazer v. South & N. A. R. Co., 81 Ala. 185, 1 South. 85, 60 Am. Rep. 145. There is no averment that the injury was willfully or wantonly inflicted. It is certainly the law that any want of care, however slight, on the part of the plaintiff, if it contributed proximately to produce the injury, will defeat his action. Beach on Contributory Negligence, § 20; S. R. Co. v. Arnold, 114 Ala. 183, 191, 21 South. 954; Holland, §§ 444, 454.

The court erred in refusing this charge, and for that error the judgment below is reversed.

Reversed and remanded.

REAGAN v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Feb. 24, 1904.)

[79 S. W. Rep. 435.]

Appeal—Record.

Where a cause comes to the Supreme Court not on the short form allowed by statute, but on full record, showing the final judgment, the order allowing the appeal, the record entry of the filing of the bill of exceptions, and the full bill itself, an abstract accompanying the record, and containing a recital of these facts, is sufficient.

Injury to Street Railway Passenger—Burden of Proof—Failure to Exercise High Degree of Care.*

In an action for injuries to a passenger alighting from a street car, a charge that the burden of proof was on plaintiff to show that the car had stopped or slowed down, and that, while plaintiff was alighting, and before she had a reasonable time to alight, defendant's servants caused the car to move forward with increased motion, and thereby plaintiff was thrown on the street and injured, whereas, if defendant's servants had exercised a high degree of care, they would have prevented such injury, was not open to the objection of throwing on plaintiff the burden of proving that the sudden starting of the car could have been prevented by the exercise of the high degree of care incumbent on defendant.

Same—Sudden Starting of Car While Passenger Is Alighting—Liability.*

Where a street car stops or slows down to such a degree that it is reasonably prudent for a passenger to attempt to alight, and she so attempts, but while alighting the car starts forward so as to throw her down, the street railway is liable for a resulting injury, unless it can affirmatively show that such movement of the car could not have been prevented by the exercise of that degree of care which a carrier owes to a passenger.

Same—Same—Burden of Proof.

In an action for injuries to a passenger alighting from a street car, where the defense was that the car had not stopped for plaintiff to alight, but was moving at a rate of speed that rendered it dangerous for her so to do, the burden was on plaintiff to prove that the car had stopped or had slowed down to a degree rendering it safe for her to alight, and that a new impetus was given to it while she was alighting.

Same—Same—Pleading and Proof.

In an action for injuries to a passenger alighting from a street car, there was no necessity for instructions on the care to be exercised by defendant in preventing the sudden starting of the car, where there was no claim by defendant that the car had started from a cause beyond its control, but its defense was a denial that the car had stopped for the passenger to alight, but was moving at a speed rendering it dangerous for her to so do.

*As to the care due alighting passengers, see foot-note appended to *Richmond Traction Co. v. Williams* (Va.), 9 R. R. R. 754, 32 Am. & Eng. R. Cas., N. S., 754, where all the preceding authorities in this series are collected or referred to.

As to the liability of railroads for injuries to passengers from jerks and jolts of trains or cars, see foot-note appended to *Field v. Delaware, L. & W. R. Co.* (N. J.), 9 R. R. R. 653, 32 Am. & Eng. R. Cas., N. S., 653, where all the preceding authorities in this series are collected.

As to the degree of care required of a carrier of passengers, see foot-note appended to *Chesapeake & O. Ry. Co. v. Jordan* (Ky.), 9 R. R. R. 672, 32 Am. & Eng. R. Cas., N. S., 672, where all the preceding authorities in this series are collected.

Reagan v. St. Louis Transit Co**Trial—Rule of Court.**

A rule of court providing that in jury trials plaintiff, or, where he has the affirmative of the issues, defendant, may open and close, and that the court may announce how much time will be allowed on each side for argument, and that plaintiff may apportion the time allotted to him between his opening and closing argument, but shall not consume more than one-half thereof in closing, is a reasonable regulation, and within the power of the court to make.

Same—Argument.

In an action for injuries to a passenger, where the only issue presented was whether or not the car had slowed down or stopped, and, before plaintiff had time to alight, started again with a jerk, and plaintiff was the only witness in her behalf, and defendant introduced but five witnesses, the law of the case being plain and fully covered by the instructions given, a 15-minute limitation for argument was proper.

Same—Same—Discretion of Trial Judge.

The limitation of argument to the jury is a matter for the judicial discretion of the trial judge, and an abuse of that discretion must be clear, to authorize reversal therefor.

Robinson, C. J., and Brace and Valliant, JJ., dissenting.

In Banc. Appeal from St. Louis Circuit Court; Selden P. Spencer, Judge.

Action by Bridget Reagan against the St. Louis Transit Company. From a judgment for defendant, plaintiff appeals. Affirmed.

The following is the opinion of the court in Division No.

1:

VALLIANT, J. Plaintiff was a passenger on a street car on defendant's railway in St. Louis, and received injuries to her person by falling while she was in the act of alighting. The petition alleges that, when the car reached the point of the plaintiff's destination, in obedience to her signal, for the purpose of allowing her to alight, it either stopped or slowed down so as to be moving imperceptibly (plaintiff being unable to say which), whereupon she attempted to alight, and while in the act of doing so the defendant's servants in charge of the car negligently caused or suffered it to move forward with increased motion, which caused the plaintiff to be thrown upon the street and suffer certain severe injuries. The answer was general denial and a plea of contributory negligence, to which there was a reply. The testimony on the part of the plaintiff tended to prove the cause of action as stated in her petition, and that on the part of the defendant tended to prove the contrary, and to sustain the plea of contributory negligence. There were four witnesses examined on the part of the plaintiff, and five for the defendant. Their testimony, as reported, covers 53 pages in the bill of exceptions. The instructions given cover 4 closely written pages of manuscript. The instructions given on behalf of the plaintiff were to the effect that if, for the purpose of allowing the plaintiff to alight, the car had been stopped, or slowed down so that its motion was imperceptible, and the plaintiff thereupon was in the act of alighting, and while she

Reagan v. St. Louis Transit Co

was in that act, and before she had a reasonable time in which to alight, the servants of defendant in charge of the car caused or suffered it to move forward with an increased motion, and thereby the plaintiff was thrown upon the street and injured, and that if the defendant's servants had exercised a high degree of care and skill, such as careful and skillful railway operators would exercise under like circumstances, they would have prevented such motion of the car, but that they neglected to do so, the plaintiff was entitled to recover. The instructions for the defendant were to the effect that if the plaintiff suffered the injuries complained of in consequence of attempting to alight from the car while it was moving, under such circumstances as that a woman of ordinary prudence would not have so attempted, she was not entitled to recover. Then the court, of its own motion, gave this instruction, which is the only one complained of: "The burden of proving the facts set out in these instructions as necessary to be proved in order to enable plaintiff to recover is upon the plaintiff—that is, the preponderance or greater weight of the testimony must be on the side of the plaintiff—and, unless she has so proven them, she is not entitled to recover. The burden of proving any negligence in the plaintiff is upon the defendant." To the giving of which exception was taken.

The following, which was one of the rules of practice of that court, was enforced in this case:

"Rule 29. Trial—Argument of Counsel. In cases tried before a jury the plaintiff shall have the privilege of opening and closing the argument; the opening argument to be made after the evidence is in and after the instructions, if any, have been given. Should the plaintiff decline to make the opening argument, he will be considered as thereby waiving his privilege of closing the same, and shall not be allowed to do so, but the defendant shall, nevertheless, have the privilege of making his argument. Before the argument begins, the court will announce how much time will be allowed on each side for argument, each side being allowed the same length of time. The plaintiff may apportion the time allotted to him between his opening and closing argument, as he may choose: provided he shall not consume more than one-half of his time in his closing argument. In those cases in which the court decides that the defendant has the affirmative of the issues, he shall have the opening and closing of the argument in like manner, and under the same restrictions, as above laid down for the plaintiff. The court may in its discretion change the order of argument as above described, in a particular case, where the circumstances in the opinion of the court require it, and where it is so ordered before the argument begins. The court may in its discretion allow the argument in a particular case to extend beyond the allotted time if the circumstances in the opinion of the court render it proper to do so."

Reagan v. St. Louis Transit Co

The court limited the arguments to 15 minutes on each side. Counsel for plaintiff asked longer time, but the court refused the request, and the plaintiff excepted.

The verdict and judgment were for the defendant, and plaintiff appealed.

1. Respondent presents the point that the abstract of appellant does not show that there was a final judgment rendered or appeal allowed, and, further, that it does not show that there is a record of the filing of the bill of exceptions. The cause is not here, however, on the short form allowed by statute, but on full record; and that record shows the final judgment, the order allowing the appeal, and the record entry of the filing of the bill of exceptions. It also contains the full bill of exceptions. The abstract contains a recital of all these facts, and, accompanying, as it does, the full record, is sufficient.

2. Appellant assigns for error the giving of the instruction above quoted, which is to the effect that the burden was on the plaintiff to prove the facts set out in the instructions as necessary to entitle her to recover. It is contended that this instruction throws upon the plaintiff the burden to prove that the sudden starting of the car after it had stopped, and while the plaintiff was alighting, could have been prevented by the exercise of the high degree of care that was incumbent on the carrier. We do not think the instruction susceptible of that construction. If the car had stopped, or if it had slowed down to such a degree that it would have been reasonably prudent for the plaintiff to have attempted to alight, and she had so attempted, but while in that act the car had started forward with such a motion as to throw her down, the defendant would have been liable for the result, unless it could show that such movement of the car could not have been prevented by the exercise of that degree of care which the carrier owed the passenger; and the burden of showing that fact would have been on the carrier. *Hutchinson on Carriers* (2d Ed.) §§ 800, 801; 3 *Thompson on Neg.* §§ 2754, 2759, 2760, 2770; *Dougherty v. R. R.*, 81 Mo. 325, 51 Am. Rep. 239. But there was no such question in this case. It was not asserted in any manner by the defendant that the alleged sudden starting of the car was a fact beyond its control. There was neither allegation nor proof on that point. The defense was a denial that the car so started, and an assertion that it had not stopped as alleged, but was moving at a rate that rendered it dangerous for the plaintiff to attempt to alight as she did. The effect of the instruction complained of was to throw the burden on the plaintiff to prove that the car stopped, or that it slowed down to the degree alleged by the plaintiff, and that a new impetus was given to it while she was in the act of alighting. Those were the facts which the instruction required the plaintiff to prove, and in that respect it was correct. There was no necessity for the men-

Reagan v. St. Louis Transit Co

tion in the plaintiff's instructions of the degree of care to be exercised by the defendant in preventing the sudden starting of the car, for the reason that there was no claim by the defendant that the car started from a cause beyond its control. If there had been evidence of such a condition, then the court would have qualified the instructions given at the instance of the plaintiff by saying, in effect, that the defendant was liable, under the facts stated, unless the jury should find from the evidence that the defendant's servants could not have prevented the starting of the car by the exercise of the high degree of care devolving on the carriers. But there was no such issue in this case. There was no error in the instruction relating to the burden of proof.

3. Appellant complains of the rule of court above quoted, regulating the order of argument in jury trials, and of the action of the court under that rule. The rule itself is a reasonable regulation, and is within the power of the court to make. In *Blewett v. Railway Co.*, 72 Mo. 583, this court said that the order of argument in such case was a matter to be regulated by the rules of court. It is universally recognized that, in debate, he who has the affirmative of the question has the right to open and close. This right, as it affects one's own interest, involves also a duty as it affects the action of the court or jury, and the interest of his adversary. He who has the affirmative of the issue, and who, therefore, has the right to close the argument, owes it as a duty as well to the tribunal whose judgment he seeks to persuade, as to his adversary, against whom he seeks the verdict, to make a fair presentation of his case in an opening argument after the evidence has been adduced, to the end that his adversary may know what he is to answer, and the jury may fairly understand the questions of fact they are to decide. The rule of court now under discussion seems to have been designed to enforce that order of procedure. Its provision that the plaintiff shall not use more than half the time allotted to him in his closing argument is to induce him to use at least half of it in his opening argument. We find no objection to the rule.

4. But appellant has a just cause to complain of the action of the court in limiting the time for argument in this case to 15 minutes on each side. The effect of that ruling was to allow the plaintiff only 7½ minutes in which to make his closing argument. Whilst the rule commands itself to our sense of justice, yet, in order to promote the purpose for which it was designed, the court should allow a reasonable time to enable the plaintiff to present his case by argument to the jury both in opening and closing. The limiting of the time for argument is a matter in the sound judicial discretion of the court, and an appellate court will hesitate to interfere with the exercise of that discretion. But when the appellate court is satisfied that that discretion

Reagan v. St. Louis Transit Co

has not been well exercised, and that injustice has been done, it is its duty to reverse the judgment. It is impracticable to lay down any fixed rule as to the length of time the trial court should allow for argument. That is a matter addressed to the sound discretion of the trial court, in the light of the circumstances of the particular case on trial. We will not say that a court would not in any case be justifiable in limiting the time for argument to 15 minutes on a side, for in some cases that might be sufficient. But in this case a fair argument of the questions of fact, in the light of the conflicting evidence, could not be made within the time the court limited for that purpose. There were, in all, 9 witnesses, whose testimony covers 53 pages of manuscript, and in which there was much conflict. Besides, there was some documentary evidence. The hearing of the evidence must have occupied several hours. The instructions were elaborate, ringing the changes on the various forms of the issues to be tried. Under the circumstances of this case, the limiting of the time for the argument to 15 minutes on a side was an unreasonable exercise of the power of the court in that respect, and for that reason the judgment is reversed, the cause remanded, and a new trial awarded.

BRACE, P. J., and ROBINSON, J., concur. MARSHALL, J., concurs in all, except that he is of the opinion that, under the facts of this case, the limit of 15 minutes for argument was not unreasonable, and hence that the judgment should not be reversed on that account.

A. R. Taylor, for appellant.

Boyle, Priest & Lehmann and Geo. W. Easley, for respondent.

PER CURIAM. On the hearing in banc, paragraphs marked 1, 2, and 3 in the opinion by VALLIANT, J., in Division No. 1, are concurred in by all the judges. Paragraph marked 4 is concurred in by ROBINSON, C. J., and BRACE and VALLIANT, JJ., but is not concurred in by MARSHALL, GANTT, FOX, and BURGESS, JJ., who on this point concur in the opinion by MARSHALL, J.

MARSHALL, J. This is an action for damages for personal injuries. The case is as simple a one of its kind as may be imagined. The plaintiff charges that she was a passenger on one of the defendant's cars, and desired to get off of the car at the corner of Easton and Grand avenues, and that when the car reached said place, and whilst it "was slowed up, so as to be moving imperceptibly, or stopped, for the purpose of allowing the plaintiff to alight therefrom at her said point of destination, and whilst the plaintiff was in the act of stepping off said car whilst so slowed up or stopped (and plaintiff is unable to say whether it was so slowed up or stopped), defendant did carelessly and unskillfully cause and suffer said car to move forward and with in-

Reagan v. St. Louis Transit Co

creased motion, whereby plaintiff was thrown upon the street, and greatly and permanently injured," etc. The petition further charges that the city ordinance provides that conductors shall not allow women or children to enter or leave a car while it is in motion, and that the defendant's conductor "did allow said plaintiff to leave said car while the same was in motion," which act directly contributed to the injury. The answer is a general denial and a plea of contributory negligence.

The plaintiff first read in evidence the city ordinance pleaded. She then produced four witnesses, to wit, Dr. S. B. Prouty, Dr. R. L. Campbell, Mrs. Thomas McCune, and the plaintiff herself. The two doctors testified that they were her physicians after the accident, and they testified only to the extent of her injuries. Mrs. McCune testified that she is a cousin of the plaintiff, and that she nursed her after the accident. None of these witnesses testified as to the accident, and the defendant introduced no evidence whatever bearing upon any fact testified to by these witnesses, so that the testimony of these three witnesses was absolutely uncontradicted. The plaintiff was the only witness in her behalf who testified as to the cause of the accident. The abstract of the record of her testimony prepared by her counsel covers a page and a half, and is here reproduced in full. It is as follows: "Bridget Reagan, plaintiff, testified in her own behalf: That she is about 40 years old, and that her occupation was that of a cook. That she earned \$19 per month. That on the evening of October 21st she boarded one of the defendant's cars on Clara and Easton avenues, and that her place of destination was Grand and Easton avenues. That when she got within a block of Grand avenue she rang the bell to notify the conductor of her intention to get off the car, and, when the car had passed the crossing of Grand avenue, it stopped. She then started to get off the car, and, as she was getting down on the last step, the car gave a jerk and threw her off. The conductor and a policeman were standing on the rear platform. She had to pass the conductor, who was in reach of her, and that he neither did nor said anything to her regarding her leaving the car. That there were two steps on the car, and that she was thrown as she was taking the last step. That she fell east of the crossing, near the curbstone. The policeman picked her up and carried her to the drug store, on the north side of the street, and then took her in an ambulance to the City Hospital, where she remained twenty-four hours, and then she was taken to the St. Mary's Infirmary, where she was treated by Drs. Prouty and Campbell for twelve weeks. That she cannot bear any weight on her injured limb, and can only move about with the aid of a chair, leaning on the back of it. That she has been unable to do anything since she was hurt. That she paid \$72 for nursing." Cross-ex-

Reagan v. St. Louis Transit Co

amination: "Am single, and have lived in the city for sixteen years. At the time of the accident I was working for Mrs. Carter as a cook. I occupied the second seat from the rear, sitting on the south side. Arose from my seat as the car was about to stop, and went to the door, where I waited until the car had stopped. Then I stepped from the platform to the step, and, when I started to leave the step to get to the ground, the jerk came. That is what I meant when I said there were two steps. Q. Now, was it a hard or light jerk? A. Yes, sir; it was a hard jerk. Q. And was the car standing perfectly still at that time, was it—before the jerk? A. Yes, sir. I fell flat on the ground, with my head towards the east and my feet towards the west. Don't know how far the car went after I fell, but it was only a little ways. Did not hear any signal given by the conductor to start the car. Have not been able to leave the house since the accident." The record shows that the defendant introduced five witnesses, who testified that they were on the rear platform of the car at the time the plaintiff started to get off, at Grand and Easton avenues, and that she got off of the car while it was moving slowly, but before it was stopped, and that the car stopped within a few feet after the plaintiff got off, and that there was no jerk or increased forward movement of the car, and that plaintiff was not thrown off of the car, but that she voluntarily got off of the car while it was in motion, and fell after she got off, in consequence of getting off while the car was in motion. The conductor testified that the plaintiff came out onto the back platform while the car was approaching Grand and Easton avenues, but that "there was nothing in her manner indicating that she intended to get off the car before it stopped." This was all the evidence in the case. The record then shows that the following proceedings were had: "The Court: I will allow twenty minutes on a side to argue the case before the jury. Mr. Taylor: I ask that more time be given than that. That is too short. The Court: That is longer than I usually give. Fifteen minutes on a side ordinarily do. Mr. Taylor: Well, we except to the ruling of the court on the ground that it was not sufficient. The court: I will give you fifteen minutes on a side. I understood you to say fifteen minutes would not be enough time, but that twenty minutes would be sufficient." The plaintiff saved an exception to this action of the court.

The court then, as shown by appellant's abstract, instructed the jury as follows:

"Thereupon the court, at the request of the plaintiff, gave to the jury the following instructions:

"If the jury find from the evidence in this case that the defendant on the 21st day of October, 1900, was operating the cars mentioned in the evidence, for the purpose of transporting passengers for hire from one point to another within

Reagan v. St. Louis Transit Co

the city of St. Louis, as a street railway company; and if the jury further find from the evidence that on said day the defendant, by its servants in charge of its east-bound car, received the plaintiff as a passenger thereon, to be carried to Easton and Grand avenues; and if the jury find from the evidence that the plaintiff paid her passage as such passenger to the defendant; and if the jury find from the evidence that said car was slowed down by defendant's servants in charge, so as its motion was imperceptible, or stopped, to enable the plaintiff to alight from said car at her point of destination; and if the jury further find from the evidence that, whilst said car was so slowed down or stopped by defendant's servants in charge of said car to enable plaintiff to alight from said car at her said destination, the plaintiff proceeded to alight from said car at said point, and that, whilst doing so, defendant's servants in charge of said car caused or suffered said car to be moved forward, and with increased motion, and that thereby the plaintiff was thrown upon the street and injured; and if the jury further find from the evidence that defendant's servants in charge of said car would, if they had exercised a high degree of care and skill, such as careful and skillful railway operators would exercise under the same or similar circumstances, have prevented such motion of said car at said time, and neglected to do so; and if the jury find from the evidence that the plaintiff was exercising ordinary care for her own protection at the time of her injury—then the plaintiff is entitled to recover.

“The court instructs the jury that if they find from the evidence that the defendant on the 21st day of October, 1900, was operating the car mentioned in the evidence, for the purpose of carrying passengers for hire from one point to another in the city of St. Louis, as a street railway company; and if the jury find from the evidence that on said day the defendant, by its servants in charge of its said car, received the plaintiff as a passenger on its east-bound car at or near Clara and Easton, in the city of St. Louis, to be conveyed as such passenger to Grand and Easton avenues, in said city; and if the jury further find from the evidence in this case that the defendant's servants in charge of said car slowed down said car so that its motion was imperceptible, or stopped said car, at said Grand and Easton avenues, to enable the plaintiff to alight therefrom, as such passenger, whilst said car was slowed down or stopped; and if the jury find from the evidence that, whilst said car was so slowed down or stopped at her said point of destination, the plaintiff started to alight from said car as such passenger, and that whilst she was doing so, and before she had a reasonable time or opportunity to so alight, defendant's servants in charge of said car caused or suffered said car to move forward with increased motion, and that thereby the plaintiff was thrown upon the street and injured; and if the jury find from

Reagan v. St. Louis Transit Co

the evidence that defendants' servants in charge of said car could, by the exercise of a high degree of care and skill, such as would have been exercised by careful and skillful railway employees under the same or similar circumstances, have prevented such motion of said car at said time, and neglected to do so; and if the jury find from the evidence that the plaintiff was exercising ordinary care for her own protection at the time of the injuries—then the plaintiff is entitled to recover.

“If the jury find for the plaintiff, they should assess her damages at such a sum as they believe from the evidence will be a fair compensation to her (1) for any pain of body which she has suffered or will hereafter suffer by reason of her injuries, and directly caused thereby; (2) for any loss of the earnings of her labor which she has sustained or will hereafter sustain by reason of her injuries, and directly caused thereby; (3) for any expenses necessarily incurred by her for medical attention and nursing which the plaintiff has sustained by reason of said injuries, and directly caused thereby.

“If your verdict is for the defendant, you will simply so state in your verdict.”

“Thereupon the court, at the request of the defendant, gave to the jury the following instructions:

“The court instructs the jury that if they find from the evidence that the plaintiff alighted from the defendant's car while the same was in motion, and that a woman of ordinary prudence would not have so alighted therefrom under such circumstances, and that but for such attempt on her part the plaintiff would not have been thrown down and injured, even though they also find that said car started forward with increased motion while she was so alighting, and that the defendant was negligent in allowing it to do so, provided said action was not willful on the part of defendant's agents in charge of its car, then the plaintiff is not entitled to recover, and your verdict must be for the defendant.

“If the jury find from the evidence that both the plaintiff and defendant were guilty of some act of negligence, as set out in these instructions, which directly contributed to cause the plaintiff's injuries, and that the negligence of neither, without the negligence of the other, would have caused the plaintiff's fall and injuries, then the plaintiff is not entitled to recover, and your verdict must be for the defendant.”

“To the action of the court in giving said instructions, and each of them, the plaintiff at the time excepted.

“Thereupon the court, of its motion, gave the following instructions to the jury:

“The burden of proving the facts set out in these instructions as necessary to be proved in order to enable plaintiff to recover is upon the plaintiff—that is, the preponderance or greater weight of the testimony must be on the side of the

Reagan v. St. Louis Transit Co

plaintiff—and, unless she has so proven them, she is not entitled to recover.

“‘The burden of proving any negligence in the plaintiff is upon the defendant.

“‘The court instructs the jury that the ordinance of the city of St. Louis read in the evidence was in force on the 21st day of October, 1900. And if the jury find from the evidence that the plaintiff did alight from the car on which she was a passenger at her point of destination in the city of St. Louis while the car was moving slowly, and further find from the evidence that defendant's servant and conductor in charge of the car on which she was a passenger saw her preparing to alight from said car while in motion, and also saw her while she was proceeding to alight whilst said car was in motion, and permitted her to do so without remonstrance or warning, or any effort to prevent her doing so, then such conduct of said conductor was negligence; and, if it directly contributed to cause plaintiff's injuries, by being thrown upon the street by the motion of said car, if she was so injured, and if the plaintiff was exercising ordinary care at the time of the injury for her own protection, then plaintiff is entitled to recover.

“‘Under this ordinance, a conductor is required to use ordinary care in watching out for women who are about to alight from cars, and thereupon to prevent them from leaving a moving car. When they have thus exercised ordinary care, the provision of the ordinance has been fulfilled.

“‘To which ruling of the court in giving each of said instructions on its own motion, plaintiff at the time excepted.’”

The jury returned a verdict for the defendant. In due time the plaintiff filed a motion for a new trial, assigning as ground therefor, *inter alia*, the action of the court in limiting the arguments as aforesaid. The court overruled the motion, and, in so doing, rendered an opinion, which the abstract of the record states to be as follows: “In regard to the fifth, sixth, and seventh grounds for the motion for a new trial, it may be said that after the evidence was heard, which consumed in the hearing not over three or four hours, I thought fifteen minutes for each side was a fair allowance of time, and so stated to counsel. The matter was fresh in the minds of the jury, and the issues were not complicated. Upon consultation with the counsel, I understood that fifteen minutes was deemed by them too short, but that twenty minutes on each side would be satisfactory. Acting upon this understanding. I made the allowance of twenty minutes for each side, I must have misunderstood the counsel for plaintiff, as he excepted to the allowance of twenty minutes. Thereupon I made the original allowance of fifteen minutes for each side, as, in my judgment, a fair allowance of time for argument. This allowance, of course, did not include the time required to read the instructions to the jury. Rule No.

Reagan v. St. Louis Transit Co

29 of the circuit court of this circuit, is, in my judgment, a fair rule, tending to prevent (what too often occurred) plaintiff's counsel from making his opening argument a mere perfunctory recital, without either touching the issues of the case, or acquainting defendant with the line of his argument; reserving until his closing statement, when there was no opportunity for answer, every substantial argument in the case."

The plaintiff assigns two errors: First, error in the instruction as to the burden of proof; and, second, error in limiting the time for argument to 15 minutes on a side. The whole of this court is of the opinion that the first assignment of error is untenable, and that the instruction complained of correctly states the law applicable to facts such as are disclosed by this record. The second error assigned is therefore the only matter left for discussion.

The plaintiff contends that the trial judge abused his judicial discretion in allowing only 15 minutes on a side for argument. In support of this contention the plaintiff cites five cases: *White v. People*, 90 Ill. 117, 32 Am. Rep. 12; *Dille v. State*, 34 Ohio St. 617, 32 Am. Rep. 395; *Hunt v. State*, 49 Ga. 255, 15 Am. Rep. 677; *State v. Page*, 21 Mo. 257, 64 Am. Dec. 229; and *State v. Baker*, 136 Mo., loc. cit. 83, 37 S. W. 810. *White v. People*, 90 Ill. 117, 32 Am. Rep. 12, was a prosecution for larceny. Nine witnesses were examined. They were allowed only five minutes to argue the case to the jury. This was held to be reversible error. In *Dille v. State*, 34 Ohio St. 617, 32 Am. Rep. 395, the charge was burglary and larceny. Eleven witnesses were examined. Half a day was consumed in taking the testimony, the evidence was circumstantial and conflicting, and the defendant was represented by two counsel. The court allowed the defendant 30 minutes for argument, and this was held to be reversible error. In *Hunt v. State*, 49 Ga. 255, 15 Am. Rep. 677, the charge was assault, with intent to murder. The report of the case does not show how many witnesses were examined, nor how long a time was consumed in adducing the testimony, nor, in fact, any particulars as to the case or the trial. The court allowed defendant's attorney 30 minutes for argument, and then allowed him to run 10 minutes over that time. His counsel protested that "he could not do justice to his client's case within the limited time prescribed by the court." It was held that, in view of the Constitution of that state, giving every person charged with an offense the benefit of counsel, the trial court erred in limiting the time for argument. In speaking of this case, the note to *Yeldell v. State*, 46 Am. St. Rep., loc. cit. 28, says: "This ruling is, however, directly opposed to all other authority examined on this topic." Later, however, it was held in Georgia that the power of the court is limited to preventing idle repetition. *Williams v. State*, 60 Ga. 367,

Reagan v. St. Louis Transit Co

27 Am. Rep. 412. But since then a rule limiting the time has been adopted in that state. 2 Enc. Pl. & Pr. 703, note 3. In *State v. Page*, 21 Mo. 257, 64 Am. Dec. 229, the charge was trespassing on school lands. "After the case was closed on both sides, the court stated that the defendant's counsel could only address the jury for thirty minutes, and afterwards stated that the defendant's counsel could only address the jury for fifteen minutes." The defendant's counsel objected and saved an exception, and, upon the defendant being found guilty and fined \$160, which the court reduced to \$100, he appealed to this court, and assigned as the principal error the action of the court in limiting the time for argument. This court affirmed the judgment of the trial court, and the opinion by Ryland, J., is so apposite to the case at bar that the following extensive excerpt is taken therefrom: The learned judge said: "Can the circuit court limit the time in which a defendant's counsel shall address a jury in a criminal case? By the thirteenth article, § 9, of the state Constitution, it is declared that, 'in all criminal prosecutions, the accused has the right to be heard by himself and his counsel.' Now, in the nature of things, there must be some discretion left with the courts who have criminal jurisdiction in this matter. How long has the accused and his counsel a right to consume the time of the court in their exercise of this right? There must be a limit to it as to duration. The right to be heard exists; it cannot be taken away; nor can the court deny this right, as was done in *Word's Case*, in Virginia, reported in 3 Leigh [743]. But there is also an inherent right in courts of justice to control and restrain the acts of parties and counsel and officers while engaged in the administration of justice before them. The courts must take care not to abuse these rights on the one side, nor on the other. There are cases in which the time necessary to a proper and fair elucidation of the matters involved in the prosecution must be greater than in others. The courts must not, then, arbitrarily cut down the time in all cases to a certain limit. They must exercise proper discretion in such matters, granting longer or shorter time as the intricacy, mass of matter, nature of offense, and the means or circumstances on which the defense may rest, may seem to require. This court will not countenance any acts of the lower courts which may seem to owe their origin to mere caprice or arbitrary power or wanton oppression. Nor, on the other hand, will we lend a willing ear to support the complaints of obstinate and willful or capricious opposition to the orders of the courts, made for advancement and completion of the business before them. The record before us shows first the allowance of thirty minutes, then the reduction of this to fifteen minutes. We cannot say that this is an abuse of the discretionary power of the court. There may be a reason for this. The improper waste of the time

of the court, or the urgent pressure of important business on the docket, or the improper opposition and behavior of the counsel—unnecessarily troublesome and vexatious—all may have their operation, or the plain and obvious statement of the facts of the case in evidence may not have required longer time, in the opinion of the court, for the defense, than fifteen minutes. At all events, we will not presume the court below did wrong, and we cannot say that it did not allow the defendant to be heard by his counsel. This matter of limiting the time to be occupied, in the prosecution of causes before courts of justice is of very ancient origin. It is found among the Greeks, and was carried thence to Rome. The Greeks had their instruments by which they measured time in the halls of judicature. The clepsydra was used. It was an instrument by which they measured time by means of the flowing of water through it, and so frequent and common was the practice of limiting the time to the speakers by water flowing through these instruments, that the word 'water' was used metaphorically for time. When a speaker was allowed to speak so long, they said he was allowed so much water. The Greeks had an officer in their courts of justice, whose duty it was to watch this measuring of time; and, when a certain amount was allotted to a speaker, if there were any documents to be read during his speech, the time the reading of such documents consumed was not to be estimated as any part of what had been allotted to him. Therefore this officer, whose station was near to the clepsydra, stopped the water while the documents were being read. The orator did not waste his water in reading documents. Pliny tells us he was allowed ten large amphoræ of water once, and, so important was the cause in which he was engaged, that the judges added four more to the amount. He says he spoke five hours. He tells us, likewise, that he himself used to allow the accused as much water as he wanted. The tribune of the people, Titus Sabienus, only allowed half an hour to Cicero to speak in defense of Caius Rabirius when he was prosecuted for murder. This, too, on an appeal from the judgment of the duumviri to the people. The orator complained of being cramped by the narrow space of time, 'for, though it would be nearly enough to make the defense for his client, it would not be enough for preferring the complaints he had a right to bring forward.' 'I have spoken the time allowed me,' he said, when about to conclude. And in no part of the monument erected by his genius to its own immortality will you find a more polished or more intelligent gem than this half hour's work. We conclude, therefore, that a quarter of an hour allowed to a modern orator in a petty case of cutting down timber on the school lands cannot be considered as an inhibition to be heard in defense of his client. This judgment is affirmed, Judge Leonard concurring." Scott, J., dissented, and held that, under the Consti-

Reagan v. St. Louis Transit Co

tution, the court has no power to limit in advance the argument of counsel to the jury. As hereinafter pointed out, this position has since been many times declared not to be the law by nearly all courts that have spoken on the subject. In *State v. Baker*, 136 Mo. 74, 37 S. W. 810, the defendant was indicted for carnal knowledge of his 14 year old daughter, tried and convicted, and sentenced to 20 years in the penitentiary. The court limited the argument to one hour on a side; and, in an opinion by Gantt, P. J., concurred in by Sherwood and Burgess, JJ., this was held not to be error, the opinion saying: "Ordinarily it is in the discretion of the court to limit argument even in capital cases, like this." These, however, are not the only decisions of this court bearing upon the question, as will appear by the following cases: *Freligh v. Ames*, 31 Mo. 253, was an action upon a promissory note executed by the two defendants to one Lawrence. The defense was usury, and a denial of the plaintiff's ownership of the note. The court limited the argument to 20 minutes on a side. This was assigned as error, and this court affirmed the judgment, with 10 per cent. damages for vexatious delay. The opinion was written by Scott, J., and he said: "The court very properly limited the time to counsel in addressing them. This is a matter in the discretion of the court, and will not be controlled here." From which it would appear that the learned judge had receded from the position taken by him in his dissenting opinion in *State v. Page*, 21 Mo. 257, 64 Am. Dec. 229, wherein he said the trial court could not limit the time for argument. *Trice v. Railroad*, 35 Mo. 416, was an action for damages for killing 20 head of hogs. Four witnesses testified. The court limited the defendant's counsel to 10 minutes. This court affirmed the judgment, in an opinion by Dryden, J., from which the following excerpt is taken: "The only ground upon which we are asked to reverse the judgment of the circuit court is the action of that court in restricting the time for the argument. The power of the courts to limit counsel in the time to be occupied in the argument of causes cannot be denied. It is a power essential to the convenient dispatch of business, and to the good order of the courts. What restrictions shall be imposed under this power is a mere matter of practice, resting in a large degree in the discretion of the judge in every case. Indeed, in the case at bar, it is not contended that the circuit court did not possess the power to restrict, but the complaint is that the power was exercised unreasonably. It is a rule from which this court never departs, not to revise the action of inferior courts in matters within their discretion, except in case where it is manifest that they have exercised their discretion unsoundly, and to the prejudice of the rights of the party complaining. Upon this principle, we are obliged to abstain from interference in this case. There is nothing in the

Reagan v. St. Louis Transit Co

circumstances of this case, so far as we can see, that rendered the limit of the court at all unreasonable or in any wise hurtful to the appellant." *State v. Linney*, 52 Mo. 40, appears to have been an indictment for murder. Among the errors assigned was the limiting of the time for argument. It does not appear what time was allowed. But it is stated that it was contended that the court had no power to limit the time. This conclusion was held to be untenable, and the right of the court to limit the time for argument declared, and the judgment of the circuit court was affirmed. It was, however, said by Wagner, J., delivering the opinion: "The power to limit and restrict the time might be abused, and a case might be presented in which this court would feel itself called upon to interfere." *State v. Williams*, 69 Mo. 110, was a prosecution for murder. The court allowed defendant's counsel one hour for argument. This was assigned as error. The court, per Henry, J., affirmed the judgment, and, speaking of this assignment of error, said: "Nor was it error to limit counsel in argument to the jury, or to require the defendant's counsel to close his argument at the expiration of the hour given him. This has more than once been decided to be a matter in the discretion of the court, and we see no reason to determine otherwise, when that discretion has not been abused."

A careful examination of the cases in which the question in hand has undergone review by this court discloses that no case has ever heretofore been reversed by this court because of the limit set by the trial court for the argument to the jury, but that in every case the rule has been announced that such matters lie in the wise judicial discretion of the trial judge, and that his action in this regard would not be interfered with by this court, except in case of a clear abuse of such discretion; and the cases considered involved various limitations of time for argument, varying from 10 minutes in an action for damages for killing stock (*Trice v. Railroad*, 35 Mo. 416), to 1 hour in a prosecution for incest (*State v. Baker*, 136 Mo. 74, 37 S. W. 810), and to 1 hour in a prosecution for murder (*State v. Williams*, 69 Mo. 110). The action of the trial court in *State v. Page*, 21 Mo. 257, 64 Am. Dec. 229, was very like the action of the trial court in the case at bar. In the *Page Case* the trial court first allowed 30 minutes for argument, and, upon counsel objecting to the allowance as insufficient, the trial court, of its own motion, reduced the time to 15 minutes. In this case the trial court first allowed 20 minutes, and, upon objection of the counsel that the time was insufficient, the court, of its own motion, reduced the time to 15 minutes. This court refused to interfere with the discretion of the trial court in the *Page Case*, where the time allowed was 15 minutes, and it is not perceivable why the same ruling should not obtain in this case, where the time allowed was also 15 minutes. If the reduction of the time

Reagan v. St. Louis Transit Co

from the time first allowed could be treated as evidence of abuse of discretion on the part of the trial judge, the abuse was much more flagrant in the Page Case than it is in the case at bar, for there the reduction of time was 50 per cent., whereas here it was 20 per cent.

This is the state of the prior rulings upon the question in this state, and the clear policy of the law, as so declared, is that the discretion of the trial judge will not be interfered with, except where there has been a clear abuse of such discretion. Under this rule, the discretion of the trial judge should not be interfered with in this case. If 10 minutes is a proper limit in an action for damages for killing of stock, or if 15 minutes is a proper limit in a prosecution for trespassing on school lands, or if 20 minutes is a proper limit in a suit upon a promissory note, or if 1 hour is a proper limit in a prosecution for incest or murder, it ought not to be said that 15 minutes is such an improper limit in this case as evidences an abuse of discretion by the trial judge; and therefore the judgment, which is held to be otherwise correct, should not be reversed.

The case at bar is a very simple one. The contention of the plaintiff is that the car had slowed down so that its motion was imperceptible, or had stopped, and that before she had time to alight the car was started with a jerk, and she was thrown down. The contention of the defendant was that the plaintiff got off of the car while it was in motion, and before it reached the street crossing, and that in consequence she fell down, and that there was no jerk or starting forward of the car, but that the car actually stopped at the proper place at the street crossing, and within a few feet beyond where the plaintiff got off. The issue was thus single and simple. The plaintiff herself was the only witness in her behalf. The defendant introduced five witnesses who supported its contention. The jury heard the testimony. The law of the case was plain, and the instructions given at the request of the parties stated it in terms as explicit as counsel could express it, and almost amounted in themselves to an argument of the case on the respective sides. It only remained for the counsel to tell the jury what they thought was the proper deduction to draw from the facts under the law. If there ever was a case where a limitation of 15 minutes was proper, it is this case. If 15 minutes was improper in this case, and constitutes reversible error, it can only mean that 15 minutes is improper in every case. Yet this court has said a limitation of 15 minutes, and even of 10 minutes, was proper in cases where the issues were much more complicated than are the issues in this case. If 15 minutes is improper where there is only a single issue of fact for the jury to pass upon, what should be said of 1 hour in a prosecution for incest or for murder? If 15 minutes was improper in this case, where the jury heard the testimony and

had been fully instructed, and where there was only a single question of fact, what should be said of the 1-hour limit in the Kansas City Court of Appeals and in the St. Louis Court of Appeals, or of the 1 hour and a half limit in this court, where the whole case is new matter to the court, and the counsel must not only state the facts, but point out the errors assigned and argue the law of the case. If 15 minutes is improper where there is only a single question of fact involved, would it not follow that 1 hour would be improper when there were four questions of fact involved? In short, if 15 minutes is improper in this case, by what rule or guide must a trial court be governed in other cases? None is prescribed in this case, and it is said none can be prescribed. What, then, will be the result? Manifestly, trial courts will be afraid to fix any limit, or, if they do, it will be assigned as error, and this court will be called on to review the discretion of the trial court in every case where a limit is fixed by the trial court. Such a rule would seriously cripple the expeditious administration of the business of the trial courts, would belittle the authority and dignity of the trial judge, and would overwhelm this court with the decision of matters that for over 80 years have been confided to the trial courts, and as to which there has never been an abuse of the discretion vested in the trial judges. For these reasons, I think it is perfectly safe to intrust this power to the trial courts, and that this court should not interfere except where there has been a clear abuse of such discretion.

The rule that has heretofore prevailed in this state, and which, I think, should be enforced in this case, is the rule that is established in nearly all of our sister states. *Yeldell v. State*, 100 Ala. 26, 14 South. 570, 46 Am. St. Rep. 20, was a prosecution for assault with intent to murder. A limitation of the argument to the jury of 15 minutes was upheld. In an exhaustive note to this case in the *American State Reports*, many cases are reviewed wherein the trial courts had set a limit to the time for argument to the jury. A reference to a few of the adjudications of other states is both interesting and instructive. In Georgia a limitation of 30 minutes in a murder case was held improper. *Hunt v. State*, 49 Ga. 255, 15 Am. Rep. 677. In North Carolina a limit of 1 hour and a half in a murder case was held proper. *State v. Collins*, 70 N. C. 241, 16 Am. Rep. 771; In Kentucky a limit of 5 minutes in a larceny case, where there were three witnesses for the state and one for the defense, was held proper. *Williams v. Commonwealth*, 82 Ky. 644. In New York a limit of 30 minutes in a prosecution for felonious assault was held proper. *People v. Kelly*, 94 N. Y. 526. In Mississippi a limit of 30 minutes in a larceny case was held proper. *Lee v. State*, 51 Miss. 566. In Tennessee a limit of 5 minutes in a civil case was held proper. *Burson v. Mahoney*, 6 Baxt. 307. In Kentucky a limit of 25 minutes in a civil case, where

Reagan v. St. Louis Transit Co

12 witnesses were examined, was held proper. *Louisville, etc., R. R. v. Earl's Adm'x*, 22 S. W. 607. In Colorado a limit of 45 minutes in a civil case was held proper. *Sylvester v. Jerome* (Sup.) 34 Pac. 760. In Indiana a limit of 1 hour and a half to the plaintiff and 1 hour to the defendant, in a suit for slander, was sustained. In Texas a limit of 25 minutes in a prosecution for keeping a disorderly house was held proper. *Mansfield v. State* (Cr. App.) 24 S. W. 901. On the other hand, a limit of 1 hour in a prosecution for arson, where 12 witnesses were examined, and the evidence was circumstantial and conflicting, was held improper. *Wingo v. State*, 62 Miss. 311. So a limit of 1 hour in a robbery case, where 24 witnesses were examined, and the trial occupied 5 days, was held improper. *People v. Green*, 99 Cal. 564, 34 Pac. 231. And a limit of 20 minutes in a case of assault with intent to kill, where 17 witnesses testified, was held improper. *Jones v. Commonwealth*, 87 Va. 63, 12 S. E. 226. A limit of 30 minutes in a case for assault to commit murder, and where the trial lasted 2 days, was held improper. *People v. Labadie*, 66 Mich. 702, 33 N. W. 806. A limit of 17 minutes in a criminal prosecution for adultery, where the two defendants were represented by separate counsel, was held improper. *McLean v. State*, 32 Tex. Cr. R. 521, 24 S. W. 898. Many other instances might be referred to on both sides of the question, but the foregoing are sufficient to illustrate the rule and the practice.

Manifestly, no fixed rule could be adopted, that would fit all cases, and hence the wisdom of the principle that prevails almost everywhere—that the determination of the matter is for the judicial discretion of the trial judge, who heard the witnesses, saw all that occurred upon the trial, knew the condition of his docket, was familiar with the learning, facility of expression, and powers of speech of the counsel, and was therefore generally better able to do justice than an appellate court could do, and that, to justify an appellate court to adjudge a trial court guilty of an abuse of that discretion, the case must be clear, cogent, and convincing; in fact, sufficient to convict the trial judge of manifest prejudice, partiality, or official misconduct. The case at bar presents no such features, and the time allowed, under the facts and circumstances of this case, is not, per se, evidence of an abuse of judicial discretion. I therefore think the judgment of the circuit court should be affirmed. It is so ordered.

BURGESS, GANTT, and FOX, JJ., concur. ROBINSON, C. J., and BRACE and VALLIANT, JJ., dissent.

KNOXVILLE TRACTION CO. *v.* CARROLL.

(Supreme Court of Tennessee, Oct. 8, 1904.)

[82 S. W. Rep. 313.]

Carriers—Injuries to Passengers—Street Railroads—Alighting from Car—Contributory Negligence—Instructions.*

Where, in an action for injuries to a passenger on a street car, there was evidence that he attempted to get off while the car was still moving, and before he was invited to alight, it was error to refuse to charge that, if the proximate cause of his injury was so alighting before the car stopped, he could not recover, whether he exercised due care or not.

Error to Circuit Court, Knox County; Joseph W. Sneed, Judge.

Action by A. J. Carroll against the Knoxville Traction Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Shields, Cates & Mountcastle, for plaintiff in error.

E. F. Mynatt, for defendant in error.

NEIL, J. The declaration alleged that defendant in error was a passenger on plaintiff in error's street car; that his destination was the point where Baxter street crosses Central avenue, in the city of Knoxville; that when the car reached this crossing it stopped to allow passengers to alight, but failed to stop long enough for this purpose, and while defendant in error was in the act of alighting it was suddenly started forward, with the result that he was jerked to the ground and seriously injured. This was the only cause of action stated in the declaration.

There was evidence to support the cause of action as alleged. There was also evidence tending to show that before the car reached the crossing, and before defendant in error was invited to alight, and while the car was still moving, he attempted to get off, and in doing so received the injury of which he complains.

The case was tried in the circuit court of Knox county, before his honor Judge Sneed and a jury. His honor charged the jury fully upon the first phase of the testimony above set forth, but not upon the second phase. Thereupon, after the conclusion of the general charge, defendant submitted the following special instruction, which he asked should be given to the jury, viz.:

"If you find that the proximate cause of plaintiff's injury was in attempting to alight before the car stopped, without defendant's invitation, then he cannot recover, whether he

*As to the contributory negligence of passengers in alighting from moving cars or trains, see foot-note appended to *Simmons v. Seaboard Air Line Ry.* (Ga.), 11 R. R. R. 454, 34 Am. & Eng. R. Cas., N. S., 454; foot-note appended to *Paganini v. North Jersey St. Ry. Co.* (N. J.), 11 R. R. R. 14, 34 Am. & Eng. R. Cas., N. S., 14.

Canton Co. v. Baltimore & O. R. Co

exercised due care or not in so attempting to alight from the moving car."

This was refused by the circuit judge, on the ground that "it is a question of fact for the jury to say whether it is negligence for a passenger to leave a moving street car."

We think it was error to refuse the request. The case put therein, for which, as we have said, there was some support in the evidence, was one wherein it appeared the passenger was injured without any fault on the part of the carrier. Or, to state the point in another way, on the hypothesis assumed in the request, the defendant in error received his injury through his own want of care; that is, from his own negligence. That to step from a moving car, without invitation from the carrier, before it reaches its stopping point, is negligence, we think there can be no doubt. In the case assumed it was not a question of fact for the jury, but a question of law for the court; since the rule is that any act must be held negligence in law, or negligence as matter of law, where no reasonable difference of opinion can exist among men as to the negligent character of the act. *N., C. & St. L. Ry. Co. v. Edwards* (Nashville, 1903) unreported. So, whether the instruction be regarded as based upon the principle that the carrier cannot be held liable for an injury suffered by a passenger where it has been guilty of no breach of duty to him, or upon the conclusion of law that the defendant in error, on the facts assumed, would be guilty of negligence, the result is the same.

There was a judgment below in favor of the defendant in error for \$375. This must be reversed, and the cause remanded for a new trial.

CANTON CO. OF BALTIMORE v. BALTIMORE & O. R. CO.

(Court of Appeals of Maryland, March 23, 1904.)

[57 Atl. Rep. 637.]

Appeal—Questions Reviewable.

The Court of Appeals cannot pass on receptions as to which the lower court made no ruling.

Railroad Right of Way—Reversion to Fee Owner.

Where a corporation, under condemnation proceedings, acquired for public purposes a mere easement in land, its right and title to the property so acquired are dependent upon the use of the property for public purposes, and, when such public use becomes impossible or is abandoned, its right to hold the land ceases, and the property reverts to its original owner.

Same—Abandonment.*

Mere nonuser of land condemned by a railroad, or the establishment

*As to what constitutes an abandonment of a right of way, see note, 15 Am. & Eng. R. Cas., N. S., 813; *Chicago & E. I. R. Co. v. Clapp* (Ill.), 7 R. R. R. 489, 30 Am. & Eng. R. Cas., N. S., 489; *Garlick v. Pittsburgh*

Canton Co. *v.* Baltimore & O. R. Co

of another route, will not of themselves operate as an abandonment of the land condemned; but there must be some decided act indicative of an intention to abandon, which intention must be determined from the circumstance of the case.

Same—Same.

Where a railroad, after having acquired property by condemnation proceedings, found itself financially embarrassed, and could not complete the proposed route over the land condemned, the mere fact that it entered into an arrangement with another road by which it secured traffic facilities did not conclusively show an abandonment of the condemned land and its own proposed line.

Same—Same.

A stipulation in a contract that a railroad should send all its traffic in a certain city over another road, entered into in order to secure to the latter road the necessary funds to take care of bonds to be issued by it to enable it to perform its obligations under the contract, and made while the stipulating road was in financial difficulties, but had great prospects of a future heavy business, could not be construed as precluding the stipulating road from availing itself of other lines to transport the traffic that the road contracted with could not take care of, or as conclusively indicating an intention to abandon a line previously projected by it, and land condemned for the construction of such line.

Same—Same—Application of Statute.

Acts 1890, p. 246, c. 220, the title of which states that it provides for the use by any other railroad of the abandoned or unused right of way of a railroad, and the body of which declares nonuser of a right of way on an unfinished railroad for 10 years to amount to an abandonment, and to make the right of way subject to use and appropriation on purchase or condemnation by another road, merely permits another railroad to condemn unused property in the specified contingency, and has no application to a case in which the former owner of the property claims a reversion by reason of the nonuser.

Appeal from Circuit Court, Baltimore County; N. Charles Burke, Judge.

Action by the Canton Company of Baltimore against the Baltimore & Ohio Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, PAGE, PEARCE, SCHMUCKER, and JONES, JJ.

T. Wallis Blackistone and Arthur George Brown, for appellant.

W. Irvine Cross and John I. Yellott, for appellee.

PAGE, J. This is an appeal from the judgment of the circuit court for Baltimore county, rendered in an action of ejectment brought by the appellant to recover possession of a strip of land which had been condemned by the appellee for railroad uses in 1885. Two exceptions were taken—one,

& W. Ry. Co. (Ohio), 6 R. R. R. 234, 29 Am. & Eng. R. Cas., N. S., 234 (question one of intention); *Graham v. St. Louis, etc., Ry. Co.* (Ark.), 1 R. R. R. 527, 24 Am. & Eng. R. Cas., N. S., 527 (effect of permitting grantor to use part of land); *Jones v. Van Bochove* (Mich.), 1 Am. & Eng. R. Cas., N. S., 664; *Mathews v. Lake Shore, etc., R. Co.* (Mich.), 6 Am. & Eng. R. Cas., N. S., 791; *Scarritt v. Kansas City O. & S. Ry. Co.* (Mo.), 15 Am. & Eng. R. Cas., N. S., 809.

to the admission of evidence; the other, to the action of the court upon the prayers.

The appellant, to sustain its case, offered in evidence, among other things, the proceedings whereby the land in question was condemned for the use of the appellee for the construction of its Philadelphia Branch Railroad, intended to be a connecting line of the Baltimore & Ohio Railroad Company, from its station on Camden street down and along Pratt street and Eastern avenue to the city limits, and thence to its yards at Bay View. The appellee paid to the appellant the damages awarded, amounting to \$20,000, and entered into the possession of the property, but has made no further use of it, than laying on it rails, which did not connect with its other tracks, and which were removed in 1898, without having been employed for any substantial use. In 1886 the Philadelphia Branch of the appellee was opened for business, but, instead of following the route over this property for its connection with the main stem, a temporary line, over other land to the ferry to Locust Point, was made use of until the year 1895, when the ferry line was discontinued for general business; and the connection was then made via the tunnel under Howard street, over the tracks of the Belt Line Company. In 1890 that company entered into an agreement with the appellee whereby it was stated that the Belt Line Company being about to construct a railroad from Camden Station at a point of connection with the tracks of the main stem of the appellee at Hamburg street, midway between Howard and Eutaw streets, to a point of connection with the tracks of the Philadelphia Branch of the appellee, at the western end of the Bay View yard, and it being desired by the parties that the appellee should enjoy the use of these tracks, etc., when completed, therefore it was agreed, among other things, that, as soon as the said railroad was constructed, the appellee should have the right to use the same; and, in part consideration thereof, the appellee stipulated to ship and cause to be transported and carried over the Belt Line during the continuance of the agreement all of its traffic, of every kind, passing through the city of Baltimore, etc., except such part thereof as was loaded at or destined for stations of the appellee on or adjacent to the water, or destined to or from Canton. Much of this, as well as other evidence, was offered for the purpose of showing that the appellee had abandoned the projected line, across the land now in controversy, by reason whereof it was contended that the right of occupancy thereof had reverted to the appellant.

The appellee, with a view of showing that the appellee had not intended to abandon the route across the lands in question, offered evidence tending to prove the circumstances attending the agreement with the Belt Line Company, and the reason for not having yet completed the Pratt street

branch. One of its witnesses, in the course of the examination, was asked by the counsel for the appellee whether, in his judgment, it would be proper for the appellee to abandon definitely its projected line through the city, to which the witness replied that he would consider it "a very unwise thing to do," and proceeded to give the grounds therefor, which substantially were that the capacity of the tunnel was now taxed to the utmost, and the business was still growing, and, as soon as the capacity of the tunnel proved inadequate, the freight traffic would have to go over the Pratt street line, "or some line substituted for it." The counsel for the appellee thereupon remarked, "That is just what I wanted." Objection was made to the question and answer, and, this being overruled, exception was taken to the ruling of the court, as well as to the remark of counsel; and this constitutes the appellant's first exception. With respect to the exception to the remark of counsel, there was no ruling of the court below, and therefore nothing for this court to pass upon.

The question objected to was put to a witness who was an expert in railroad matters, respecting a fact pertinent to the inquiry then being made. For reasons that will appear hereafter, it was competent for the appellee to show all the facts and circumstances affecting the question of abandonment. The theory of the appellant in objecting to this question and answer is stated in its several prayers, all of which were refused by the court. In its first and third prayers, it is substantially affirmed that if the appellee made the agreement with the Belt Line Road in 1890, and since then has transported its freight and passenger traffic from its main stem to the Philadelphia Division over the line of that company, and not over the land in dispute, and (by its third prayer) if the appellee has adopted another and different route, and has never completed its railway over the land in question, then there was an abandonment of the rights of the appellee acquired by the condemnation, and in such case the property has reverted to the appellant, and it has the right to recover the possession thereof. So that the question raised by this exception and these prayers is whether the specific intention of the appellee with respect to an abandonment of the land under the circumstances of this case is a material matter, or whether it must be conclusively presumed in this case, as matter of law, that there was an abandonment of the property by the appellee; and this is made to depend upon two facts, viz., first, the noncompletion of the road over the land, or a nonuser of the property for the purposes of the Philadelphia Branch; and, second, that since the condemnation proceedings the traffic of the appellee has been sent over the Belt Line Road. If these facts were found by the court, sitting as a jury, then there was a reversion of the property, and the plaintiff would be entitled to recover. It

seems to be well settled that when a corporation, under condemnation proceedings, "acquired for public purposes a mere easement in land, its right and title to the property so acquired are dependent upon the use of the property for public purposes, and, when such public use becomes impossible or is abandoned, its right to hold the land ceases, and the property reverts to its original owner." Many of the authorities to sustain this proposition are to be found cited in 10 A. & E. Enc. Law (2d Ed.) 1198; Lewin on Eminent Domain, § 596. Here the condemnation was "for the use and occupation in perpetuity by said company of said parcel of land for its Philadelphia Branch Railroad," and the damages of \$20,000 assessed, and paid by the appellee, were assessed for that purpose, and no other. To deprive it now of the possession of the land for that purpose, there must be shown that it has lost its right, either by reason of the fact that, such use having become impossible, which is not contended, or by some act, or the omission of some act it was bound to perform, the appellee must legally be regarded as having abandoned it. It would appear to be entirely unreasonable to hold that a mere nonuser could have that effect, because to so hold would make it impossible for a corporation to make any provision for the future, by securing more property than was then required, but would be needed thereafter. Nor ought the mere fact that another route has been established be sufficient per se, since that would prevent a railroad from acquiring two routes having the same terminals. It is certainly conceivable that a railroad company might deem it advisable to take, under condemnation proceedings, more or other property than it could then use, or having taken it for present uses, it might become financially embarrassed, so that its plans would have to be postponed. In such cases it should not be held that while it is awaiting developments of its business, or the re-establishment of its financial ability, it must lose whatever expenditures it may have incurred in the acquirement of property which for the present cannot be made use of, but is absolutely necessary for the carrying out of its plans. In *Pittsburg, F. W. & C. Ry. Co. v. Peet* (Pa.) 25 Atl. 612, 19 L. R. A. 467, the court said: "When a railroad company condemns land, it is, of necessity, the judge of how much is required for its use. The company had a right, when it condemned the property, to regard and make provision for its future as well as its present needs." It has accordingly been frequently held that, while nonuser is strong evidence tending to show abandonment, yet it will not per se operate as abandonment, unless there is some decided and unequivocal act of the owner inconsistent with the continued existence of the easement, or unless the nonuser has been for a considerable period, without a valid reason or excuse for its neglect. *Eddy v. Chace*, 140 Mass. 471, 5 Atl. 306; *People v. Albany, etc., R. R. Co.*,

Canton Co. v. Baltimore & O. R. Co

24 N. Y. 261, 82 Am. Dec. 295. This court, in *Vogler v. Geiss*, 51 Md. 410, has said that while a party entitled to a right of way or other mere easement in the land of another may abandon and extinguish such rights by acts in pais, and without deed or other writing, yet such acts relied on to effect such result "must be of a decisive character," and whether they amount to an abandonment or not "depends upon the intention with which it was done, and that is a subject for the consideration of the jury. A cesser of the use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect as an express release of the easement, without any reference whatever to time." And this seems to be in accordance with authority as well as reason. In 2 *Wood on Railroads* (Ed. 1894) § 242, the principle is thus stated: "The question as to whether there has been an abandonment, or not, is usually one of fact, to be determined by the circumstances in each case; and a mere nonuser for a long time, less than the period prescribed in the statute of limitations—as in one case thirteen years—is not sufficient to establish an abandonment." *Barlow v. Chicago, etc., R. R. Co.*, 29 Iowa, 276. So a change of route is strong evidence of an abandonment of the old way, and in some cases has been held, under the then existing circumstances, to amount to an abandonment. *Com. v. Cambridge*, 7 Mass. 163; *Com. v. Westborough*, 3 Mass. 406; *Stacey v. Vermont Central Railroad*, 27 Vt. 39. If the new route be attended by circumstances showing that the change is but temporary, or that it is not in fact intended for an abandonment of the old route, but to secure additional accommodation for its business, or there are other acts showing a want of intention to abandon, there is no good reason why, as matter of law, it should be so regarded. *Chicago R. R. Co. v. Bean*, 69 Iowa, 257, 28 N. W. 585. In the case of *Roanoke Inv. Co. v. Kansas City Ry. Co.*, 108 Mo. 66, 17 S. W. 1000, where there was a change of route, the court laid stress upon the "intention" to be gathered from all the facts of the case. It held that the "intention" to abandon was clear, not only from the declarations of the officers, but because it had adopted a different route—a fact of most "positive, unequivocal evidence of an intention." *Commonwealth v. Boston, etc., R. R. Co.*, 150 Mass. 174, 22 N. E. 913. It seems, therefore, clear that in this case, as, indeed, all others, abandonment is a relinquishment or surrender of rights by one person to another, and includes both the intention to abandon, and the external act by which the intention is carried into effect. 1 Am. & Eng. E. of Law, p. 2; *City of Columbus v. Columbus & Shelby R. R. Co.*, 37 Ind. 299; *Durfee v. Peoria, etc., Ry. Co.*, 140 Ill. 439, 30 N. E. 686; *Barlow v. Chicago, Rock Island & P. R. R. Co.*, 29 Iowa, 276; *Roby v. N. Y. C. & H. R. R. Co.*, 142 N. Y. 180, 181, 36 N. E. 1053. It follows from what has been said that appellant's third prayer was properly rejected.

The appellant's first and fourth prayers found the plaintiff's right of recovery solely upon the finding by the court, sitting as a jury, of the agreement with the Belt Line Railroad Company, and that in accordance therewith the appellee carries, and has carried since the year 1895, all its traffic over that line, from its main stem to the junction with the Philadelphia Branch, and that none of its traffic has passed over the land in dispute. These prayers do not permit the jury to make inquiry as to the actual intention of the appellee to abandon the route over the disputed land, but, in substance, affirm that the contract and the mode of transporting the traffic, as stated in the prayers, are of such a character that an intention to abandon must be legally presumed. It must be noticed that these facts do not prove a change of route of a character similar to that shown in the cases cited by the appellant, where the alteration of the route consisted in a change of the line in such a manner as to import, as matter of fact, a strong, if not necessary, implication that the old way was to be abandoned. In fact, in this respect there was no such change of route at all. It is shown by the proof that, after condemning and buying the property along Pratt street and elsewhere along the proposed route, financial difficulties compelled the appellee to postpone completing the Pratt street line. An opportunity arose by which it was enabled to secure a means of transporting its traffic over the property of another corporation. It was by means of a traffic arrangement that the appellee became financially able to secure this. At that time the appellee owned none of the stock of the Belt Line Company, and it was not until a later period that it became the owner of its stock, or a majority of it. The implication to be deduced from an arrangement like this cannot be similar to that to be derived from a change of line, which per se creates a reasonable belief that the company has no further use for, and does not intend to use, the old line. Here the character of the transaction is this: The appellee, finding itself financially embarrassed, and therefore unable at that time to complete its projected plan of connection with the Philadelphia Branch, enters into a contract by which it acquires traffic accommodation over another road. Surely it cannot be contended with success that this act alone carries with it a legal implication, not rebuttable by other facts, that there was an intention to abandon its own line, as being thereafter wholly valueless. But it is further contended that the character of the contract shows that it was the intention of the appellee to abandon the Pratt street line, from the fact that the appellee stipulated to ship over the Belt Line "all its traffic of every kind passing through the city of Baltimore," and has since done so. A careful examination of the entire contract shows that the purpose of that provision was to secure to the Belt Line the necessary funds with which to take care of

the bonds issued and to be issued by the Belt Line in the performance of its obligations under the contract. The appellee, by the contract, was to furnish such amount of transportation of its own traffic as, with the sums received from other companies, at the rates named, would amount to certain sums named; and, if there was a deficiency, the appellee was to make it good, to the extent of the annual interest on the bonds issued by the Belt Line Company. The stipulation that the appellee should send all its traffic over the Belt Line cannot, under all the circumstances, be regarded as tantamount to an expression of an intention to abandon its Pratt street route, or as a stipulation that it should not avail itself of other means of transportation it then had, or might thereafter have, of all such traffic as for any reason could not pass through the tunnel along Howard street, or was an excess of the capacity of the tunnel to carry. The appellee, at the time this agreement was made, though then in financial difficulties, was an important line of transportation, with great possibilities in respect to freight and passenger transportation. Its officials must have expected that its business would increase until it should be beyond the capacity of the Belt Line. It cannot be imagined, therefore, that by these stipulations it intended to preclude itself from availing itself of other avenues for transporting such traffic as, for any reason, the Belt Line could not take care of, or to abandon a route on which much money must have already been expended. The evidence shows that the capacity of the Belt Line Route has almost reached its limit, and when that has been exceeded the appellee must look to the Pratt street or some other route to accommodate the excess. For these reasons the appellant's first and fourth prayers were properly rejected.

The appellant's second prayer, also rejected below, announced as a correct legal proposition that the court, sitting as a jury, should find the right of way was abandoned by the defendant, "if it finds that the property has remained unused for ten or more years after such condemnation." This prayer involves the construction of the act of 1890, p. 246, c. 220, which is as follows: "Whenever upon an unfinished railroad a right of way or location on any part thereof remains for ten years unused for railroad purposes, the same shall be held to be abandoned, and shall be liable to be used and appropriated by another railroad company upon purchase or condemnation in the manner provided in this article." We do not think its provisions apply to the case now under consideration. Here it is claimed that by nonuser of the property the right of possession has reverted to the owner of the fee. The purpose and effect of the act do not work this result. Its purpose was to give power to a railroad company to secure by condemnation a right of way upon an unfinished railway, which has been disused for

Louisville & N. R. Co. v. Smith

railroad purposes for 10 or more years, and for that purpose it should be held to be abandoned. This appears not only from the terms of the act, but also from its title, where it is stated to be an act providing for the use of any other railroad company of the abandoned or unused rights of way or location of railroad companies. The word "abandoned," in the connection in which it is used, cannot import such abandonment as would cause a reversion to the first owner, for the reason that such a construction would be to take from the railroad company property obtained by condemnation, and paid for, without compensation, and therefore raise a constitutional question not necessary for us now to decide. Its more reasonable construction would be that it is to be applied to cases only where there has been no use of the property for railroad uses, and in such a case there has been such an abandonment that authority is granted to another railroad company to take condemnation proceedings to secure it for its use without further special legislative permission so to do. This would be within the legislative power. "It rests with the Legislature to determine when the necessity arises for making one public purpose subordinate to another." It cannot, however, bestow the property of any person, natural or corporate, upon another, but the Legislature may determine when it may be taken for public purposes. *Turnpike Co. v. Railroad Co.*, 81 Md. 257, 31 Atl. 855. This act therefore merely authorizes a railroad to take by condemnation property which has been unused for railroad purposes for 10 or more years upon an unfinished railway. It does not, however, attempt to deprive the owner of any of its interests in the property, without proceedings in condemnation, and the payment of such damages as the jury may award. This prayer was therefore properly rejected. It follows, also, from what has been said, that the second prayer of the appellee was properly granted.

Finding no error, the judgment will be affirmed. Affirmed.

LOUISVILLE & N. R. CO. v. SMITH et al.

(Circuit Court of Appeals, Fifth Circuit, February 2, 1904.)

[128 Fed. Rep. 1.]

Railroad—Right of Way—Easement by Prescription.*

Where a railroad company has the charter power to acquire a right of way for railroad purposes, and it enters upon lands with the consent or

*See foot-note appended to *Southern Cal. R. Co. v. Slauson* (Cal.), 2 R. R. R. 520, 25 Am. & Eng. R. Cas., N. S., 520; *Boyce v. Missouri Pac. R. Co.* (Mo.), 4 R. R. R. 496, 27 Am. & Eng. R. Cas., N. S., 496; *Narvon v. Wilmington & W. R. Co.* (N. Car.), 13 Am. & Eng. R. Cas., N. S., 852; *Chicago, M. & St. P. Ry. Co. v. Grant* (Ill.), 11 Am. & Eng. R. Cas., N. S., 823.

Louisville & N. R. Co. v. Smith

license of the owner, and builds its railroad, expending money in the prosecution of the work, and holds it continuously for a period of more than 40 years, running trains over it daily, and exercising the acts of ownership that are necessary to keep the roadbed in proper condition during all that time, it acquires a right of way by prescription.

Injunction—Grounds—Protection of Easement.

Equity has jurisdiction by injunction to prevent interference with easements or their destruction, and a bill by a railroad company against a number of defendants, alleging that as owners of lands through which its road runs they are interfering with its right of way, denying its right to the same, threatening suits, and preventing it from keeping its roadbed in repair, states a cause of action for equitable relief.

Jurisdiction of Federal Courts—Amount in Controversy—How Determined.

In a suit by a railroad company in a federal court against a number of landowners to enjoin threatened interference with its use of its right of way through their lands the value of the right sought to be protected, and not the value of the land constituting the right of way across the lands of defendants, constitutes the value in controversy for jurisdictional purposes.

Parties—Joinder of Defendants—Suit to Enjoin Interference with Easement.

Different landowners may be joined as defendants in a single suit by a railroad company to enjoin interference with its use of its right of way and with the maintenance of its track, where the right asserted is the same against each defendant.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

The appellant, a Kentucky corporation (complainant below), brought this suit against Mrs. M. E. Smith and 14 others, appellees (defendants below), all citizens of Alabama. The averments and purpose of the bill are sufficiently shown in the opinion. The defendants demurred to the bill, making the objections which are stated and discussed in the opinion. The circuit court sustained the demurrers and dismissed the bill, and its decision and decree are assigned as error.

John W. Judd (John B. Keeble and Chas. B. Stark, on the brief), for appellant.

W. R. Walker (Thomas C. McClellan, on the brief), for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. 1. It is shown by the bill that on December 19, 1853, the Legislature of Alabama passed "An act to incorporate the Tennessee and Alabama Central Railroad Company." Acts 1853-54, p. 298. The act provided that the railroad to be built should extend from Montevallo, in Shelby county, Ala., through the town of Decatur, crossing the Tennessee river; thence through Limestone county to some point on the boundary line between Alabama and Tennessee, and there to connect with other railroads. The charter authorized the company to

contract for and receive conveyances for the right of way not to exceed 150 feet wide, and for the material necessary to build the road. It also made provision for the condemnation of the right of way where it could not be contracted for. Work began on the building of the road in 1856 or 1857, and it was finished through Limestone county to the Tennessee line in the year 1859. It is alleged on information and belief that the railroad company either acquired the right of way upon and through the defendants' lands under provision of the charter, or that it acquired such right by "let" and license of the owners through whose lands the railroad was constructed. After the completion of the road through Limestone county, and through the lands now owned by the defendants, its operation was begun in the year 1859, and it has since been continuously operated by the complainant, and those under whom it claims, up to the time of the filing of the bill. It is alleged that since July 1, 1872, and up to the present time, the complainant has claimed, owned, held, operated, and maintained the railroad continuously without hindrance from any one, and that it is now holding, maintaining, operating, and claiming to own and operate it. These averments are emphasized in an amendment to the bill, in which it is averred that the right of way in question is continuous, extending through Limestone county, a distance of 26 miles, and was acquired and taken possession of more than 40 years ago, and that the complainant and those under whom it holds "has claimed, used, occupied, and been in possession of said right of way all this time, continuously running its trains over the same, and continuously, wherever necessary, building switches and turnouts, ditching, grading, and doing all manner of work necessary to keep its roadbed and right of way in suitable condition and repair for the safe operation of its trains, both freight and passenger, and this use of said right of way has never been questioned or denied until the interference by the defendants." We think these averments are sufficient to show that the complainant has acquired an easement or right of way across the lands in question. In Alabama an action to recover lands, tenements, or hereditaments is barred by the statute of limitation of 10 years. Code Ala. 1896, § 2795. The ancient doctrine of prescription required a use from time immemorial. But now, in most jurisdictions (and certainly in Alabama) the prescriptive period is the same as the local statute of limitations for quieting titles to land. *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412. Where a railroad company has the charter power to acquire a right of way for railroad purposes, and it enters upon the lands of the owner, with his consent or license, and builds its railroad, expending money in the prosecution of the work, and holds it continually for a period of more than 40 years, running trains over it daily, and exercising the acts of owner-

Louisville & N. R. Co. v. Smith

ship that are necessary to keep the roadbed in proper condition during all that time, it acquires by prescription a right of way. *Texas & Pacific Railroad v. Scott*, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94; *National Water Works v. Kansas City (C. C.)* 65 Fed. 691; *Cogsbill v. Mobile & Girard Railroad*, 92 Ala. 252, 9 South 512; *Midland Ry. v. Smith*, 113 Ind. 233, 15 N. E. 256.

2. It is unquestionably settled that equity has jurisdiction by injunction to prevent the interference with easements or their disturbance or destruction, actual or threatened. This doctrine has been applied in a great variety of cases, such as preventing the diversion of water, preventing the obstruction of a private right of way, preventing the pollution of a stream, preventing the obstruction of a public right of way, etc., and (in *Cairo V. & C. Railroad v. Brevoort (C. C.)* 62 Fed. 129, 135, 25 L. R. A. 527) in the prevention of obstructions or interference with a railroad's right of way. Every disturbance of an easement, actual or threatened, will be restrained whenever, from the essential nature of the injury or from its continuous character, the legal remedy is inadequate. *Nininger v. Norwood*, 72 Ala. 277, 47 Am. Rep. 412; *Hacke's Appeal*, 101 Pa. 245; *Gardner v. Trustees*, 2 Johns. Ch. (N. Y.) 162, 7 Am. Dec. 526; *Russell v. Napier*, 80 Ga. 77, 4 S. E. 857; *Nashville, etc., Railroad v. M'Connell (C. C.)* 82 Fed. 65; 3 Pom. Eq. Jur. (2d Ed.) § 1351, and notes. It is shown by the bill that the defendants are denying the right of the complainant to the right of way, and are insisting upon their right to cultivate the lands up to the ends of the cross-ties of the complainant's roadbed and track, and are denying the complainant the right to go upon the lands included in its right of way for the purpose of reconstructing its roadbed and banks and cutting or repairing ditches therein as the same are needed in the proper maintenance and operation of the road. The complainant has been warned by the defendants not to do the work necessary on the right of way to keep the same in proper condition, and other wrongs and threatened wrongs are alleged in the bill; and it is then stated:

"The action of the defendants is such that the complainant is unable to keep and maintain its track and roadbed in proper and safe condition so as to suitably and safely operate its trains. That said defendants are continually threatening this complainant and its employees with suits, both civil and criminal, for entering upon its right of way contiguous to their land in the performance of the work necessary to be done in the maintenance and operation of the road."

These averments, taken in connection with the others in the bill, are amply sufficient to give a court of equity jurisdiction to protect the alleged rights of the complainant. *Jones on Easements*, § 879 et seq.

3. The defendants contend that it does not appear from

Louisville & N. R. Co. v. Smith

the bill that the suit involves property exceeding \$2,000 in value, and that, therefore, the circuit court was without jurisdiction. The bill shows that the complainant is the owner of a railroad known as the Nashville & Decatur Railroad, 119 miles long, extending from Nashville, Tenn., to a junction with the Southern Railway near Decatur, Ala., including the roadbed, tracks, switches, side tracks, rails, ties, bridges, etc. The exhibits to the bill showing rental values for long terms of years, and amount of taxes paid, show that the entire railroad is of great value, worth several millions of dollars. The railroad runs through Limestone county, Ala., a distance of 26 miles, and for a distance of about 20,000 feet through lands in that county which are owned in separate tracts by the defendants. It is averred that for the last 45 years the complainant and those under whom it claims has used the track, and is now using it, by running trains of cars over it. The complainant asserts the right to continue so to use the road, and claims that its right of way is 150 feet wide—75 feet on each side from the center of its track. The purpose of the bill is to protect the complainant in the use of this right of way against the unlawful interference of the defendants. The property claimed by the complainants in the bill is an easement or right of way. The easement extends from one end of its road to the other. After stating these facts, the complainant alleges that "the value of the property, as mentioned in this bill as claimed by it, and which is in controversy in this suit, exceeds the sum and value of \$2,000, exclusive of interest and costs." The construction placed on the bill by appellees' counsel can be best shown by a sentence from their argument: "Plaintiff cannot join in a single suit in a federal court claims against several parties, and sustain the jurisdiction of the court by reason of the fact that the total amount involved exceeds the amount necessary to give the court jurisdiction." The railroad, as we have said, passes through the different tracts of defendants' lands for about 20,000 feet, varying in length through the separate tracts from 200 feet to 4,150 feet. The learned counsel for the appellees evidently construes the bill as involving, as to amount, not more than the value of a strip of land 150 feet wide across the respective tracts of the defendants. And, placing that construction on the bill, it is argued that the value of the several strips across the several tracts cannot all be added together to make the jurisdictional amount. If that construction of the bill were correct, unless the value of the strip on each defendant's land exceeded \$2,000, the court would be without jurisdiction, for it has been often held that distinct claims against several defendants cannot be united to make up the amount necessary to give the court jurisdiction. *Walter v. Northeastern Railroad*, 147 U. S. 370, 13 Sup. Ct. 348, 37 L. Ed. 206; *Clay v. Field*, 138 U. S. 464, 11 Sup. Ct. 419, 34

Louisville & N. R. Co. v. Smith

L. Ed. 1044; *Russell v. Stansell*, 105 U. S. 303, 26 L. Ed. 989; *Gibson v. Shufeldt*, 122 U. S. 27, 7 Sup. Ct. 1066, 30 L. Ed. 1083; *Fishback v. Western Union Telegraph Co.*, 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630; *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552; *Seaver v. Bigelow*, 72 U. S. 208, 18 L. Ed. 595. But the bill in this case does not assert distinct claims against several persons, and seek to aggregate them to make up the jurisdictional amount; nor is it a suit to condemn or appropriate a right of way across defendants' lands. It is specifically alleged that the plaintiff many years ago "acquired and now holds" the right of way as a perpetual easement. The property involved, and which the complainant seeks to protect, is the easement or right of way acquired many years ago—the right to run its trains along its railway. The value of the thing involved in this suit cannot be ascertained by aggregating the value of the several strips of land covered by the right of way across the tracts owned by the defendants. That becomes clear when we consider that one defendant—the one whose land on one side joins the right of way for only 200 feet—can damage the complainant as much by obstructing its right of way as all of the defendants owning the other 19,800 feet. A permanent impediment on 10 feet of the road would be as injurious and disastrous to complainant's rights as an impediment on 10 miles of it. When the pleader says that the "property claimed by it" and "which is involved in this suit" is worth more than \$2,000, he means, not that several and distinct claims against the several defendants are to be valued and added together, but it means the one indivisible right to run its trains on its right of way. That is the right it seeks to protect by its suit praying for an injunction. In a suit to abate a railroad bridge as a nuisance the Supreme Court held that the value of the right to maintain the bridge, and not the amount of complainant's damage, determines the jurisdiction of the court. The question was disposed of with much brevity:

"But the want of a sufficient amount of damage having been sustained to give the federal courts jurisdiction will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern." *Mississippi, etc., Railroad v. Ward*, 67 U. S. 485, 492, 17 L. Ed. 311.

In an injunction suit by a railroad company to maintain its scheduled rate against attack by numerous actions in state courts it was held by this court, citing the case last quoted, that the amount in dispute was the value of the object to be gained by the bill. *T. & P. Railway v. Kuteman*, 54 Fed. 547, 4 C. C. A. 503. The same principle has been announced in other cases. *Whitman v. Hubbell* (C. C.) 30 Fed. 81; *Smith v. Bivens* (C. C.) 56 Fed. 352; *Humes v. City of Fort Smith* (C. C.) 93 Fed. 857; *Nashville, etc., Railroad v.*

M'Connell (C. C.) 82 Fed. 65. In a case where the plaintiff sought an injunction against several defendants diverting water from a river, it was held that it need not appear that the amount involved as to each defendant exceeded \$2,000. The matter involved was the injury to the plaintiff's property. If the injury sought to be enjoined was of the jurisdictional amount, that was sufficient. *Pacific Live Stock Co. v. Hanley et al.* (C. C.) 98 Fed. 327. A recent decision of the Supreme Court sustains this view. The plaintiff was a dealer in imported liquors. The defendants—several constables—threatened to seize and destroy all liquor imported by him into the state. Objection was made to the plaintiff's bill on the ground that the value in controversy did not exceed the sum of \$2,000. The record showed that he intended to import liquors of a value exceeding that sum, and that the right to deal in such liquors was of a greater value than \$2,000. This appears in evidence by an agreed statement. The court held that:

"Such statements sufficiently concede that the pecuniary value of plaintiff's rights in controversy exceed the value of two thousand dollars. Nor can it be reasonably claimed that the plaintiff must postpone his application to the Circuit Court, as a court of equity, until his property to an amount exceeding in value two thousand dollars has been actually seized and confiscated, and when the preventive remedy, by injunction would be of no avail." *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648.

It must be remembered, too, that this question is before us on demurrer, and that the value is not liquidated or fixed by law. The alleged value, therefore, must govern. *Texas & Pacific Ry. v. Kuteman*, 54 Fed. 547, 4 C. C. A. 503. Taking the averments of the bill as true, as we must do on demurrer, we think it is shown that the value of the right involved in the suit is sufficient to confer jurisdiction.

4. The appellees contend that there is a misjoinder of parties defendant. There has been much controversy in recent years as to the circumstances under which a plaintiff may join many defendants in a suit in equity to prevent a multiplicity of suits. Some courts have held that Mr. Pomeroy (1 Pom. Eq. Jur. §§ 245-273) has unduly enlarged the rule. *Tribette v. Railroad Company*, 70 Miss. 182, 12 South. 32, 19 L. R. A. 660, 35 Am. St. Rep. 642; *Turner v. Mobile*, 135 Ala. 73, 33 South. 132. But there are other authorities that fully indorse the views of the text-writer. *Harlan*, Circuit Justice, in *Osborne v. Wisconsin Railway Co.* (C. C.) 43 Fed. 825; *De Forest v. Thompson* (C. C.) 40 Fed. 375; *Ritchie v. Sayers* (C. C.) 100 Fed. 520; *Keese v. City of Denver*, 10 Colo. 113, 15 Pac. 825; *Carlton v. Newman*, 77 Me. 408, 1 Atl. 194. If the position taken by Pomeroy and the authorities last cited be correct, there is no misjoinder of parties defendant, because equity would have jurisdiction

of the case on the sole ground of preventing a multiplicity of suits. But in this case we are not required to take either side in that controversy. Here the jurisdiction in equity, as we have seen, is not dependent alone on preventing a multiplicity of suits. There are other and distinct grounds for equitable interference. The complainant seeks by injunction to prevent an obstruction to and interference with its right of way under circumstances, as we have shown, that confer equity jurisdiction from the inherent nature of the case, aside from the fact that the interposition of the equity court may prevent a multiplicity of suits. As to the alleged misjoinder of the defendants, the question here is, when may defendants be joined in a suit by a complainant, the bill stating other grounds for equitable interference, and not depending for its equity on the doctrine of preventing a multiplicity of suits? The rule, we think, is plain that when the matter in litigation is entire in itself, and does not consist of separate things, having no connection with one another, it is not necessary that each defendant should have an interest in the suit coextensive with the claim set up by the bill. He may have an interest in a part of the matter in litigation instead of the whole. There can be no reason why one complainant, who has the same right against a number of persons—that right being such that it confers equity jurisdiction—may not have that right determined as to all the parties interested by one suit. The plaintiff's claim is an entirety. It is a suit to protect a single indivisible right of way. The right claimed is exactly the same against each one of the defendants. All of the defendants are interfering in the same manner with the same right of way. As the case is one on the averments of the bill within the jurisdiction of a court of equity, there can be no reason for requiring the complainant to file 15 bills, one against each defendant. It is no objection that the several defendants each have a right to make a separate defense against the claim of the complainant, provided the complainant's assertion of right is the same against each, and there is only one general question to be settled, which pervades the whole case. It is enough if the purpose of the bill is to establish a single right between the complainant and the several defendants. *Hyman v. Wheeler* (C. C.) 33 Fed. 629; *Pacific Live Stock Co. v. Hanley et al.* (C. C.) 98 Fed. 327; *Smith v. Bivens* (C. C.) 56 Fed. 352; *Nashville, etc., Railroad v. M'Connell* (C. C.) 82 Fed. 65; *Union Mill & Mining Co. v. Dangberg* (C. C.) 81 Fed. 73; *Pillsbury-Washburn Mills v. Eagle*, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; *Prentice v. Duluth Forwarding Co.*, 58 Fed. 437, 7 C. C. A. 293; *Sang Lung v. Jackson* (C. C.) 85 Fed. 502; *American Central Ins. v. Landau*, 56 N. J. Eq. 513, 39 Atl. 400; *Cadigan v. Brown*, 120 Mass. 493; *Kerr on Injunctions* (Ed. 1880) 522.

We do not deem it necessary at this time to decide other

Ulmer v. Lime Rock R. Co

questions. The complainant contends that the width of the right of way should be fixed at 150 feet, the charter of the company having authorized the obtaining of a right of way of that width. The defendants assert that a right of way acquired by prescription does not exceed in width the land occupied and used as a right of way. Clearly, this question, though elaborately argued here, is not necessarily involved in a decision of the demurrers, which are addressed to the whole bill.

The decree of the circuit court is reversed, and the cause remanded, with instructions to overrule the demurrers.

ULMER et al. v. LIME ROCK R. CO.

(Supreme Judicial Court of Maine, April 25, 1904.)

[57 Atl. Rep. 1001.]

Eminent Domain—Branch Railroads—Accommodation of Private Business—Public Purposes.*

The mere fact that a railroad company builds a branch track for the immediate purpose of accomodating a private business enterprise is by no means a controlling test to determine whether the right of way therefor is taken for private purposes, or for public use, by right of eminent domain.

Same—Public Purposes.

While the power of eminent domain should not be so extended as to allow the taking of private property of one for the private benefit of another, it should not be so abridged as to interfere with the development of enterprises of a public nature, within the meaning of the Constitution.

Same—Branch Railroads—Public Purposes.

By the great weight of authority, the decisive tests as to whether a branch railroad track is for public or private purposes are these: Is the track to be open to the public, on equal terms to all having occasion at any time to use it, so that all can demand that they be served without discrimination, as of right? If so, and the track is subject to governmental control, under general laws, as are the main lines of a railroad, then the use is public, and the case a proper one for the exercise of the right of eminent domain.

Same—Same—Same—Accommodation of Private Business.

In *Farnsworth v. Lime Rock Railroad Company*, 22 Atl. 373, 83 Me. 440, the purpose of this particular railroad, so far as its main line is concerned, viz, the transportation of limestone and other freight to and from the limekilns and stores along its line, was declared to be a public use. In order to perform business of this nature, it is absolutely essential that connections should be made with the different limekilns, in many instances by branch tracks.

Same—Public Purposes—Legislative Determination—Review by Courts.

While legislative determination that the use for which property

*As to the power to condemn right of way for railroad branches, spurs or private railroads, to or from private property to be especially benefited, see extensive note, 20 Am. & Eng. R. Cas., N. S., 614; footnote appended to *Zircle v. Southern Ry. Co. (Va.)*, 9 R. R. R. 861, 32 Am. & Eng. R. Cas., N. S., 861.

Ulmer v. Lime Rock R. Co

authorized to be taken by eminent domain is a public one is undoubtedly subject to review by the courts, yet it is a familiar principle that all reasonable presumptions are in favor of the correctness of the legislative decision, and the act must be regarded as valid unless it can be clearly shown to be in conflict with the Constitution.

Same—Same—Branch Railroads.

The exercise of the power of eminent domain for the purpose of acquiring a right of way for a branch track is, in effect, a declaration by the railroad company that such track is to be open to the public, and operated as a public way, and subject to all public rights and public control.

Same—Same—Same.

If the purpose of a railroad corporation in building any particular branch track is to operate the same in conformity with the foregoing requirements, the power of eminent domain granted by the Legislature may properly be exercised, even though few may have occasion to be served by the branch, outside the owners of the quarry to which it is to be constructed,

Railroads—Ownership—Effect of Ownership of Entire Stock.

A business or manufacturing corporation, by owning nearly all the stock of a railroad corporation, does not thereby become the owner of the railroad company's road, franchises, or other property. A railroad company, whoever may be the owner of its stock, still owns its property.

Same—Control of Property—Stockholders.

Control of the property of a corporation is not in its stockholders. Of course, a majority of stockholders control the election of its officers and agents. But the control of the company's property is in the corporation itself, and in its officers and agents, who are intrusted with such control by virtue of the by-laws.

Same—Exercise of Franchises.

Railroad franchises must be exercised by the corporation to which they are granted, and by it alone.

Corporations—Effect of Ownership of Entire Stock.

A corporation is an entity, irrespective of the persons who own all of its stock, and the fact that one person owns all the stock does not make such owner and the corporation one and the same person. Neither is there any identity between the individual or the corporation which owns such stock in another corporation and the latter corporation.

Railroads—Forfeiture of Franchises.

If a railroad corporation unreasonably fails to perform the public duty for which it was chartered, and the management makes discrimination clearly showing an intention to exclude from the benefits of the road all except its principal stockholder, for the purpose of preventing competition, it might be sufficient to work a forfeiture of the railroad company's franchises.

Same—Duty to Construct Branch Lines.

It cannot be the duty, however, of a railroad company to build a branch track to connect with some particular lime quarry simply because such connection may be desired by the owner, independently of the question of the cost of construction and the probable income to be derived.

Same—Same.

It is the duty of the management of a railroad company, before entering into new construction, to take into consideration both the probable cost of the same, and the amount of freight which would be obtained therefrom for transportation.

Same—Same—Review by Courts.

So long as the directors of a railroad corporation act in good faith upon such questions, their determination is conclusive, and is not subject to review by proceedings in court.

Ulmer v. Lime Rock R. Co

Same—Forfeiture of Franchises—Quo Warranto.

The question whether or not a railroad corporation has done or failed to do anything which should result in a forfeiture of its franchises can only be inquired into by a proceeding appropriate for that purpose, such as an information in the nature of quo warranto, instituted by the proper authorities in behalf of the state.

(Official.)

Report from Supreme Judicial Court, Knox County.

Bill by Fred T. Ulmer and another against the Lime Rock Railroad Company. On report. Bill dismissed.

Argued before WISWELL, C. J., and WHITEHOUSE, STROUT, POWERS, PEABODY, and SPEAR, JJ.

D. N. Mortland and J. E. Moore, for plaintiffs.

C. E. & A. S. Littlefield, for defendant.

WISWELL, C. J. The defendant, the Lime Rock Railroad Company, is a corporation organized under chapter 418, p. 633, of the Private and Special Laws of 1889, and the amendments thereto, and was given power, by its charter, "to construct, maintain and use one or more lines of railroad to be operated by steam or horse power, with single or double tracks, from the lime quarries in the city of Rockland and town of Thomaston, in such direction as may best convene the transportation of lime stone from said quarries to the various lime kilns in said city and town, together with other freight, with convenient branches to accommodate each kiln." It was also authorized "to construct, maintain, use and operate all side tracks, spurs, turnouts and branches, and to make such additions to its present location, from time to time, as may be necessary or convenient in order to reach the various lime quarries and lime kilns that are now opened or built, or that may be hereafter opened or built, in said city and town." The corporation was also given power to purchase and hold such real estate as might be necessary and convenient for its purposes; "and in case said corporation cannot agree with the owners of land necessary and convenient for said road, it may be taken for the aforesaid purposes, as and for public uses, subject to the same damages and proceedings as when land is taken by other railroads under the general laws of the state."

The corporation soon after the date of its charter filed locations for the lines of its roads in accordance with the provisions of its charter, and has since, from time to time, made additional locations, in each case stating therein that such location was a partial location and that it reserved the right thereafter to make additional locations. The road has been built and has been in operation for a number of years, and now consists of about 13 miles of track extending from various lime quarries in Rockland and Thomaston to the lime kilns. It also connects with the Maine Central Railroad at Rockland, and with an

Ulmer v. Lime Rock R. Co

electric street car line extending through the two towns. The principal business of the road has always been the transportation of lime rock from the quarries to the kiln, but it has also been engaged to a considerable extent in the transportation of other freight between the Maine Central Railroad Station and the places of business of various persons, firms, and corporations.

On January 20, 1903, the railroad company commenced proceedings to condemn, under its power of eminent domain, a right of way over the land of the complainants, for the purpose of building thereon a branch track from one of its main lines to a line quarry owned by the Rockland-Rockport Lime Company. No question is raised as to the form or sufficiency of the proceedings commenced by the railroad company for the purpose of acquiring by condemnation this easement; but in this bill the complainants ask that the railroad company may be restrained from further proceedings, and from taking possession of any portion of the complainants' premises for this purpose. The prayer for this relief is based upon many reasons set out in the bill, which will be considered. The principal ground for relief is that the easement in the complainants' real estate is not to be taken by the railroad company for a public use, but solely for the private use and benefit of the railroad company, and of the owner of the quarry to which a branch track is to be constructed.

The charter of the company, already quoted from, authorized the railroad company, so far as it could do so within constitutional limitations, to construct and maintain branch lines to each kiln, and to the various quarries then opened or built, or that might be subsequently opened or built. Somewhat similar to this authority given to the defendant by its charter is the power conferred upon railroads by a general statute of this state (Rev. St. 1903, c. 51, § 30) which is as follows: "Any railroad corporation, under the direction of the railroad commissioners, may locate, construct and maintain branch railroad tracks to any mills, mines, quarries, gravel-pits or manufacturing establishments erected in any town or township, through which the main line of said railroad is constructed," etc.

But it is urged that this general statute, and the provisions referred to in the charter of this railroad company, are unconstitutional, since it allows the private property of an individual to be taken, not for a public use, but for the private purposes of the railroad corporation and of the manufacturer or mine owner who is primarily accommodated by the construction of such branch track, or that at least in this particular case the land sought to be taken by the railroad company for the purpose of constructing a branch track from its main line across the plaintiff's land to the lime quarry is for the sole use and benefit of the railroad company.

Ulmer v. Lime Rock R. Co

and the lime company, and will in no sense serve any public purpose or use.

The question thus presented, as has been frequently decided in this and many other states of this country, is a judicial one. The Legislature has the power to take, or to delegate to another the power to take private property for public purposes, provision being made for the payment of just compensation therefor; but it cannot take, or delegate to another the right to take, private property for anything but a public purpose. Whenever, therefore, it is contended that this power of eminent domain is attempted to be improperly exercised under legislative authority, it is necessary for the court to determine whether or not the Legislature, in granting such authority, has acted within the limitations of the Constitution, and whether or not, in the exercise of this power, the corporation is in fact carrying out the public purpose on account of which the power was granted. It is, of course, important in the determination of such a question that this essential attribute of sovereignty should not, upon the one hand, be so abridged as to interfere with the development of enterprises which are of a public nature, within the meaning of the Constitution, or, upon the other hand, so extended as to allow the taking of the private property of one for the private use and benefit of another.

That the ordinary purposes for which railroads are constructed and operated—the transportation of freight or passengers—are essentially public in their nature, and of great public convenience and utility, is, of course, conceded. "They are public highways; great thoroughfares of public travel and convenience." *In re Railroad Commissioners*, 83 Me. 273, 22 Atl. 168. These great thoroughfares of public travel could not be constructed if the acquisition of their necessary rights of way depended upon the whim, caprice, or unreasonable demands of the owners of all lands over which it is necessary for them to be constructed. For this reason public railroad corporations are very properly endowed by the Legislatures of all states with the power to exercise the right of eminent domain. It is plain that such transportation lines from place to place, whether in the same or in different towns, are as much a public enterprise and use as are public roads constructed for the same purpose. That the purposes of this particular railroad, so far at least as its main lines are concerned, are public, and therefore that the corporation was properly invested with the right of eminent domain, was decided by this court in 1891. *Farnsworth v. Lime Rock Railroad Company*, 83 Me. 440, 22 Atl. 373.

The general question is then presented whether or not a railroad corporation organized under legislative authority for the purpose of constructing and operating a public railroad, with express authority to build a branch track to a private manufacturing establishment, mine, or quarry, and

Ulmer v. Lime Rock R. Co

invested with the right to take by eminent domain lands necessary for such purposes, may take the private property of an individual, under such right, for the purpose of the construction of such a branch track, even if the primary purpose for such taking and construction is to accommodate such manufactory, mine, or quarry, and of obtaining the business of the transportation of freight therefrom. There is no arbitrary rule by which this question can be determined in all cases. It must be decided by the application of general principles to the particular facts of each case. Of course, the general question is whether such track is to be constructed for private purposes or for public use. If the branch track is to be built solely and exclusively for the benefit and accommodation of the railroad company and of the owner of the private business enterprise, it may well be said that it would serve no public purpose and would be of no public use, although the existence of such a track might be of great, but indirect, benefit to the community, by enabling the private enterprise to be carried on, and in thereby giving employment to labor. But the mere fact that the primary purpose of such a branch is to accommodate a particular private business enterprise is by no means a controlling test. The character of the use, whether public or private, is determined by the extent of the right by the public to its use, and not by the extent to which that right is or may be exercised. If it is a public way in fact, it is not material that but few persons will enjoy it. When such a branch track is first constructed, and the right of way necessary therefor is taken, it may in fact be used only for the business of the plant to which it is constructed, because at that time no other business enterprise may exist in that vicinity to furnish freight for transportation; but in the future other enterprises may spring up, either upon the line or upon the extension thereof, so that a branch track which in the first instance is primarily constructed for the accommodation of one may become of equal accommodation, benefit, and use to others. As illustrative of this, the directors of the railroad company have said in their location filed in this particular case: "This location is a location also in part. The line and locations of said railroad are to be extended and additional locations made as soon as the proper course and location of such extensions and additional locations are determined upon, so that said railroad, when the locations thereof are completed, shall reach all of the kilns, quarries, and other property that can be accommodated by its southern, northern, and other branches."

The tests decisive of this question as to whether a branch track of this character is to be constructed and operated for public or private purposes, deducible from the great weight of authority upon the question in this country, are these: If the track is to be open to the public, to be used upon

Ulmer v. Lime Rock R. Co

equal terms by all who may at any time have occasion to use it, so that all persons who have occasion to do so can demand that they be served without discrimination, not merely by permission, but as of right, and if the track is subject to governmental control, under general laws, as are the main lines of a railroad, then the use is a public one, and the Legislature may grant the power to exercise the right of eminent domain to a corporation which is to construct and operate such track; and, if the purpose of the railroad corporation in building any particular branch track is to operate the same in conformity with these requirements, then the power granted by the Legislature may be exercised in that particular case.

This is in accordance with the almost unbroken line of decisions of the appellate courts of the various states of this country, brief quotations from a few of which may be advantageous. In *De Camp v. Hibernia R. R. Co.*, 47 N. J. Law, 43, the court said: "This enterprise does not lose the character of a public use because of the fact that the projected railroad is not a thoroughfare, and that its use may be limited by circumstances to a comparatively small part of the public. Every one of the public having occasion to send material, implements, or machinery for mining purposes into, or obtain ores from, the several mining tracks adjacent to the location of this road, may use the railroad for that purpose, and of right may require the company to serve him in that respect; and that is the test which determines whether the use is public." To the same effect, see *National Dock R. R. Co. v. Central R. R. Co.*, 32 N. J. Eq. 755.

In *Kettle River R. Co. v. Eastern Railway Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111, the New Jersey case first above cited is quoted from with approval, the court saying: "If all the people have the right to use the road, it is a public use or interest, although the number who have business requiring its use may be very small." In *Chicago, B. & N. R. Co. v. Porter*, 43 Minn. 527, 46 N. W. 75, the court decided that a spur track extending from the main line of a public railroad across private property to a private manufacturing establishment was a public enterprise, the court saying: "The switch track is to be a part of its system of tracks, all belonging to the general enterprise of maintaining and operating a railroad for public use." The court in this case also adopted the test applied in numerous other cases, to the effect that the character of the use does not depend upon the amount of business or number of persons who may have occasion to use, but upon the right of the public to use, and goes on to say that there is nothing in the evidence showing that the manufacturer is to have any control over or management of the road, or any right in it other than that of any person or corporation having business establishments along its line.

Ulmer v. Lime Rock R. Co

In *Phillips v. Watson*, 63 Iowa, 28, 18 N. W. 659, the court said: "The character of a way, whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which the right is exercised. If all the people have the right to use it, it is a public way, although the number who have any occasion to exercise the right is very small." The earlier Iowa case of *Bankhead v. Brown*, 25 Iowa, 540, is cited by the court in support of this doctrine. In the case last quoted from, the spur track from the railroad to the private property was constructed by the owner of the private business enterprise under a statute authorizing such construction and the condemnation of property therefor. But the right to take private property, even under such circumstances, was sustained, the court saying: "We conclude, therefore, that a road of way established under the provisions of this statute is a public way, in the sense that the public may use and enjoy it in the way in which roads and highways are ordinarily used by it, and that the mine owner who procured it to be established must use the special privilege which the act confers on him in such manner as not to destroy this right of the public or prevent its enjoyment."

The public character of the use of such a branch track, built under similar circumstances, was sustained in the case of *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155, 3 N. E. 448, in which the court said: "We have not regarded the circumstances that they were laid with private funds, and that they terminated opposite or within convenient contiguity of a private manufacturing establishment, as materially affecting them and giving a private character to their use. All termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the tracks is never affected by this. If they are open to the public use indiscriminately, and under the public control to the extent that railroad tracks generally are, they are tracks for public use. It may be in such cases that it is expected or even that it is intended that such tracks will be used almost entirely by the manufacturing establishment, yet, if there is no exclusion of an equal right of use by others, and this singleness of use is simply the result of location and convenience of access, it cannot affect the question." Numerous other Illinois cases are cited in that opinion.

In a recent Illinois case, announced October 26, 1903 (*Gaylord v. Sanitary District of Chicago*, 204 Ill. 576, 68 N. E. 522), the general doctrine is thus stated: "It is also the settled doctrine of this court that, to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement. The public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right." To the same effect is the case of *Butte, etc., Railway Co. v.*

Ulmer v. Lime Rock R. Co

Montana, etc., *Railway Co.*, 16 Mont. 504, 41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508, in which many of the cases already referred to, as well as others, are cited, and the constitutionality of legislative authority, and the public character of the use for which the land was to be taken, under circumstances similar to those in the case at bar, are upheld.

In a recent case in Wisconsin, decided in November, 1901 (*Chicago & Northwestern Railway Company v. Morehouse*, 112 Wis. 1, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918), in which this particular question was involved, it was decided that: "A statute authorizing railroad companies to condemn land for branches and spur tracks to any 'mill, elevator, store-house, or other industry or enterprise,' is valid and constitutional; and the taking of land for a spur track to connect with a single industry is a taking for public use, if the purpose of the company is to maintain and operate such track as an integral part of its railway system, so as to serve all who may desire it, and all can demand, as a right, to be served without discrimination." Many cases are cited by the court in support of this doctrine, some of which have already been referred to.

To the same effect, either upon the particular question here involved, or upon the general question as to when an enterprise is of such a public character as to authorize the grant of the right of eminent domain, and the exercise of such right for its necessary purposes, are the following cases: *St. Louis, etc., R. R. Co. v. Petty*, 57 Ark. 359, 21 S. W. 884, 20 L. R. A. 434; *Bridal Veil Lumbering Co. v. Johnson*, 30 Or. 205, 46 Pac. 790, 34 L. R. A. 368, 60 Am. St. Rep. 818; *Toledo, etc., R. R. Co. v. East Saginaw, etc., R. R. Co.*, 72 Mich. 206, 40 N. W. 436; *Dietrich v. Murdock*, 42 Mo. 279; *Hays v. Risher*, 32 Pa. 169; *Talbot v. Hudson*, 16 Gray, 417; *Denham v. County Commissioners*, 108 Mass. 202.

In opposition to these authorities, and numerous others to the same effect that might be cited, we are aware of but two cases directly in point wherein different views have been expressed. These cases are *Pittsburg, etc., Railroad Co. v. Benwood Ironworks*, 31 W. Va. 710, 8 S. E. 453, 2 L. R. A. 680, and *Kyle v. Texas & New Orleans Railroad Co.* (Tex. App.) 4 L. R. A. 275, not officially reported. As to these cases, we only need to say that the reasoning of the opinions is not satisfactory to us. They both proceed upon the theory that because the primary and immediate purpose of building the branch tracks in question was to accommodate the railroad and the private business enterprise, to which they were extended, they were necessarily for a private purpose, and could not under any circumstances be for a public use. This is not in conformity with the weight of authority.

Adopting these general principles and the tests determi-

native of the question involved which have been almost universally laid down by the courts of this country, we come to the question as to whether in this particular case an easement in the plaintiffs' land may be taken by the defendant corporation for the purpose of building this branch track, as for public uses. And this question may perhaps be resolved into two—first, as to whether the legislative authority was constitutional; and, second, if it should be held to be, whether or not, in attempting to exercise that right in this particular instance, the railroad company is in fact carrying out one of the public purposes for which it was chartered.

It, of course, must be conceded that the Legislature, in so far as it could do so, delegated this power to the railroad company in the most express and explicit terms. And in determining the question of the constitutionality of this legislation it must be remembered that, although the court must finally determine the constitutionality of any legislation, all reasonable presumptions are in favor of its validity, and the courts will not declare an act of the Legislature to be invalid, because contrary to the provisions of the organic law, unless it is clearly so. This is a familiar principle recently stated by this court in *State v. Rogers*, 95 Me. 94, 49 Atl. 564, 85 Am. St. Rep. 395. And this is as true respecting legislative enactments by which the power to exercise the right of eminent domain is delegated as in regard to any other species of legislation. The determination by the Legislature that the use for which property is authorized to be taken is a public one is undoubtedly subject to review by the court, but all reasonable presumptions are in favor of the validity of such determination by the Legislature, and the act must be regarded as valid unless it can be clearly shown to be in conflict with the Constitution. *Hazen v. Essex County*, 12 Cush. 477; *Talbot v. Hudson*, 16 Gray, 422; *Moore v. Sanford*, 151 Mass. 285, 24 N. E. 323, 7 L. R. A. 151; *United States v. Gettysburg Electric Railway Co.*, 160 U. S. 668, 16 Sup. Ct. 427, 40 L. Ed. 576.

That the Legislature, in granting these powers and privileges to the defendant, did not transcend its constitutional limitations, must, we think, be obvious. The power was granted to a public railroad corporation, the principal purpose of which was the transportation of limestone and other freight for all persons whom it could accommodate. This, as we have seen, is universally conceded to be a public purpose. The nature of the business of the corporation was to be such that it was absolutely essential, in order to perform that business, that connection should be made with the different quarries and limekilns, in many instances by a branch track. In fact, the constitutionality of this legislation was sustained by this court in *Farnsworth v. Lime Rock Railroad Co.*, 83 Me. 440, 22 Atl. 373—a decision which there is certainly no reason to question.

But it is argued that, even if the original legislation was constitutional, the authority granted being somewhat general in its character, and no reference being made necessarily to this particular quarry or branch track, the exercise of this right by the railroad company is not within the terms of the charter, because the purpose of the management of the railroad company in taking this land and in building this branch track was not to serve a public purpose, but to accomplish its own private ends for its own benefit.

It is undoubtedly true that for the present, at least, few persons may have occasion to be served by this branch track, except the owner of the quarry to which it is to be constructed; and we assume that it is equally true that the primary purpose in the construction of this track is to obtain the transportation of freight from this quarry to and over the main lines of the railroad company's road. But as we have already seen, this is by no means decisive of the character of the use of the road or branch track; and there is nothing further to indicate that it is to be for the sole and exclusive benefit of the quarry owner, or that all members of the public will not be entitled to demand, of right, whenever they may have occasion to do so, that their freight of all kinds shall be transported to the quarry over this branch road, or that the owners of other quarries that may be opened either upon the branch track, or any extension thereof, shall not have the right to demand that the product of their quarries shall be transported, without discrimination, over the same. In fact, this track must be operated by the railroad company for the benefit of all persons that may have occasion to use it. It must be operated by the railroad company as an integral part of its entire system, and as much subject to public control as any other part of the road, because the directors of the railroad company, in acquiring this right of way for the track, have exercised the right of eminent domain, and have thereby, in effect, declared that it is to be open to the public, and operated as a public way, subject to all public rights and public control. This action of the directors has some tendency to show their purpose. If it were not their intention that the branch should be open to the public, and operated for the benefit of all members of the public who may have occasion to use it, they would not have attempted to acquire the right of way in this manner.

Again, the directors of the road, in the location filed by them, have said that this was a partial location only, to be extended and additional locations made as soon as the proper courses and locations for such extensions are determined upon, so that this branch track, when completed, "shall reach all of the kilns, quarries, and other property that can be accommodated by its southern, northern, and other branches." We are aware of no reason why the truth of this statement should be disputed. For these reasons, we

Ulmer v. Lime Rock R. Co

are of the opinion that the legislative grant of the right of eminent domain to the railroad company was constitutional, because it authorized the taking of private property for public purposes, and that in the exercise of that right in this particular case the railroad company was carrying out one of the public purposes for which it was chartered, and to accomplish which this power was granted to it.

Another cause of complaint, much relied upon in argument, and which appears in different forms of allegation throughout the bill, is that all of the stock of the railroad company is at the present time owned by the Rockland-Rockport Lime Company. It appears from the evidence that each of the directors of the railroad company is the owner of one share of its capital stock, and that all of the rest of the stock is owned by the lime company. It is argued from this that the lime company, a corporation organized purely for private purposes, with no duties to perform of a public nature, is in fact the owner of, and is in possession and control of, the railroad, and of all the franchises and privileges that were granted by the Legislature to the railroad company, and that as such owner it is operating and managing the same for the sole benefit of the Lime company, to the exclusion of all others.

But the argument is based upon a wrong assumption. Whoever may be the owner of the stock of the railroad company, or however many or few such owners there may be, that corporation still continues to exist as a separate and independent corporation. It preserved its corporate existence. It operates its own road. It has its own officers and makes its own contracts. Although the lime company is the owner of nearly all of its capital stock, that company does not thereby become the owner of the railroad company's road, franchises, or other property. That corporation, whoever may be the owner of its stock, still owns its property. Neither do the stockholders of a corporation control the property of the corporation. Of course, a majority of the stockholders control the election of directors and other officers and agents of the corporation; but the control of the property of the corporation is in the corporation itself, and in its officers and agents who are invested with such control by virtue of the by-laws of the company.

The franchises granted to a railroad corporation must be exercised by that corporation, and by it alone. There is no identity between the individual or the corporation which owns stock in another corporation and that latter corporation. A corporation is an entity, irrespective of the persons who own all of its stock, and the fact that one person owns all the stock does not make him and the corporation one and the same person. It would seem that the citation of authorities in support of these well-established principles would be unnecessary, but we call attention to a few of the many

Ulmer v. Lime Rock R. Co

that might be referred to: *Pullman Palace Car Company v. Missouri R. R. Co.*, 115 U. S. 587, 6 Sup. Ct. 194, 29 L. Ed. 499; *Exchange Bank v. Macon Construction Company*, 97 Ga. 7, 25 S. E. 326, 33 L. R. A. 800; *Button v. Hoffman*, 61 Wis. 20, 20 N. W. 667, 50 Am. Rep. 131; *Morawetz on Private Corporations*, § 227 et seq. We cannot, therefore, see how this allegation can in any way affect the question here involved.

Still another allegation in the complainants' bill is that the Rockland-Rockport Lime Company in January, 1900, acquired, by purchase or otherwise, and is now the owner and in possession and control of, all the lime quarries which are now reached by or connected with the railroad or any of its branches, and that the railroad company has since that time, "refused and neglected to extend or connect its line of tracks with any lime quarry not owned or controlled by said Rockland-Rockport Lime Company.

It is clear, we think, that the first part of this allegation cannot in any way effect the question involved, or the railroad company's right to take the complainants' land for its purposes. If at one time the railroad served a considerable number of independent lime quarries, owned by different owners, and subsequently the ownership of such quarries has been acquired by one person or corporation, the powers, privileges, and duties of the railroad company are precisely the same as before, and cannot have been affected by such consolidation of ownership.

As to the second part of the allegation—that the company now refuses to connect with any quarry not owned by the lime company—this is a matter which must necessarily depend to a large extent upon the discretion of the management of the railroad company. It cannot be the duty of that company to build a tract to connect with any particular quarry simply because such connection may be desired by the owner, independently of the question of the cost of construction and the probable income to be derived therefrom. It is certainly the duty of the management of a railroad company, before entering into new construction, to take into consideration both the probable cost of such construction, and the amount of freight for transportation that would thereby be obtained. So long as the directors act in good faith upon any such question, their determination is conclusive, and is not subject to review by the court in proceedings of any kind.

If, of course, the railroad company should unreasonably fail to perform the public duty for which it was chartered, and the management should make such discriminations as to clearly show an intention to exclude from the benefits of the road all persons and corporations, except the lime company, its principal stockholder, for the purpose of preventing any competition with the latter company, it might be sufficient

Fargo v. Hart

to work a forfeiture of the franchises granted to the railroad company. For, as we have seen, the railroad company, irrespective of the fact that substantially all of its capital stock is owned by another corporation organized purely for private purposes and profits, continues to exist as an independent corporation, with public duties to perform, and, because of that fact, invested with valuable franchises. It cannot, therefore, while exercising the franchises and rights with which it has been endowed, because of the public nature of the duties to be performed, conduct the management of its road so as to result in the benefit of one person or corporation, the owner of its stock, and to the exclusion of all others from the benefits which they are entitled to derive therefrom. The public nature of the business of a railroad company depends upon the right of any member of the public to use the road, and to require the company, as a common carrier, to transport his freight.

But the question whether or not the railroad company has done or failed to do anything which should result in a forfeiture of its franchises can only be inquired into in a proceeding appropriate for that purpose, such as an information in the nature of quo warranto instituted by the proper authorities in behalf of the state. It is not competent in a collateral proceeding, such as this, to show any matter affecting the forfeiture of a charter. *Encycl. of Pleading & Practice*, vol. 17, p. 409; *Elizabethtown Gaslight Company v. Green*, 46 N. J. Eq. 118, 18 Atl. 844; *Sewalls Falls Bridge v. Fiske*, 23 N. H. 171; *Frost v. Frostburg Coral Company*, 24 How. 278, 16 L. Ed. 637; *Lee v. Drainage Commissioners*, 125 Ill. 47, 16 N. E. 915; *Commonwealth v. Union Insurance Company*, 5 Mass. 230, 4 Am. Dec. 50; *Attorney General v. Adonai Shomo Corporation*, 167 Mass. 424, 45 N. E. 762.

We have considered all the reasons set out in the complainants' bill why the relief asked for should be granted. In our opinion, it should not be granted for any of these reasons. The bill will therefore be dismissed, with costs.

So ordered.

JAMES C. FARGO, as President of the American Express Company,
Appt., v. WILLIAM H. HART, Auditor of State of the State of
Indiana.

(Argued February 24, 25, 1904. Decided March 21, 1904.)

[24 Sup. Ct. Rep. 498.]

Taxation of Nonresident Express Company—Mileage Basis—Including Value of Personal Property outside State.

Personal property owned by a nonresident express company and situated outside the state cannot be taken into account in fixing the value, for taxation, of its property within the state, on a mileage basis, on the theory that it gave the credit necessary for carrying on the business

Fargo v. Hart

in the state, where the resulting assessment is greatly in excess of the value of the total good will of the company, measured by the difference between its tangible assets and the total value of its stock.

Injunction against Illegal Taxation—Tender.

Tender is not a prerequisite to injunctive relief against an assessment for taxation made upon unconstitutional principles.

Same.

Injunction is the proper form of relief from an assessment for taxation made upon unconstitutional principles.

Appeal from the Circuit Court of the United States for the District of Indiana to review a decree which dismissed a bill which sought injunctive relief against assessment for taxation of the property of a nonresident express company on a mileage basis. Reversed.

The facts are stated in the opinion.

Mr. Lewis Cass Ledyard for appellant.

Messrs. Cassius C. Hadley, Charles W. Miller, L. G. Rothchild, and William C. Geake for appellee.

MR. JUSTICE HOLMES delivered the opinion of the court:

This is an appeal from a decree of the United States circuit court dismissing the plaintiff's bill and supplemental bills. The bill was brought by the president of the American Express Company, a joint stock company of New York, on behalf of himself and the other members of the company, to enjoin the auditor of the state of Indiana from certifying an assessment for 1898 to the auditor of the several counties of the state. Supplemental bills sought the like remedy in respect of the assessments for the following years through 1901. The ground of relief is that the assessments will result in unconstitutional interferences with commerce among the states and also are contrary to the 14th Amendment. The plaintiff's case may be stated in a few words. The American Express Company is engaged in commerce among the states, including Indiana. It has real estate of a market value of nearly two million dollars, which is outside of Indiana, and which it says is not used in its business, and fifteen million and a half dollars' worth of personal property in New York, as to which it says the same; over three million dollars' worth of real estate used in connection with the business, and about a million and a half dollars' worth of personal property used in the business, of which there was less than eight thousand dollars' worth in Indiana. It has paid the local taxes on this last. The total value of the property for 1898 was \$22,059,055.35. The market value of what, for brevity, we may call its stock, was \$21,600,000. The state board of tax commissioners has undertaken to tax the property of the company under the law which was upheld in *American Exp. Co. v. Indiana*, 165 U. S. 255, 41 L. Ed. 707, 17 Sup. Ct. Rep. 991; *Adams Exp. Co. v. Ohio State Auditor*, 195 U. S. 194, 41 L. Ed. 683, 17

Fargo v. Hart

Sup. Ct. Rep. 305, 166 U. S. 185; 41 L. Ed. 965, 17 Sup. Ct. Rep. 604; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 41 L. Ed. 960, 17 Sup. Ct. Rep. 527, by treating the whole business as a unit and assessing the company on a proportion of the total value of its property, determined by the ratio of the mileage in Indiana to the total mileage of the company, excluding its ocean mileage for foreign express business, which the company says should have been included. The company relies on the fact that it made a return to the board, setting forth in detail what its property was, where it was situated, and how used, and that the value and nature of the property was not disputed; and it contends that when these facts appeared the board was not at liberty to spread the whole value over the whole line equally, and tax by mileage. The auditor in his answer sets up that the said sum of fifteen and a half million dollars in securities is used by the company as a part of the necessary capital of its business, and denies that the board assesses personal property not used in connection with its business. Thus, he admits, by implication, that the above sum did enter into the assessment made, and this would be obvious unless we should assume the intended tax to be wholly arbitrary, as the assessment was at the rate of \$450 a mile for 1,798 and a fraction miles, amounting to \$809,253, as against less than eight thousand dollars' worth of tangible property in the state. There are some differences of detail between the state and the company as to the precise value of the stock, etc. But the foregoing facts present the general question.

The contention of the company in its extreme form is that the state had no right to tax it anything for the years when its stock was of less marked value than its property, because that ratio showed that the whole value of the company was in its tangible assets, and that the intangible property spoken of in the *Adams Express Company Case* was nothing. It says that in any year that property was so small as to warrant only a nominal tax. We lay this contention on one side. It was admitted at the hearing before the board of tax commissioners that an appreciable sum properly might be assessed on the mileage basis, and therefore the board was warranted in assuming the fact. It was admitted at the argument before this court that the low market value of the stock was due in part to the ignorance of the public as to the assets of the company. On this concession the market value of the stock was not a test of the value of the business. The statement is confirmed by the continued rise in the stock since, up to \$225 in April, 1902. And apart from these admissions the board well might have hesitated to believe that the company was carrying on a business, which it gave no signs of intending to stop, at a loss, and was paying its regular dividends out of investments alone. We lay on one side also the question of ocean mileage. Without dwelling

Fargo v. Hart

on the sudden change in the returns, which added nearly 130,000 miles in 1898, with comparatively slight explanation, or the admitted differences between the ocean and land carriage, we cannot say that the tribunal, having the duty and sole jurisdiction to find the facts, exceeded its powers in not allowing the item.

We come, then, to the real question of the case: whether, the tax provided for by the statute being a tax on property, it sufficiently appears that the board took into account property which it had no right to take into account in fixing the assessment at the large sum which we have mentioned. We already have stated reasons for assuming that the personal property in New York did enter into the valuation. We may add that it appears by a stipulation as to facts, that "the minutes of said state board of tax commissioners" are in evidence. This means the complete minutes. It must be assumed that the minutes show all that took place in the proceedings, and therefore that we have before us all the evidence that was put in as well as a report of what was said. There was no indication of dispute concerning the amount, value, and place of the company's personal property. The protests of the company alleged that there was no dispute as to the facts. If the company had been mistaken common fairness required that it should be informed and allowed to give further evidence of the undoubted truth. The ground taken before the board, and insisted on in argument before us, was that the property ought to enter into the valuation, because, wherever situated, it was used in the business; if not otherwise, at least as giving the credit necessary for carrying the business on. We shall assume that the question before us is narrowed to whether that ground can be maintained. The pleadings and proceedings leave no alternative open, and no other could be pressed consistently with the candor to be expected from the officers of a state, in face of a constitutional question and dealing with great affairs. For present purposes it does not matter whether the sum taken for division on a mileage proportion was reached by taking the value of the stock or the value of the tangible assets of the company. For if the former was the starting point it appears from what we have said that the tangible assets gave the stock its value. The use of the value either of total stock or total assets is only as a means of getting at the true cash value of property within the state. *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 26, 27; 41 L. Ed. 49, 58, 59, 16 Sup. Ct. Rep. 1054; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 25, 35 L. Ed. 613, 617, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

The general principles to be applied are settled. A state cannot tax the privilege of carrying on commerce among the states. Neither can it tax property outside of its jurisdiction belonging to persons domiciled elsewhere. On the other

Fargo v. Hart

hand, it can tax property permanently within its jurisdiction although belonging to persons domiciled elsewhere and used in commerce among the states. And when that property is part of a system and has its actual uses only in connection with other parts of the system, that fact may be considered by the state in taxing, even though the other parts of the system are outside of the state. The sleepers and rails of a railroad, or the posts and wires of a telegraph company, are worth more than the prepared wood and the bars of steel or coils of wire, from their organic connection with other rails or wires and the rest of the apparatus of a working whole. This being clear, it is held reasonable and constitutional to get at the worth of such a line, in the absence of anything more special, by a mileage proportion. The tax is a tax on property, not on the privilege of doing the business, but it is intended to reach the intangible value due to what we have called the organic relation of the property in the state to the whole system. *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 21, 22, 41 L. Ed. 49, 57, 16 Sup. Ct. Rep. 1054. And this principle, established by many cases, has been extended by the cases first cited above to the lines of express companies, although those lines are not material lines upon the face of the earth. There is the same organic connection as in the other cases.

It is obvious, however, that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the state, under the name of enhanced value or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value, a division by mileage is justifiable. But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretense. *Pittsburgh, C. C. & St. L. R. Co. v. Backus*, 154 U. S. 421, 431; 38 L. Ed. 1031, 1038, 14 Sup. Ct. Rep. 1114; *Western U. Teleg. Co. v. Taggart*, 163 U. S. 1, 23, 41 L. Ed. 49, 57, 16 Sup. Ct. Rep. 1054. The same principle applies to personal property which the state would not have the right to tax directly. *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 227, 41 L. Ed. 683, 697, 17 Sup. Ct. Rep. 305, 166 U. S. 185, 222, 223, 41 L. Ed. 965, 978, 17 Sup. Ct. Rep. 604. In *Pittsburgh, C. C. & St. L. R. Co. v. Backus* there was reason to suspect an infraction of constitutional rights, but the secretary of state testified that there was no assessment of property outside the state (154 U. S. 434, 38 L. Ed. 1039, 14 Sup. Ct. Rep. 1114), and therefore the court could not say that there was more than a possible over valuation by the board. Of course, if the board did not go beyond its juris-

Fargo v. Hart

diction, its decision was final. But the court recognized that if the facts charged had appeared the case would have been different. In the Express Companies' Cases previously decided, it was pointed out that there was nothing to show that the lien might not fairly be assumed to be of substantially the same value throughout. But it was intimated on the pages just cited that if the companies should prove the fact to be otherwise a different rule would apply, and the statutes were construed not to prevent such a difference from being taken into account.

We come back to the question whether the taking of personal property outside the state into the assessment can be justified on the ground that it gives credit necessary for the business in the state. The testimony was that the property was not necessary for that purpose, and, in fact, was not used. We may assume that the board was of a different opinion, so far as that was concerned, and still we may hold its action unjustified. It will be seen that we are dealing with much more attenuated relations than when there is a physical line of rails or wires to be valued, every mile of which is a necessary condition of the use of the rest of the lines beyond, and therefore a reflex condition of the value of the line behind it. The case is stronger even than one of terminals having a large value as real estate independent of their use to the road. The express business added nothing to the value of the bonds in New York. Conversely, the utmost extent to which those bonds entered into the value of property in Indiana was in so far as they helped to make the public believe that the express company could be trusted, and therefore increased its good will. That they made a part of the public more willing to buy interests in the company because they were an assurance against personal liability was no concern of Indiana. But it is obvious that, merely from the point of view that the express company could be trusted by the public with the carriage of goods or money, the good will could not be measured by the assets. In the first place, the public knew nothing of the amount. This appears as to even the more instructed portion of the public which bought interests in the concern, and a fortiori as to the general run of shippers. For if even the buyers of the stock of the company would pay only in the neighborhood of the value of the tangible assets, it is apparent either that they did not know what the assets were, as was stated by the appellant's counsel, or else that the good will taxed was worth nothing; and either view is equally fatal to the grounds for the tax.

But again, suppose that the state of the assets of the company had been published in every newspaper in Indiana, can it be imagined that it would have had an appreciable effect upon the company's business? Certainly it is absurd to say that the business of such companies will bear an exact or any proportion to the stocks and bonds which they may

Fargo v. Hart

own. Unless we are much mistaken, most people who want to send things by express employ a company simply because it is there, and they see its sign is out. The only effect that knowledge of the capital of the company could have would be to produce the conviction that the company was safe to employ. Assume that something is to be added to the good will of a company because it is safe, and that the good will, or a part of it, of the express business in Indiana may be considered in assessing its property there, this is very different from measuring the good will by the capital, when the facts appear as they do in this case. The difference is not a mere difference in valuation, it is a difference in principle, and in our opinion the principle adopted by the board was wrong. It involved an attempt to tax property beyond the jurisdiction of the state, and to throw an unconstitutional burden on commerce among the states. The result has been that, taking the value of the stock as stated by the defendant to have been 125 for 1898, the state of Indiana assessed the company for nearly twice the total good will of its business, measuring that good will by the difference between the tangible assets and the total value of the stock. The injustice grew less flagrant as the stock rose, but in the year 1901 the assessment still was nearly double what the state had a right to assess, assuming that, without transcending its constitutional power, it had a right to assess its proportion by mileage of the total good will.

We have explained why, in our opinion, this cannot fairly be treated as a mere case of over valuation, but is an assessment made upon unconstitutional principles. Under such circumstances it was impossible for the company to tender any sum, because it was impossible for it to say what, if anything, it ought to pay. It denied that under the Constitution it ought to pay anything, and it is plain that for the year 1898, at least, it properly could have been assessed but a comparatively trifling sum. The contention of the company was serious and plausible. It made the only offer it could, which was to give security for the payment of whatever amount should be adjudged to be due. "If there was no right to assess the particular thing at all, . . . an assessment under such circumstances would be void, and, of course, no payment or tender of any amount would be necessary before seeking an injunction." *People's Nat. Bank v. Marye*, 191 U. S. 272, 281, ante, p. 68, 24 Sup. Ct. Rep. 68, 71. See also *Santa Clara County v. Southern P. R. Co.*, 118 U. S. 394, 30 L. Ed. 118, 6 Sup. Ct. Rep. 1132; *California v. Central P. R. Co.*, 127 U. S. 1, 32 L. Ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Central P. R. Co. v. California*, 162 U. S. 91, 112, 40 L. Ed. 903, 16 Sup. Ct. Rep. 766.

The assessment being bad, for the reasons which we have stated, the board of tax commissioners acted without juris-

Louisville, etc., Ry. Co. v. Whipps

diction, according to the decision of the supreme court of Indiana. *Hart v. Smith*, 159 Ind. 182, 58 L. R. A. 949, 64 N. E. 661. We do not abate at all from the strictness of the rule that in general an injunction will not be granted against the collection of taxes. *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663. But it was recognized in the passage just quoted from *People's Nat. Bank v. Marye*, that under the present circumstances a resort to equity may be proper. The course adopted is the same that was taken without criticism from the court in *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 41 L. Ed. 683, 17 Sup. Ct. Rep. 305. It avoids the necessity of suits against the officers of each of the counties of the state, and we are of opinion that the bill may be maintained. *Union P. R. Co. v. Cheyenne*, 113 U. S. 516, 28 L. Ed. 1098, 5 Sup. Ct. Rep. 601; *Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works*, 172 U. S. 32, 43 L. Ed. 354, 19 Sup. Ct. Rep. 90.

Decree reversed.

The CHIEF JUSTICE, MR. JUSTICE BREWER, and MR. JUSTICE DAY dissented.

LOUISVILLE, A. & P. V. ELECTRIC RY. CO. v. WHIPPS et ux.

(Court of Appeals of Kentucky, May 4, 1904.)

[80 S. W. Rep. 507.]

Contract to Locate Depot—Measure of Damages for Breach.

Where plaintiff conveyed a right of way through his land to defendant in consideration of its agreement to erect a depot on his land and stop its cars there, the measure of damages for its breach of the agreement is the difference between the market value of the residue of his land with and without the depot.

Same—Damages for Breach—Evidence.

In an action for breach of defendant's agreement, in consideration of the right of way conveyed it, to erect a depot on plaintiff's land and stop its cars there, evidence of the prices for which other lands contiguous to his, and situated, like it, on the defendant's road, sold, and as to the advantages of plaintiff's land for business and suburban purposes, and also as to what value the location of the depot would give the land, is admissible.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"To be officially reported."

Action by George L. Whipps and wife against the Louisville, Anchorage & Pewee Valley Electric Railway Company. Judgment for plaintiffs. Defendant appeals. Reversed.

D. W. Saunders, O'Neal & O'Neal, and W. B. Thomas, for appellant.

Kohn, Baird & Spindle and R. L. Greene, for appellees.

Louisville, etc., Ry. Co. v. Whipps

SETTLE, J. This is an action in damages for a breach of contract. The appellant owns and operates an electric railroad from the city of Louisville to Pewee Valley, a distance of about 15 miles. It appears from the petition that the appellee Minnie C. Whipps owns 45 acres of land in Jefferson county, opposite the Lakeland Depot of the Louisville & Nashville Railroad Company, from which she and her husband, the appellee George L. Whipps, conveyed to appellant, in fee simple, something near half a mile of right of way, 25 feet in width, for its roadbed, in consideration, as alleged, that the appellant would erect and maintain at Lakeland a depot or stopping point on the right of way conveyed, at a point opposite the depot of the Louisville & Nashville Railroad, which the appellant's road parallels. By the terms of the conveyance, appellant's road was to make a curve at the proposed depot location or stopping place, leaving a strip of ground between its road and the Louisville & Nashville Railroad, on which the appellees were to have the right to erect a storehouse and business place, as they thought such a location, between two roads carrying suburban traffic, would possess unusual advantages for business purposes. After the execution of this deed it was ascertained by appellant that it would be of detriment to it, in the operation of its road, to make this curve, and of decided advantage to have its road straightened, as at a point not far distant it had to climb an ascent so as to make an overhead crossing to the north side of the Louisville & Nashville Railroad, going into Anchorage. So, at the request of appellant, appellees consented that the road might be straightened, as by so doing appellant avoided some very heavy cutting through a hill on the appellees' property. It was, however, understood between the parties that this concession did not relieve the appellant of its undertaking to locate the depot or stopping place at a point just opposite the Lakeland Depot of the Louisville & Nashville Railroad, and about the center of the appellees' land, and its location there was expected to add a value to the property both for business sites and for suburban residences. Upon the completion of appellant's road, and for some days after its cars were in operation, it seems to have regularly stopped them at the point where the station was to be located, according to agreement; and lumber and materials were placed there by appellant, apparently with a view of erecting the depot at that point. But it was then concluded by appellant that it would be unable to carry out its contract with the appellees, because the Louisville & Nashville Railroad, whose property adjoins, would not grant it the right of a public crossing, for which reason appellant carried away its building material, and erected its depot a quarter of a mile east of the point agreed on, putting it at the corner of adjacent property, owned by Shalcross, where it is entered by the county road. After con-

Louisville, etc., Ry. Co. v. Whipps

cluding to thus change the location of the depot, appellant would not suffer its trains to be stopped at the point on appellees' land where it had agreed to locate it, and the agreement as to the depot and stopping place was never performed. Therefore this action was instituted against appellant by appellees for the breach of the contract resulting from its nonperformance.

The answer of appellant denied the material averments of the petition, and, in addition, among other matters of defense, alleged that appellees not only donated the land for its right of way through their property, but also agreed to donate further land to it for a depot, and to erect thereon a depot for the use and benefit of appellant, and that appellant only agreed, on its part, to use the depot thus furnished by the appellees. An amended answer was tendered, but not allowed to be filed, which contained an offer upon the part of appellant to establish a stopping place at the point agreed if appellees would erect there a depot for its use, and make the same accessible to the public. We do not think it was an abuse of discretion for the lower court to refuse to permit the amendment to be filed. The matter relied on therein was known to appellant when its original answer was filed, and no reason was shown why the amendment was not offered earlier.

The principal issues presented by the pleadings were as to whether the appellant had agreed to erect the depot at the point claimed by appellees in consideration of the right of way conveyed, or whether its erection was conditioned upon the appellees donating further land for the location of the depot, and themselves building it. These and other material issues seem to have been submitted to the jury under the proof heard, and under instructions given by the court, and they found in favor of appellees, assessing the damages for the breach of the contract at the sum of \$800.

Conceding that appellant was sincere in its tardy offer to yet make a stopping place at the point contended for by the appellees, if the latter would there erect for it a depot, and make it accessible to the public, no reason is perceived why such an offer should have authorized the lower court to take the case from the jury, as contended by appellant. That court could properly have done no more than to instruct the jury on that point, as it did, that, if such was the consideration for the conveyance of the right of way, they should find for the appellant. But upon the other hand, if the agreement was that appellant, in consideration of the conveyance of the right of way by appellees, was to erect the depot or establish a stopping place at the point claimed by appellees, they should find for them.

But we find that there are two other contentions relied upon by appellant for a reversal that are much more serious than the one indicated, viz : (1) That the trial court erred

Louisville, etc., Ry. Co. v. Whippa

as to the measure of damages in instructing the jury; (2) that the court also erred in the admission of evidence.

The following is the instruction given by the court on the measure of damages: "If the jury find their verdict for the plaintiff, they shall find for the plaintiff in such sum of money as they may believe, from the evidence, represents the fair and reasonable value of the land conveyed by the plaintiff to the defendant for the right of way at the time said conveyance was made, and in addition thereto such a further sum as they may believe from the evidence would represent the difference, if any, between what would have been the market value of the residue of the plaintiff's land, out of which said right of way was conveyed, if such stopping place had been established at the location mentioned in instruction No. 1, and the market value of said residue of land without said stopping place; the whole award not to exceed the sum of \$3,000, the amount claimed in the petition. In determining the difference in value referred to herein, if there be such difference, the jury will not consider the profits, if any, which might have been made by the plaintiff in any business the plaintiff might have established at or near said stopping place, but the jury may consider the adaptation, if any, which the location of said stopping place, as in instruction No. 1, would have given plaintiff's land for business or other useful purposes, and thereby have enhanced its market value. If the jury find their verdict for the defendant, they shall so state, and no more." This instruction was evidently patterned after that approved by this court in the case of *L. & N. R. R. Co. v. Neafus*, 93 Ky. 53, 18 S. W. 1030. But after a careful examination of the authorities bearing upon the question, we have come to the conclusion that the measure of damages in that case, as well as in the one at bar, was not correctly announced. In *Sutherland on Damages*, vol. 2, § 576, we find what we regard as the correct rule on this subject thus stated: "A covenant by a railroad company, in consideration of the grant of the right of way through land, to erect a flag station convenient to the grantor's house, and to permit him to cultivate all the land granted which was not needed by the grantee, runs with the land, and binds the grantee's assignee, who has notice. The measure of damages for its breach is the difference between the value of the lands when suit is brought and what their value would have been, had all the stipulations in the contract been substantially performed, or, in other words, the additional value which would have accrued to the lands but for the breach. The covenant inured to the benefit of the grantor's adjoining land, and, if performed, would have increased its market value. This appreciation was within the legal, if not the actual, contemplation of the parties. Its loss was the natural and proximate result of the breach of the contract." Continuing the discussion, the learned author refers to a Penn-

sylvania case in which there was a breach of the contract to erect a depot, the erection of which was the principal consideration for the release of the right of way through the plaintiff's land. The trial court announced the damages to be the same as would have been awarded the owner if the land had been condemned. When the case reached the Supreme Court of the state, that court, in an opinion by Agnew, J., which is approved by Sutherland, said: "Instead, then, of the question being the difference in value of the land before and after the building of the road, considering all advantages and disadvantages to the owner, the question would be upon the additional value which would accrue to the plaintiff's land in the event of erecting such a depot as the contract called for. Under the contract, whatever specific advantages would accrue to the land from the adjacent depot and station would have to be added to the plaintiff's claim, for this would be his loss in case of a breach of the contract. While the profits of his business cannot be added to his damages, for these are speculative and uncertain, the business advantages which constitute the characteristics of the land and give it value are not to be thrown out of consideration in determining the value of the land. Clearly, if the depot and station would make the plaintiff's land more valuable as a place of business, by bringing to it business it would not possess without them, they give greater value to the land to the extent of the increase by reason of their being placed there, and therefore fall within the scope of the contract." In Sedgwick on Damages, vol. 2, § 630, it is said: "Where a railroad company breaks an agreement to build a station at any given place, the measure of damages is the enhanced value of the land, had the depot been erected." The rule announced in these two admirable works on Damages is in conflict with that stated in *L. & N. R. R. Co. v. Neafus*, supra, yet we think it both just and reasonable.

We think it would be neither reasonable nor just to allow appellees the value of the land conveyed by them to appellant for its roadbed, in addition to the value which would have accrued to the residue of their land by the building of the depot. The action is not one to recover the value of land which appellant has wrongfully appropriated to its use. In such case the damages recoverable would necessarily include the value of the land taken, as well as the injury that resulted to the residue of appellees' lands from such taking, without regard to any advantage that might have accrued thereto by the construction of the railroad. But here it is conceded that the land was conveyed appellant by the appellee, and the complaint of the latter is that there has been a failure of consideration—in other words, appellant has failed to erect a depot or establish a stopping place at an agreed point in front of appellees' property, as it undertook to do, as compensation to them for the right of way, which failure constitutes a breach of the contract.

Louisville, etc., Ry. Co. v. Whipps

What induced appellees to convey the right of way to appellant? It was because the erection of a depot and the stopping of its cars in front of their property would enhance its vendible value. The depot was not built or the stopping place established as agreed. Consequently the expected increase in the value of appellees' land did not result, and by this means they have been damaged. What, then, is the true criterion of damages? It is such a sum as would represent the difference, if any, as shown by the evidence, in what would have been the fair market value of the residue of Minnie C. Whipps' land, after the conveyance of the right of way, if the depot or stopping place had been established at the point on appellees' land agreed upon by the parties, and the fair market value of such residue of land without the depot or stopping place; the whole award not to exceed \$3,000, the sum claimed in the petition. And in so estimating the damages the jury should not consider the profits, if any, which might have been made by the appellee Minnie C. Whipps in any business she might have established at or near such depot or stopping place, but consider adaptation, if any, which the location of the depot or stopping place at the point mentioned would have given her land for business or other useful purposes, and thereby have enhanced its market value.

Certain evidence as to what prices other lands contiguous to that of appellees', and situated, like it, on the appellant's roadway, sold for, and as to the advantages of appellees' land for business and suburban purposes, and also as to what value the location of a depot on her land at the point agreed on would give the land, was objected to by appellant, and it now complains of its admission. But such evidence has been declared by this court competent. In *City of Paducah v. Allen* (Ky.) 63 S. W. 981, it was said on this subject: "On the trial appellant offered to prove by various witnesses what adjoining properties of the same class and character had been sold for just before and since the location of the pesthouse, it being thus attempted to prove that the market value of this property had not been impaired to that extent indicated by the opinion of appellees' witnesses. Of course, market value is the price at which an article sells in the market. This price is fixed by sales actually consummated. Such sales, when made under normal and fair conditions, are necessarily a better test of the market value than speculative opinions of witnesses, for truly here is where money talks. * * * We are of opinion that it was error in the trial court to reject the testimony above mentioned." In *Railway v. Clark*, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751, the same character of evidence was held by the Supreme Court of Missouri to be competent. We are of opinion, therefore, that the evidence complained of by appellant was properly admitted by the trial court.

Indiana Ry. Co. v. Morgan

We are further of opinion that the only reversible error appearing in the record is that committed by the lower court in the instruction as to the measure of damages. And to the extent that they conflict with the views herein expressed, the cases of *L. & N. R. R. Co. v. Neafus*, 93 Ky. 53, 18 S. W. 1030, and *L. & N. R. R. Co. v. Taylor*, 96 Ky. 241, 28 S. W. 666, are hereby overruled.

For the error indicated, the judgment of the lower court is reversed, and cause remanded, with directions to that court to grant appellant a new trial, and for further proceedings consistent with this opinion.

INDIANA RY. CO. *v.* MORGAN.

(Supreme Court of Indiana, March 17, 1904.)

[70 N. E. Rep. 368.]

Wills—Powers to Executors—Devolution of Title—Vendees of Heirs—Rights.

Where a will gave a life estate to testator's widow, and provided that at her death the executor should sell the real estate, and after payment of certain legacies divide the proceeds among testator's children, the title during the life of the widow was not in the executor, but in the beneficiary children, who could convey the estate, and whose vendee was entitled to defend the same against all persons but the life tenant, and the right of the executor to sell when the contingency arose, and whatever injury he could prevent the life tenant from doing he could also prevent a stranger.

Estoppel—Acquiescence in Railroad Construction.*

Where the owner of land, with full knowledge of his rights, stood by while an electric railroad made a considerable excavation and embankment, and constructed its road on his farm, and made no protest except to the excavation of gravel, the railroad was justified in assuming that he assented to the construction of the road, and the owner was estopped to recover possession of the land, after the road had been completed, large sums of money expended, and the interest of the public in the road as a line of common carriage had become fixed.

Same—Same.

The fact that the road had not the power of eminent domain was immaterial.

Appeal from Circuit Court, St. Joseph County; W. A. Funk, Judge.

Action by Henry C. Morgan against the Indiana Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under Burns' Rev. St. 1901, § 1337u. Reversed.

Brick & Bates, for appellant.

Anderson, Du Shane & Crabill, for appellee.

HADLEY, J. Appellee brought this suit on March 8,

*See note, 1 Am. & Eng. R. Cas., N. S., 66; *Scarritt v. Kansas City, etc., Ry. Co. (Mo.)*, 15 Am. & Eng. R. Cas., N. S., 809; *Tendrix v. Southern Ry. Co. (Ala.)*, 23 Am. & Eng. R. Cas. N. S., 272.

Indiana Ry. Co. v. Morgan

1901. The first paragraph of the complaint is a common count to quiet his title to, and the second to recover mesne profits for the alleged wrongful occupancy with its railroad track and right of way, and without his authority, of, a strip of ground from 8 to 25 feet wide running east and west across his certain farm of 100 acres, and between the Vistula road and the bank of the St. Joseph river.

There is no controversy over the pleadings. The controlling question arises upon appellant's exception to the conclusion of law upon the special finding of facts. The facts found established, so far as material to the question involved, are in substance as follows: John M. Miller died testate in 1880, the owner of the farm of which the strip in dispute was a part, and by his will devised the land to his widow for and during the remainder of her life, and directed his executor, upon her death, to sell the land, and, after the payment of some small legacies, to divide the balance of the proceeds of the same equally among his three children, Henry C., Martha E., and Sarah A. Miller. The widow accepted the will, took possession of the land, and enjoyed the rents and profits thereof until her death, in 1899, when the land was conveyed by the executor as directed by the will. In 1893 Sarah A. executed to appellee, Morgan, for value, a warranty deed for an undivided one-third of said lands. A public highway known as the "Vistula Road," and running east and west across the land, has been opened and used for public travel to a width of 40 feet for more than 50 years, though its legal width was never defined. In 1894 the board of commissioners granted to the General Power & Quick Transit Company, a corporation organized as a street railroad company, a franchise to construct a street railroad upon and along the Vistula road, and providing that the track shall be laid north of said road wherever practicable to do so, and at no point should the south rail of said track be laid nearer than 20 feet to the center of said road. In 1895 said corporation constructed through the premises a railroad, connecting the town of Mishawaka with the city of South Bend, along the north side of the Vistula road, occupying a strip outside the limits of the highway, varying in width from 8 to 25 feet from the north line of the highway to the north line of the railroad track. After the company had cut and removed the timber and bushes that grew upon the line, and was engaged in constructing the grade, appellee, Morgan, first learned that said company proposed to and was engaged in constructing a street railroad on the land, and immediately, through his attorney, notified the company that he was informed that it had taken a large amount of gravel off the farm to be used in the construction of said road, and that he was the owner of an undivided one-third of the land, subject only to the life estate of the widow of John M. Miller, deceased, that the widow had no right to sell the

Indiana Ry. Co. v. Morgan

gravel, and he should hold the company liable to him for one-third in value of the same. Henry C. and Martha E. Miller, the other two beneficiaries of the will, and the widow of John M. Miller, had knowledge of the location and construction of said railroad from beginning to end, and neither the said Henry, Martha, the widow of John M. Miller, nor appellee, at any time during the construction and operation of said railroad, prior to February 23, 1900, made any protest or objection to the location, construction, or operation of said railroad upon the land in controversy. The railroad was completed in 1895, and from January 1, 1896, to the commencement of this action the cars have been continuously run over the same at intervals of 15 minutes, and have carried from 1,500 to 4,000 passengers daily, including a large number of laborers who lived in one, and worked in the other, of said cities. On March 15, 1899, appellant, the Indiana Railway Company, by consolidation succeeded to the rights and obligations of the said General Power & Quick Transit Company, and after said last-mentioned date, in addition to the cars run between South Bend and Mishawaka, passenger and express cars from Goshen and Elkhart were run over said road to Mishawaka and South Bend, carrying passengers and light freight. The cost of construction of said railroad was \$8,000 per mile. The widow of John M. Miller died in August, 1897, and in June, 1899, Henry C. and Martha E. Miller, the other tenants in common, and James S. Ellis, as executor of the will of John M. Miller, pursuant to the will, for value, executed to appellee a deed conveying to him the whole of said farm. On February 23, 1900, appellee, then being the owner of all of said farm, demanded of appellant payment for the value of the land occupied by said railroad.

The conclusion of law was that appellee is the owner in fee of the land described in the complaint, and entitled to the immediate possession thereof, and to have a judgment quieting his title thereto, and for \$1 damages and costs, and judgment was rendered accordingly.

The real question is, does it appear from the findings that appellee is entitled to have his title to the land occupied by appellant for its track and right of way quieted as against such use and occupancy? Or—what means the same thing—is he entitled to oust the appellant from the premises? Appellee's right to pecuniary compensation for the land so occupied is not questioned by appellant, but it is vigorously maintained that appellee, having knowingly stood by and observed appellant's grantor, at great expense, construct upon the land a permanent railroad, make excavations and embankments thereon, without protest or objection, and having observed the operation of cars over it at regular and frequent intervals, carrying passengers and light freight, for more than five years, and a large number of inhabitants

Indiana Ry. Co. v. Morgan

establish their homes and business along the line, induced so to do by the apparent easy, cheap, and comfortable means of transportation from their homes to and from their work and places of business, will not now, after such prolonged acquiescence, be permitted to oust appellant, and thus, by wresting from it possession of a part of said line, destroy said means of transportation, to the injury of the public. Whether appellant's contention shall be sustained depends largely upon whether appellee, as the grantee of Sarah A. Miller, held such an interest in the farm as would enable him to protect the estate against the encroachment of appellant's grantor. It is well to note that the will of John M. Miller gave a life estate to his widow, and then proceeds, "and after the death of my wife, I direct that the remaining real estate shall be sold by my executor, and out of the proceeds thereof shall be paid [certain small legacies] and the balance of the proceeds of said real estate shall be equally divided between my son, Henry G. Miller, and my two daughters, Martha E. and Sarah A. Miller." It has been uniformly held in this state since *Doe v. Lanus* (1852) 3 Ind. 441, 56 Am. Dec. 518, that a naked power given by will to an executor to sell land, for the purpose of paying legacies or making distribution, does not vest the title in the executor, but in the heir, who becomes entitled to the rents and profits until the power to sell is exercised. In no case can the heir be cut off by will, except by a devise of the estate, either expressly or by implication, to some one else. *Bowen v. Swander*, 121 Ind., and authorities collected on page 170, 22 N. E. 725. Under this rule, during the life estate of the widow, the title to the land in controversy was not in abeyance, nor in the widow, nor in the executor, but in the beneficiary children of the testator, and subject also to conveyance by them. *Brumfield v. Drook*, 101 Ind. 190. Therefore, as a remainderman, by purchase from Sarah A. Miller, appellee was entitled to defend the estate against all persons but the life tenant, and the right of the executor to sell it when the contingency arose; and, as such, whatever injury to the inheritance he might prevent the life tenant from doing, he might also prevent a stranger. Appellee was bound to know what his legal rights were in the premises, and it is evident that he did know, as it is shown by the special findings that, upon learning that appellant's grantor had taken possession of the land, and had cut away the trees and bushes, and was engaged in grading a railroad upon it, he immediately notified the company in writing that he was the owner of an undivided one-third of the farm, subject only to the widow's life estate, that the widow had no right to sell certain gravel that had been taken from the farm and used in the construction of the road, and he should hold the company liable to him for one-third in value of the same. Thus, with full knowledge of his rights, appellee stood by while the

Indiana Ry. Co. v. Morgan

company made an excavation from 2 to 7 feet deep for a distance of 400 feet, and threw up an embankment from 1 to 3 feet high on the entire balance of the distance through his farm, without the slightest complaint or manifestation of displeasure at the proceeding. He must have known, when he proclaimed to the company his ownership, and demanded an accounting to him for the gravel, that whatever he might demand pay for he might decline to sell, except upon his own terms; and, furthermore, that whatever right he could assert to the gravel he could also assert to every other part or parcel of his estate. Having, therefore, gone to the pains of giving written notice of his purpose and intention with respect to the gravel, without expressing any complaint or dissent to the digging up and removal of the earth from one part of his farm to another, which he knew was being done in the construction of a railroad thereupon, the company had the right to assume from appellee's conduct that he assented thereto. His conduct was sufficient to justify the belief that he acquiesced in the construction of the road upon his land, and would be content to receive, at some subsequent time, pecuniary compensation therefor. He was at least silent when he ought to have spoken. Having thus permitted the construction and operation of the road to go forward until after a large sum of money has been expended, and the public has placed itself in such relation to the road as a line of common carriage as to be injuriously affected by a destruction of a part of it, appellee will not now be permitted to recover that which equity says he should not have. "Compensation he may recover, possession he cannot." *Railroad Co. v. Allen*, 113 Ind. 581, 583, 15 N. E. 446; *Railroad Co. v. Berkey*, 136 Ind. 591, 593, 36 N. E. 642.

Appellee argues that the rule above stated only applies to railroad corporations vested with the right of eminent domain, and that, since street railroad companies had no such power prior to 1901 (Acts 1901, p. 461, c. 207), it is not applicable to this case. No attempt is made to point out any principle of the law of eminent domain that will afford a reason for greater protection against being misled by false appearances, to railroad corporations having such right, than to those not having it. We assume that no such reason can be shown, for it seems to us very clear that the doctrine rests upon principles of public policy, and not upon the right of eminent domain. See *Railroad Co. v. Passenger Ry.*, 167 Pa. 62, 31 Atl. 468, 46 Am. St. Rep. 659, 664.

Our conclusion is that appellee is not now entitled to the possession of the ground occupied by appellant's railroad, nor entitled to have his title thereto quieted. The judgment is therefore reversed, with instructions to restate the conclusion of law in accordance with this opinion.

CHICAGO & A. RY. CO. *v.* PULLIAM.

(Supreme Court of Illinois, Feb. 17, 1904.)

[70 N. E. Rep. 460.]

Accident at Crossing—Contributory Negligence—Question for Jury.

Where, in an action for injuries at a railroad crossing, plaintiff testified that when he arrived at a street near the track, and as he passed along the street toward the main track, he looked north and south for trains, and when he reached the track he slowed his team to a walk, and looked north and south, and back north again, when, for the first time, he saw a limited passenger train coming right upon him, and that the short alarm whistle then given attracted his attention, and there was also evidence that there were obstructions to sight and hearing as a person was crossing the track, it was proper for the court to submit the question of his contributory negligence to the jury, though other witnesses testified that they saw the train coming before plaintiff got on the track, and attempted to warn him by calling to him, waving their arms, etc.

Same—Signals—Negative and Positive Testimony.*

In an action for injuries at a railroad crossing, evidence of several witnesses that they did not hear the bell rung, though they admitted that they did not know definitely whether it was rung or not, was sufficient to justify an instruction authorizing a recovery if there was a failure to ring the bell at least 80 rods from the crossing, though defendant's evidence was to the effect that the bell was rung automatically, and had been ringing for more than a mile before reaching the crossing.

Appeal from Appellate Court, Third District.

Action by Floyd J. Pulliam against the Chicago & Alton Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Patton & Patton (William Brown, of counsel), for appellant.

Robert H. Patton and T. J. Nuckolls, for appellee.

CARTWRIGHT, J. The appellate Court for the Third District affirmed a judgment of the circuit court of Sangamon county in this suit for \$1,500 in favor of appellee for personal injuries caused by appellant's train at a street crossing in the village of Auburn. Plaintiff was 18 years old, and was engaged in hauling ice to an icehouse from a car on the side track of defendant in said village. At the time of the accident he drove from the icehouse in a northerly direction along a highway parallel with and adjoining the right of way on the southeasterly side until he reached Monroe street, and then turned west across the track of the Pawnee Railroad and several side tracks of defendant to the main track. The weather was cold, and he was standing up in the wagon. When he reached the main track, the limited train approach-

*As to the comparative weight of positive and negative testimony in regard to whether crossing signals were given, see foot-note appended to *Stanley v. Cedar Rapids, etc., Ry. Co.* (Iowa), 9 R. R. R. 398, 32 Am. & Eng. R. Cas., N. S., 398.

ing from the north struck the wagon and threw him out, causing the injuries for which the suit was brought.

At the close of the evidence the defendant moved the court to instruct the jury to find it not guilty. The motion was overruled, and the instruction refused, and the ruling is assigned as error. The charges of the declaration were negligence, generally, in the management of the train, a failure to give statutory signals before reaching the crossing, and a violation of the ordinance of the village of Auburn regulating the speed of trains. The train was running at a much higher rate of speed than was permitted by the ordinance, and it is not claimed that there was no evidence tending to prove negligence in that respect on the part of the defendant. The ground on which it is contended the instruction should have been given is that there was no evidence that the plaintiff was in the exercise of reasonable care for his own safety, but that, on the contrary, the evidence conclusively showed that, if he had exercised such care, he would have avoided the injury. The evidence of the respective parties on that question is as follows: Plaintiff testified that when he arrived at Monroe street, and as he passed along that street toward the main track, he looked north and south for trains; that, when he reached the railroad tracks, he slowed his team to a walk; that when he was on the side tracks he looked north, and then looked south, and looked back north again, and the train was coming right there; that the team was then on the main track; that the short whistle given as an alarm was the first thing that attracted his attention to the train; and that he did not see it before. On the part of the defendant, a witness testified that he was standing on the north side of the street, just west of the railroad, when he saw plaintiff coming toward the track; that plaintiff had a cap pulled down over his ears; that the witness "hollered" at him four times to keep off the track, or he would get run over; that plaintiff never looked up, but was standing in the wagon, not looking for trains or anything else; and that he did not think plaintiff heard him. Another witness testified that he was standing south of the street crossing; that he "hollered" to the plaintiff three times; that the first time was just after the plaintiff had crossed the Pawnee track, and witness called twice after that; and that plaintiff did not appear to hear him, and, if he did, he did not pay any attention. The man for whom plaintiff was hauling ice was on a load of ice east of the track, going south, and testified that as plaintiff's horses were on the turn into Monroe street, when the witness was about 100 feet from him, the witness threw up his hand as a warning, and motioned to him, but he could not say whether he saw the warning. There were some obstructions to sight and sound, but they were some distance from the crossing; the first one being the station building, more than a block north. Although the

existence of such obstructions does not excuse the exercise of care on the part of one approaching the crossing, the fact is proper to be considered in connection with all the other facts of the case. Obstructions to the view or hearing may require greater care and attention to ascertain whether a train is approaching, but they may sometimes have a tendency to render such care and attention unavailing. The care required is such as a reasonably prudent person would ordinarily exercise under the same circumstances, and in this case the testimony of plaintiff was sufficient to entitle him to have the question submitted to the jury. It was not error to refuse the request to take the case from the jury, and the judgment of the Appellate Court upon the controverted question of fact is conclusive.

The only other error alleged is the giving of the second and fifth instructions at the request of the plaintiff, which authorized a recovery if the plaintiff was in the exercise of due care for his own safety, and there was a failure to ring the bell at least 80 rods from the crossing. The objection to these instructions is that there was no evidence on which to base them. It is contended that not only was there no evidence tending to prove that the bell was not ringing, but, on the other hand, the evidence showed conclusively, without any conflict, that the bell was ringing for more than a mile from the place of the accident. The evidence on the part of the defendant was that the bell was rung automatically, and was ringing for more than a mile before reaching the crossing. All the witnesses agreed that the whistle was blown when it became apparent that plaintiff was going upon the crossing and there was likely to be a collision. Several witnesses for the plaintiff testified that they did not hear the bell, but none of them knew definitely whether it was ringing or not. It is urged that this evidence was too unsubstantial as the basis of an instruction, because one witness said he was hard of hearing, and another had his cap pulled down over his ears, and none of them were paying any attention to the question whether the bell was ringing or not. The evidence was admissible on the question whether the bell was rung or not, and it is not error to give an instruction based on the hypothesis that a fact exists, although the court may be of the opinion that the evidence is very slight, or that the great weight of the evidence disproves the existence of the fact. The court cannot exercise its judgment as to the weight of the evidence in giving or refusing instructions. We do not think it was error to submit the issues to the jury, or to give the instructions complained of.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

KANSAS CITY SOUTHERN RY. CO. *v.* MARX.

(Supreme Court of Arkansas, April 9, 1904.)

[80 S. W. Rep. 579.]

Costs—Attorney's Fee—Action against Railroad Companies.

Under Acts 1887, p. 225, No. 127, providing in all actions against railway companies for violation of any law regulating transportation of freight or passengers a successful plaintiff may recover an attorney's fee, such fee cannot be recovered for injury to a passenger from negligence of a railroad employee, no statute being violated.

Appeal from Circuit Court, Polk County; Will P. Feazell, Judge.

Action by A. Marx against the Kansas City Southern Railway Company. From a judgment allowing plaintiff and attorney's fee, defendant appeals. Reversed.

A. Marx took passage on a local freight train of the defendant company from Mena to Jameson, Ark. At one of the stations, when the train stopped en route, the caboose in which plaintiff rode was cut loose or separated from the train, and when the train was backed up to the caboose again, through the negligence of the engineer in charge of the train it struck the caboose with considerable force, which resulted in some injury to plaintiff. He brought an action against the company for damages, and on the trial in the circuit court the jury found in his favor, and assessed his damages at \$75, for which sum the court gave judgment. On the following day the plaintiff asked the court that he be allowed a reasonable attorney's fee to be taxed as costs against the defendant, and thereupon the court allowed him an attorney's fee of \$75, and gave judgment that plaintiff recover the same from the defendant as part of his costs. The defendant objected, and saved its exceptions, and afterwards, its motion to rehear being overruled, it appealed.

Lathrop, Morrow, Fox & Moore and Read & McDonough, for appellant.

RIDDICK, J. (after stating the facts). The only question raised by this appeal is whether, in an ordinary action by a passenger against a railway company to recover damages for injuries received on account of the negligence of an employee of the company, and when no statutory regulation of the state has been violated, the plaintiff may, if he makes out his case, recover, in addition to his damages, a reasonable attorney's fee. The statute of 1887 (Acts 1887, p. 225, No. 127) provides that in all actions against railway companies "for the violation of any law regulating the transportation of freight or passengers" the plaintiff, if successful, shall also recover a reasonable attorney's fee, to be taxed as part of the costs. But this provision, we think, refers to actions against railway companies for violations of statutory regulations of the

Slater v. Mexican National R. Co

state in regard to transportation of freight and passengers, for, if we should hold that it applied to all actions arising against railroads in the carriage of freight or passengers, whether any statute had been violated or not, it is doubtful if it would be a constitutional law (*Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, 6 Am. & Eng. R. Cas., N. S., 752; *St. L., I. M. & So. Ry. Co. v. Williams*, 49 Ark. 492, 5 S. W. 883); for the Legislature cannot single out railroad companies, and tax them with attorney's fees in cases where judgments are recovered against them, when other defendants are not thus taxed, unless there be some reason upon which to found the discrimination so made. Statutes allowing attorney's fees to be taxed against railway companies where judgments are recovered against them for the violation of statutory regulations are upheld on the ground that such a fee is in the nature of a penalty imposed upon the company for failure to comply with the police regulations of the state. But in this case no statute was violated, and there is no reason why a penalty should be imposed. *Dow v. Beidelman*, 49 Ark. 455, 5 S. W. 718; *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666, 6 Am. & Eng. R. Cas., N. S., 752. Statutes taxing attorney's fees against defendants, in common with other statutes imposing penalties, should be strictly construed, and, looking at the statute in that light, we are of the opinion that it does not apply to cases like the one before us, where no statute has been violated.

The judgment for the attorney's fee is reversed, and the motion therefor dismissed.

LENA M. SLATER, W. G. Slater, Jesse R. Slater, Annie E. Slater, and Henry G. Slater, Petitioners, *v.* MEXICAN NATIONAL RAILROAD COMPANY.

(Argued and Submitted February 29, 1904. Decided April 11, 1904.)

[24 Sup. Ct. Rep. 581.]

Federal Jurisdiction—Action to Enforce Liability for Death by Wrongful Act Created by Mexican Statutes.

A Federal court is without jurisdiction of a common-law action founded on the liability for a death by wrongful act, created by the Mexican laws, because of its lack of power to make a decree of the kind required by such laws, which demand that the damages be awarded as support in the nature of alimony or pension, by a decree which contemplates periodical payments, and which is subject to modification from time to time, as the circumstances change.

Evidence—Proof of Foreign Laws.

The admission in evidence of an agreed translation of the statutes of a foreign country does not preclude the use, upon any matter open to reasonable doubt, of the deposition of a lawyer of that country, respecting the accepted or proper construction of such statutes.

Slater v. Mexican National R. Co

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which reversed a judgment of the Circuit Court for the Northern District of Texas in favor of plaintiffs in an action to enforce the liability for a death by wrongful act, created by the Mexican statutes, and ordered the dismissal of the action. Affirmed.

See same case below, 53 C. C. A. 239, 115 Fed. 593.

The facts are stated in the opinion.

Messrs. Mason Williams, C. A. Keller, and E. A. Atlee for petitioners.

Messrs. Leroy G. Denman, T. W. Dodd, and Denman, Franklin, & McGown for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court:

This is an action brought in the United States circuit court for the northern district of Texas by citizens and residents of Texas against a Colorado corporation operating a railroad from Texas to the City of Mexico. The plaintiffs are the widow and children of William H. Slater, who was employed by the defendant as a switchman on its road, and was killed through the defendant's negligence while coupling two freight cars at Nueva Laredo, in Mexico. This action is to recover damages for the death. The laws of Mexico were set forth in the plaintiffs' petition, and the defendant demurred on the ground that the cause of action given by the Mexican laws was not transitory, for reasons sufficiently stated. The demurrer was overruled, and the defendant excepted. A similar objection was taken also by plea setting forth additional sections of the Mexican statutes. A demurrer to this plea was sustained, subject to exception. The same point was raised again at the trial by a request to direct a verdict for the defendant. The judge who tried the case instructed the jury that the damages to be recovered, if any, were to be measured by the money value of the life of the deceased to the widow and children, and the jury returned a verdict for a lump sum, apportioned to the several plaintiffs. The judge and jury in this regard acted as prescribed by the Texas Rev. Stat. art. 3027. The case then was taken to the circuit court of appeals, where the judgment was reversed and the action ordered to be dismissed. 53 C. C. A. 239, 115 Fed. 593.

There is no need to encumber the reports with all the statutes in the record. The main reliance of the plaintiffs is upon the following agreed translation from the Penal Code, bk. 2. "Civil Liability in Criminal Matters." "Art. 301. The civil liability arising from an act or omission contrary to a penal law consists in the obligation imposed on the

Slater v. Mexican National R. Co

party liable, to make (1) restitution, (2) reparation, (3) indemnization, and (4) payment of judicial expenses."

"Art. 304. Reparation comprehends: Payment of all damages caused to the injured party, his family, or a third person for the violation of a right which is formal, existing, and not simply possible, if such damages are actual, and arise directly and immediately from the act or omission complained of, or there be a certainty that such act or omission must necessarily cause a proximate and inevitable consequence." Coupled with these are articles making railroad companies answerable for the negligence of their servants within the scope of the servants' employment. Penal Code bk. 2, arts. 330, 331; regulations for the construction, maintenance, and operation of railroads, art. 184. We assume for the moment that it was sufficiently alleged and proved that the killing of Slater was a negligent crime within the definition of article 11 of the Penal Code, and, therefore, if the above sections were the only law bearing on the matter, that they created a civil liability to make reparation to any one whose rights were infringed.

As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. *Stewart v. Baltimore & O. R. Co.*, 168 U. S. 445, 42 L. Ed. 537, 18 Sup. Ct. Rep. 105. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. *Stout v. Wood*, 1 Blackf. 71; *Dennick v. Central R. Co.*, 103 U. S. 11, 18, 26 L. Ed. 439, 442. But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (*Smith v. Condry*, 1 How. 28, 11 L. Ed. 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. In *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 199, 38 L. Ed. 958, 961, 14 Sup. Ct. Rep. 978, an action was brought in the district of Minnesota for a death caused in Montana, and it was held that the damages were to be assessed in accordance with the Montana statute. Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may

Slater v. Mexican National R. Co

be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught. See further, *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 801, 802, 22 So. 53; *Morris v. Chicago, R. I. & P. R. Co.* 65 Iowa., 727, 731, 54 Am. Rep. 39, 23 N. W. 143; *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 31 L. R. A. 276, 33 S. W. 857; *Bruce v. Cincinnati R. Co.* 83 Ky. 174, 181; *Holmes v. Barclay*, 4 La. Ann. 64; *Atwood v. Walker*, 179 Mass. 514, 519, 61 N. E. 58; *Minor, Conf. L.* 493, § 200. We are aware that expressions of a different tendency may be found in some English cases. But they do not cover the question before this court, and our opinion is based upon the express adjudication of this court, and, as it seems to us, upon the only theory by which actions fairly can be allowed to be maintained for foreign torts. As the cause of action relied upon is one which is supposed to have arisen in Mexico, under Mexican laws, the place of the death and the domicile of the parties have no bearing upon the case.

The application of these considerations now is to be shown. The general ground on which the plaintiffs bring their suit is, as we have stated, that there is a civil liability imposed on the railroad company arising from an act contrary to the penal law,—a negligent crime, as it is called in the Code. But the Code contains specific provisions for the case of homicide. These necessarily override the merely general rule for torts which also are crimes. *Mutual L. Ins. Co. v. Hill*, 193 U. S. —, ante, 538, 24 Sup. Ct. Rep. 538. By article 311 the right is personal to the parties mentioned in art. 318, and is no part of the estate of the deceased. The specific cause of action is the killing of the deceased. So far as appears, apart from that and the following articles, these plaintiffs would have no right of action for the cause alleged. For article 304 seems to presuppose a right in the family, not to create one, and we cannot assume a general right of the members of a family to sue for causing death. By article 318 civil responsibility for a wrongful homicide includes, besides the expenses of medical attendance and burial and damages to the property of the deceased, the expenses "of the support not only of the widow, descendants, and ascendants of the deceased, who were being supported by him, he being under legal obligations to do so, but also to the posthumous descendants that he may leave." Then, by article 319, the obligation to support shall last during the time that the deceased might have lived, calculated by a given life table, but taking the state of his health before the homicide into consideration; but "the obligation shall cease: 1. At whatever time it shall not be absolutely necessary for the subsistence of those entitled to receive it. 2. When those beneficiaries get married. 3. When the minor chil-

Slater v. Mexican National R. Co

dren become of age. 4. In any other case in which, according to law, the deceased, if alive, would not be required to continue the support." It is unnecessary to set forth the detailed provisions as to support in other parts of the statutes. It is sufficiently obvious from what has been quoted that the decree contemplated by the Mexican law is a decree analogous to a decree for alimony in divorce proceedings,—a decree which contemplates periodical payments, and which is subject to modification from time to time, as the circumstances change. See also, arts. 1376, 1377, of the Code of Procedure, and Penal Code, bk. 2, art. 363.

The present action is a suit at common law, and the court has no power to make a decree of this kind contemplated by the Mexican statutes. What the circuit court did was to disregard the principles of the Mexican statute altogether and to follow the Texas statute. This clearly was wrong, and was excepted to specifically. But we are of opinion further that justice to the defendant would not permit the substitution of a lump sum, however estimated, for the periodical payments which the Mexican statute required. The marriage of beneficiaries, the cessation of the absolute necessity for the payments, the arising of other circumstances in which, according to law, the deceased would not have been required to continue the support, all are contingencies the chance of which cannot be estimated by any table of probabilities. It would be going far to give a lump sum in place of an annuity for life, the probable value of which could be fixed by averages based on statistics. But to reduce liability conditioned as this was to a lump sum would be to leave the whole matter to a mere guess. We may add that by art. 225, concerning alimony, the right cannot be renounced, nor can it be subject to compromise between the parties. There seems to be no possibility in Mexico of capitalizing the liability. Evidently the Texas courts would deem the dissimilarities between the local law and that of Mexico too great to permit an action in the Texas state courts. *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 31 L. R. A. 276, 33 S. W. 857; *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660, 1 L. R. A. 804, 9 S. W. 540. The case is not one demanding extreme measures, like those where a tort is committed in an uncivilized country. The defendant always can be found in Mexico, on the other side of the river, and it is to be presumed that the courts there are open to the plaintiffs, if the statute conferred a right upon them notwithstanding their absence from the jurisdiction, as we assumed that it did, for the purposes of this part of the case. See *Mulhall v. Fallon*, 176 Mass. 266, 54 L. R. A. 934, 57 N. E. 386.

So far as appears, the civil liability depends upon penal liability; no different suggestion has been made; and thus far we have taken it for granted that the defendant was within the penal law. The circuit court made the same as-

Slater v. Mexican National R. Co

sumption, although the question was one of fact, in case the jury should find the negligence relied upon to be proved. But whether or not a railroad company was subject to penalty for a homicide caused by the negligence of its servants did not appear. It has occurred to us, although no such argument was made, that it might be sought to sustain the liability on a different ground. The alleged cause of the accident was the different height of the draw heads on two cars which the deceased attempted to couple as they came together. By art. 52 of the Mexican railroad regulations it is required that "the cars which enter into the make-up of a train shall have draw heads of the same height." By art. 203 of the same, "all violations of this law which companies (railroad) commit shall be subject to punishment by the administration of a fine up to \$500, which the department of public works shall assess, reserving always the right of individuals through indemnity and the liabilities which the companies may incur through criminal acts and omissions committed by them." It might be argued that these sections, coupled with articles 301 and 304 of the Penal Code, to which we referred in the beginning, were enough to create the liability without regard to the question of homicide. To this it might be enough to answer that it does not appear that a law imposing a fine to be assessed by the department of public works is a penal law within the meaning of the Code,—that, as we have said in a different connection, when the tort relied on is a homicide the specific provisions for homicide override merely general rules, and that the plaintiffs come here relying, as they have to rely, upon a statute which gives them a right of action independent of the deceased, and that the statute is made expressly and only for the case of Homicide. Penal Code, bk. 2, art. 311.

But what we last have said brings into consideration another error of the circuit court which hitherto we have not mentioned. The defendant offered the deposition of a Mexican lawyer as to the Mexican law. This was rejected, subject to exception, seemingly on the ground that the agreed translation of the statutes was the best evidence. So, no doubt, they were, so far as they went, but the testimony of an expert as to the accepted or proper construction of them is admissible upon any matter open to reasonable doubt. Many doubts are left unresolved by the documents before us. The expert would have testified that where no criminal proceedings had been had, the right of the widow and children was dependent upon the court's finding that the killing was a crime as defined by the Penal Code, and that the right was in the nature of alimony of pension, to be paid in instalments for periods of time fixed by the court. Without stating his testimony more fully, we have said enough to show that it should have been received. Seemingly he understood that he was testifying in a case against a railroad,

Slater v. Mexican National R. Co

and if so he furnished further reasons for denying any liability except on the footing of homicide. In a case of homicide he excluded the argument, that there was a right to a lump sum under articles 301, 304, distinct from the right to alimony, and he confirmed the conclusion drawn from the language of the Code as to what would be the nature of a Mexican decree in such a case. There may be other matters which would have to be considered before the verdict could be sustained, but what we have said seems to us sufficient to show that the judgment of the Circuit Court of Appeals should be affirmed.

Judgment affirmed.

MR. CHIEF JUSTICE FULLER, with whom concurred MR. JUSTICE HARLAN and MR. JUSTICE PECKHAM, dissenting:

Slater, the deceased, was a citizen of Texas, residing at Laredo in that state. The Mexican National Railroad Company was a corporation of Colorado, owning and operating a railroad from Laredo to the City of Mexico. Its superintendent resided in Laredo. Slater was fatally injured through the negligence of the company while working in its yard in New Laredo, just across the Rio Grande in Mexico, and died in Laredo from the injuries so inflicted. His wife and children, who resided in Laredo, brought this suit in the circuit court of the United States, diverse citizenship being the ground of jurisdiction, and no objection in that regard arises. Defendant did not "happen to be caught" in Laredo, but was domiciled there.

The laws of Texas provided that an action for damages on account of injuries causing death may be brought when the death is caused by the wrongful act, negligence, unskillfulness, or default of another, and without regard to any criminal proceedings in relation to the homicide. The jury are to give such damages as they may think proportioned to the injury resulting from the death, to be divided among the persons entitled in such shares as found by the verdict. The jury pursued that course in this case, under the instructions of the circuit court.

By the laws of Mexico, damages are recoverable for death by wrongful act, but they, it is said, are awarded as support by decree in the nature of alimony or pension.

As the two countries concur in holding that the act complained of is the subject of legal redress, the question is whether recovery in this cause must be defeated because the law of Mexico controls and cannot be enforced in Texas.

It seems to me that the method of arriving at and distributing the damages pertains to procedure or remedy,—that is to say, to the course of the court after parties are brought in, and the means of redressing the wrong,—and I think the general rule that procedure and remedy are reg-

Slater v. Mexican National R. Co

ulated by the law of the forum is applicable. 2 Bouvier Law Dict. Rawle's Ed. 870; *Kring v. Missouri*, 107 U. S. 231, 27 L. Ed. 509, 2 Sup. Ct. Rep. 443; *Stewart v. Baltimore & O. R. Co.*, 168 U. S. 445, 42 L. Ed. 537, 18 Sup. Ct. Rep. 105.

In *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 199, 38 L. Ed. 958, 961, 14 Sup. Ct. Rep. 978, the company was not a corporation of Minnesota, and the ruling simply was that the right to recover was governed by the *lex loci*. The amount found was within the law of Minnesota as well as that of Montana.

The extent of damages does not enter into any definition of the right enforced or the cause of action permitted to be prosecuted. *Finch, J., Wooden v. Western N. Y. & P. R. Co.*, 126 N. Y. 10, 13 L. R. A. 458, 26 N. E. 1050.

In *Scott v. Seymour*, 1 Hurlst. & C. 217, which was an action by one British subject against another for an assault committed in a foreign country, it was held unanimously by the courts of exchequer and of the exchequer chamber that the objection that, by the foreign law, compensation in damages could not be recovered until certain penal proceedings had been commenced and determined there, was an objection to procedure merely, and not a bar to the action in England. And many of the judges were of opinion that an action was maintainable for any act which would have been a tort if done in England, and, whether actionable or not, was unjustifiable or wrongful, in a broad sense, under the law of the foreign country where the act was done.

Mr. Justice Wightman (Willes, J., in effect concurring) specifically held that if an action would lie by the English law for a particular wrong, the English courts would give redress for it, though it was committed in a country by the laws of which no redress would be granted, if the parties were both British subjects.

This case has never been overruled, and is cited as authority by Mr. Pollock in his work on Torts, 6th Ed. p. 201.

At all events, the rule in England is well settled, as thus laid down in *Machado v. Fontes* [1897] 2 Q. B. 231: "An action will lie in this country in respect of an act committed outside the jurisdiction if the act is wrongful both in this country and in the country where it was committed; but it is not necessary that the act should be the subject of civil proceedings in the foreign country." *Phillips v. Eyre* [1870] L. R. 6 Q. B. 1, and *The M. Moxham* [1876] L. R. 1 Prob. Div. 107, were there cited and applied.

In *Phillips v. Eyre*, Willes, J., delivering the opinion of the exchequer chamber, said: "As a general rule, in order to found a suit in England, for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First, the wrong must be of such a character that it would have

been actionable if committed in England. . . . Secondly, the act must not have been justifiable by the law of the place where it was done."

In *The Halley*, L. R. 2 P. C. 202, Lord Justice Selwyn, speaking for the court, said: "It is true that in many cases the courts of England inquire into and act upon the law of foreign countries, as in the case of a contract entered into in a foreign country, where, by express reference, or by necessary implication, the foreign law is incorporated with the contract, and proof and consideration of the foreign law therefore become necessary to the construction of the contract itself. And as in the case of a collision on an ordinary road in a foreign country, where the rule of the road in force at the place of collision may be a necessary ingredient in the determination of the question by whose fault or negligence the alleged tort was committed. But in these and similar cases the English court admits the proof of the foreign law as part of the circumstances attending the execution of the contract, or as one of the facts upon which the existence of the tort, or the right to damages, may depend, and it then applies and enforces its own law so far as it is applicable to the case thus established; but it is, in their Lordship's opinion, alike contrary to principle and to authority, to hold that an English court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

The rule in this court goes further, for "by our law, a private action may be maintained in one state, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the state where the suit is brought." *Huntington v. Attrill*, 146 U. S. 670, 36 L. Ed. 1128, 13 Sup. Ct. Rep. 229.

It is enough that the act complained of here was wrongful by both the law of Texas and the law of Mexico, and in such a case the action lies in Texas, except where the cause of action is not transitory, but is purely local, such as trespass to land. *Dennick v. Central R. Co.*, 103 U. S. 11, 26 L. Ed. 439; *Texas & P. R. Co. v. Cox*, 145 U. S. 604, 36 L. Ed. 833, 12 Sup. Ct. Rep. 905; *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105, 39 L. Ed. 913, 15 Sup. Ct. Rep. 771; *Mitchell v. Harmony*, 13 How. 1, 5, 14 L. Ed. 75; *McKenna v. Fisk*, 1 How. 241, 11 L. Ed. 117.

It is suggested that the Texas courts have held that there can be no recovery in Texas because of the dissimilarity in the ascertainment of damages between the law of Texas and that of Mexico. And this seems to have been so ruled in *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 31 L. R. A. 276, 33 S. W. 87; but the question is one of general law,

Fishburn v. Burlington, etc., Ry. Co

and we are not bound by that ruling. Moreover, the railway company is stated in that case to have been "a Mexican corporation whose line of railway extended into Texas," whereas in this case the company is a corporation of Colorado, domiciled in Texas, and whose line of railway extends from Texas into Mexico. Again, after that decision was rendered, in *Mexican C. R. Co. v. Mitten*, 13 Tex. Civ. App. 653, 36 S. W. 282, the company being a Massachusetts corporation and Mitten a citizen of Texas, the court of civil appeals for the fourth district of Texas held to the contrary.

The court said: "If the construction placed upon the decision in the Jackson Case be the true one,—and some of its expressions would seem to justify the construction,—it is a practical denial of remedies for wrongs that may be inflicted by one of our citizens upon another in Mexico, . . . " and: "We are not willing to subscribe to such doctrine, and will not extend the scope of the decision referred to beyond the purview of the facts of that case."

The supreme court of Texas apparently accepted this view, for it refused to grant a writ of error to review the judgment. 13 Tex. Civ. App. p. v. And see *Evey v. Mexican C. R. Co.*, 38 L. R. A. 387, 26 C. C. A. 407, 52 U. S. App. 118, 81 Fed. 294.

I entirely agree with the views expressed in *Scott v. Seymour*, to which I have referred. The legal relations of Slater with the United States and Texas were not destroyed by his crossing the Rio Grande to work in the railroad yard. This Colorado corporation was domiciled in Texas, as Slater was. The laws of Texas protected them alike. The injury was inflicted in Mexico and resulted fatally in Texas. The wrongful act was actionable in Texas and in Mexico.

The jurisdiction of the circuit court over person and subject-matter was unquestionable, and I cannot accept the conclusion that the form in which the law of Mexico provides for reparation to its own citizens constitutes a bar to recovery in Texas in litigation between citizens of this country.

My brothers HARLAN and PECKHAM concur in this dissent.

FISHBURN v. BURLINGTON & N. W. RY. CO. et al.

(Supreme Court of Iowa, Feb. 2, 1904.)

[98 N. W. Rep. 380.]

Snow Fence—Construction and Maintenance—Negligence—Question for Jury.

Whether a railroad company which builds a snow fence on the premises of a resident along its right of way, with his permission, was negligent, either in the matter of construction or maintenance of the fence, is a question for the jury.

Proximate Cause.

Defendant railroad company built a snow fence on the premises of a

Fishburn v. Burlington, etc., Ry. Co

resident along its right of way, a panel of which was blown or fell down through the negligent construction or maintenance of the fence, and was by plaintiff, a minor son of the owner of the premises, and another, raised up and placed against the remainder of the fence, and thereafter was blown down, or from some cause fell, and struck plaintiff, causing injury to him: *held*, that the act of plaintiff in raising the panel, and, without fastening, placing it in such a position that by the action of the wind, or some other cause, a second fall was made possible, was the proximate cause of the injury.

Pain and Suffering—Evidence.

In an action against a railroad for damages for personal injuries to a child, as the result of defendant's negligence, testimony with reference to the appearance of the child's face, as indicating the pain and suffering, complaints made by him, and the fact that he cried a great deal, is admissible.

Damages—Future Earning Capacity of Child—Evidence—Earning Capacity of Father.

In an action against a railroad company for damages for personal injuries to a child as a result of defendant's negligence, testimony of the father of the injured child in reference to the amount of daily wages received by him is admissible, as bearing upon the probable future earnings of the plaintiff.

Appeal from District Court, Washington County; W. G. Clements, Judge.

The plaintiff, a minor, sues by his next friend, Anna Fishburn, to recover damages for a personal injury alleged to have been sustained through the negligence of defendants. There was a trial to jury, and verdict and judgment for plaintiff. Defendants appeal. Reversed.

C. J. Wilson and H. & W. Schofield, for appellants.

H. M. Eicher and S. W. & J. L. Brookhart, for appellee.

BISHOP, J. At the time of the accident and injury complained of, which occurred April 8, 1900, plaintiff was a minor, six years of age. With his parents he lived in the town of Winfield, Henry county, the family homestead, adjoining the right of way of the defendant railway company. Between the Fishburn homestead premises and the right of way of the defendant company there had existed for some years an ordinary post and wire fence, the height thereof being in the neighborhood of 4½ feet. In the fall of the year 1899, the defendant, with the permission of the father of plaintiff, erected a snow fence along the right of way fence; the same being constructed of boards 14 feet in length, nailed to crosspieces so as to make a panel about 5 feet in width. These were so placed that the bottom rested on the ground on the Fishburn premises, about 18 inches from the right of way fence; the panel then slanting upward, so that the top rested against the top of the right of way fence. The top of the panel as originally constructed was connected to the top of the right of way fence by wire fastenings. On April 8, 1900, during a strong wind, a panel of such snow fence was blown over in the direction of the Fishburn premises; and the plaintiff, happening to be near,

was struck thereby, thrown to the ground, and sustained the injury of which he complains. The negligence charged against the defendant is particularly stated in the petition as follows: "(1) In not giving enough slant to said snow fence at the top toward its support on the east, to prevent it from falling to the west and upon the premises of the said Fishburn. (2) By using defective, broken, and inferior wire and material in fastening and securing said snow fence at the top to said fence and posts. (3) By making defective, imperfect, broken, and impaired connections and adjustments of the wires and materials used in the same in fastening and securing said snow fence and structure at the top to said fence and posts." At the close of the evidence for plaintiff the defendant moved for an instructed verdict; the contention therein made being that a case of actionable negligence could not be predicated upon the existing facts, conceding them to be as stated. We think the motion was properly overruled. We quite agree with counsel for appellant that the doctrine of the so-called turntable cases has no application to the facts here presented. In those cases the dangerous contrivance is situated upon the premises of the railway company, and the persons interfering therewith are trespassers. The ground upon which a liability is imposed upon a railway company is that the contrivance is an attractive one to amusement seeking children of immature years, and that the company is bound even to anticipate that such children will trespass upon its grounds, and, unless protected therefrom, may, as a probability, undertake to manipulate the turntable in play. Here the defendant, in furtherance of its own purposes, and by permission, had gone upon the Fishburn homestead premises—a town lot—and erected the fence. Now, in doing so, it must be held to have known that the premises, and every part thereof, would continue to be used at least by the members of the Fishburn family. For the purpose of this case it may be conceded that, had the fence been built wholly upon the premises of the defendant, it would have been under no obligation to protect trespassers from danger therefrom. But having built the same where it did, knowing that members of the Fishburn family not only had the right to, but in all probability would, pass and repass in more or less close proximity thereto, it must be said that the position of defendant was precisely, in principle, that which would have obtained, had the fence been erected upon the premises of the defendant at a place where the public was invited or permitted to frequent or visit. The duty and obligation of the defendant in the premises was in no manner affected by the fact that it was a company engaged in operating a railway. It occupied the position solely of one in the possession of grounds upon which a structure had been erected, said to be dangerous in character, and through the medium of which an injury was

Fishburn v. Burlington, etc., Ry. Co

sustained. Following the well-established rule, actionable negligence may be established by showing a want of ordinary care either in the matter of construction or maintenance. The question thus at issue was strictly one for the jury, and hence there was no error in overruling the motion for a verdict.

2. The accident resulting in the injury to plaintiff occurred in the afternoon. Upon the trial the defendant introduced evidence tending to prove that some hours previous to the accident the particular panel of the fence causing the same had blown down, and was lying flat on the ground; that in the forenoon of the day of the accident the plaintiff and his brother had raised up such panel, and placed it leaning against the remainder of the fence. The defendant requested the court to instruct the jury, in substance, that if they found that prior to the accident the panel of fence which caused the injury had blown down, and was lying upon the ground, and that plaintiff, with the assistance of a brother, had raised it up and placed it against the remainder of the fence, and that thereafter the accident occurred by such panel being blown down, or from some cause falling down and striking plaintiff, causing the injuries of which he complains, then the verdict should be in favor of defendant. The request for instruction so made was refused. Evidently the court was of the opinion that the facts as claimed by defendant, if found to be true, were important only as bearing upon the question of contributory negligence. In an instruction given by the court upon its own motion, the jury were told, in substance, that if they found that the panel had previously fallen down, and had been raised up by plaintiff, and thereafter the accident occurred by the panel again falling, "and if you find that plaintiff had sufficient capacity to understand and appreciate the danger surrounding him at the time of the accident, then he would be guilty of contributory negligence," etc. We do not share in the view thus taken, and think that the instruction requested should have been given. The defendant could not be held liable, except that negligence was shown, and, further, that such negligence was the proximate cause of the injury complained of. This is the doctrine of all the cases, and is well stated by Judge Cooley in his work on Torts, p. 73: "The maxim of the law here applicable is that, in law, the immediate, and not the remote, cause of any event is regarded. * * * If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote." Now here the negligence complained of had relation solely to the slant of the panel as originally constructed in the fence, and the fastening of such

Fishburn v. Burlington, etc., Ry. Co

panel to the right of way fence. Accepting for the moment the facts to be as contended for by defendants, and we may concede that the original fall of the panel was due to the causes alleged by plaintiff, and that therein was involved negligence on the part of defendant. But such fall occasioned no harm to plaintiff, and the fallen panel in itself was incapable of producing injury. If it had not been disturbed, the injury here complained of would never have occurred. Of necessity, some other efficient cause must intervene to make the accident possible, and such is presented in the alleged act of plaintiff in raising the panel up, and, without fastening, placing it in such position as that by the action of the wind, or some other cause, the second falling was made possible. Taking the facts to be as contended for—and such may have been found by the jury to be the facts in the case—and we are of the opinion that the proximate cause of the injury must then be said to have been the act of plaintiff and his brother in their placing of the panel. True, the particular accident here complained of would not have occurred, had it not been that the original fastenings of the panel gave way, and allowed it to fall or be blown to the ground. But the case is no different from what we would have if the facts appearing were that the defendant had carelessly and negligently thrown the panel upon the Fishburn premises. In such a case, if plaintiff undertook to deal with the panel, and, in doing so, placed it so that it thereafter fell upon him, then both reason and authority unite in the conclusion that the act of defendant, negligent though it may have been, was not a proximate cause. Illustrations of the principle can be found in the following cases: *West v. Ward*, 77 Iowa, 324, 42 N. W. 309, 14 Am. St. Rep. 284; *Gould v. Shermer*, 101 Iowa, 583, 70 N. W. 697; *Atkinson v. Goodrich*, 60 Wis. 141, 18 N. W. 764, 50 Am. Rep. 352; *Mahogany v. Ward* (R. I.) 17 Atl. 860, 27 Am. St. Rep. 753; *Baxter v. Railway* (Wis.) 80 N. W. 648; *Herr v. Lebanon* (Pa.) 24 Atl. 207, 16 L. R. A. 106, 34 Am. St. Rep. 603; *Stone v. Railway* (Mass.) 51 N. E. 1, 41 L. R. A. 794; *Bleil v. Detroit, etc.* (Mich.) 57 N. W. 117; 3 *Thompson, Negligence*, § 2783. It follows that the refusal to give the instruction as requested was error.

3. Many of the assignments of error are based upon rulings upon the admissibility of evidence. Most of such are not argued. Of those concerning which argument is presented, we need notice but two. On behalf of plaintiff, various witnesses were allowed to testify in reference to the appearance of his face, as indicating pain and suffering; the complaints of pain made by him; the fact that he cried a great deal, etc. We think the evidence was properly admitted. *Keyes v. Cedar Falls*, 107 Iowa, 517, 78 N. W. 227. As a witness, the father of the plaintiff was interrogated in reference to his business interests; one question being as to

Stillings v. Metropolitan St. Ry. Co

the amount of daily wages received by him. Such evidence was material and competent, as bearing upon the probable future earnings of the plaintiff, and was therefore properly allowed to go to the jury.

4. In view of the fact that a new trial of the case must be awarded, no discussion of the other assignments of error is necessary. We have examined the record with reference to such of them as are discussed in argument, and find them without merit, or that the subject-matter thereof will not be likely to arise again on a new trial.

For the errors pointed out, the judgment is reversed, and the cause remanded for a new trial. Reversed.

STILLINGS *v.* METROPOLITAN ST. RY. CO.

(Court of Appeals of New York, Feb. 9, 1904.)

[69 N. E. Rep. 641.]

Street Railroads—Injury to Pedestrian—Contributory Negligence.

Where plaintiff's decedent was killed by a street railway car, running at a high rate of speed, while crossing a track to catch a car waiting for him, the conductor of which called upon him to hurry if he wanted to get the car, the question whether decedent was guilty of contributory negligence in passing diagonally across the street, facing the approaching car, is a question for the jury; it presenting a question of fact, rather than one of law.

Appeal from Supreme Court, Appellate Division, First Department.

Action by William E. Stillings, executor of Isaac I. Stillings, against the Metropolitan Street Railway Company. From a judgment of the Appellate Division (82 N. Y. Supp. 726) modifying, and affirming as modified, a judgment for plaintiff, defendant appeals. Affirmed.

Charles F. Brown, Bayard H. Ames, and Henry A. Robinson, for appellant.

Archibald C. Shenstone, for respondent.

HAIGHT, J. This action was brought to recover damages for the alleged negligent killing of the plaintiff's testator. On January 7, 1899, at about midnight, the decedent, a man 73 years of age, with a companion, was at the southwest corner of Central Park West and Sixty-Ninth street, intending to take a north-bound car on the defendant's road. The car was then approaching from Sixty-Eighth street, and was signaled to stop by the decedent's companion; and they started diagonally across the street towards the northeast corner, where the cars stopped to receive and discharge passengers. They had proceeded as far as the south-bound track when the north-bound car passed them, and stopped at the crosswalk. The conductor then called to

Stillings v. Metropolitan St. Ry. Co

them to hurry up, if they wanted to get on that car. An instant later a south-bound car, running at a speed of from 20 to 25 miles per hour, struck and killed the decedent. His companion testified, in substance, that they saw the south-bound car approaching from Seventy-First street before leaving the southwest corner of Sixty-Ninth street; that, in proceeding diagonally across the street, he led the way, the decedent walking four or five feet behind him, and that, as the decedent stepped upon the south-bound track, he called to him to look out for the car; and that he attempted to avoid it by a backward movement, but was struck and killed.

The defense interposed is that of contributory negligence, and the contention of the appellant is that such negligence appears, as a matter of law, and that a verdict should have been directed for the defendant. It must be conceded that the question presented is upon the border line, and that ordinarily a person could not walk diagonally across a street, facing an approaching car, and colliding therewith, without becoming chargeable with contributory negligence; but in this case we have finally concluded to sustain the trial court in submitting the case to the jury, not, however, upon the theory that the call of the conductor to hurry up was such an invitation as would justify the decedent in the belief that his access to the car was thereby rendered safe, and that he was excused from looking out for the approaching south-bound car, but upon the ground that the call of the conductor may have momentarily diverted his attention therefrom, and that the loss of time occasioned thereby prevented his escape, and resulted in his death. This, taken in connection with the other circumstances disclosed in the case, including the decedent's probable deception as to the speed of the south-bound car, and his right to suppose that the motorman would have it under control as he approached the crossing, we think, presented a question of fact, rather than one of law.

The judgment should be affirmed, with costs.

BARTLETT and VANN, JJ., concur in the result, upon the ground that the call of the conductor, while engaged in the discharge of his duty to look out for passengers and take them on board his car, was an invitation by the company, and an assurance of safety to the deceased.

PARKER, C. J., and CULLEN and WERNER, JJ., concur. GRAY, J., not sitting.

Judgment affirmed.

CHICAGO, I. & L. RY. CO. v. LEACHMAN.

(Supreme Court of Indiana, Dec. 15, 1903.)

[69 N. E. Rep. 253.]

Care Required of Highway Traveler—Dangerous Place.

While it is the duty of a traveler on a highway to avoid all threatening situations by going another way when he may reasonably do so, he is nevertheless entitled to travel the highway, and, where he has no alternative, is not bound to forego an effort to pass, provided the highway is not so defective as to make it obvious to a person of ordinary understanding that the danger cannot be encountered without injury.

Same—Same.

A traveler on a highway must observe due care according to the degree of peril confronting him, and, if the place is not impassable, or known to be so defective as to render injury probable, he will be justified in proceeding if he observes that degree of care which a person of ordinary prudence in like place would deem sufficient to guard against the threatening danger.

Same—Same—Failure of Railway to Restore Crossing—Statutory Duty—Assumption of Risk.

Since, by virtue of Burns' Rev. St. 1901, § 5153, a railway is imperatively enjoined on intersecting an established highway to restore the highway to its former state, or in a sufficient manner not to necessarily impair its usefulness, a railway, and not a traveler on the highway, assumes the risk to travel resulting from the former's failure to observe such statutory duty, and the traveler is answerable only for his conduct in dealing with the defective conditions as he finds them.

General Verdict and Special Findings.

A general verdict will prevail against special findings of fact in answer to interrogatories, unless it clearly appears that the general verdict is so incompatible and contradictory on some material point that both cannot possibly be true.

Contributory Negligence—Use of Defective Crossing.

One driving across a railway, the approaches to which were defectively constructed, was not negligent as a matter of law in attempting to cross, though he knew it to be unsafe for one to ride in the wagon loaded as his was, and knew that the only way in which he could safely go over the crossing was to leave the wagon and walk on the ground, where he had encountered such crossing frequently before, and by the observance of certain precautions had always safely avoided danger by riding and driving in his wagon, and, on the occasion in question, lightened his load by causing his family to get out, set the brakes, and locked the wheels of his wagon, and stood up the better to manage and guide his team down the embankment.

Same—Appeal—Review.

Where the jury has found in a general verdict, from all the evidence, that plaintiff acted as an ordinarily prudent person would have acted under the circumstances, an appellate court cannot disturb the verdict where the evidence does not disclose as a matter of law that plaintiff's conduct amounted to negligence.

Appeal from Circuit Court, Montgomery County; Jere West, Judge.

Action by Jerome B. Leachman against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

E. C. Field and H. R. Kurrie, for appellant.

M. M. Bachelder, for appellee.

Chicago, etc., Ry. Co. v. Leachman

HADLEY, J. Appellee recovered against appellant a judgment for personal injuries alleged to have been caused by the negligence of appellant in the construction and maintenance of certain approaches to a highway crossing of its railroad. Divers answers to interrogatories were returned with the general verdict, and the correctness of the court's ruling that said answers did not entitle appellant to judgment notwithstanding the general verdict is the only question presented. The complaint avers that appellant, in constructing its railroad, intersected an established highway in Montgomery county known as the "Haw Creek Road" with a fill 20 feet higher than the surface of the highway; that prior to said intersection the Haw Creek Road was at that place level and smooth, making travel thereover easy and safe to life and property; that under pretense of restoring said highway to the condition it found it, the defendant constructed the approaches of said highway to the top of its railroad embankment, and constructed, and has ever since maintained, the said highway approaches in a negligent manner, in this: that said approaches are so steep, rough, narrow, and unguarded as to make it unsafe and dangerous to travel over the same with animals and vehicles; that the plaintiff, with his family, was traveling along said highway with his team hitched to a wagon, and was compelled to pass over said railroad on said unsafe approaches, because there was no other place or way provided, or whereby he could pass over the defendant's said railroad; that in attempting to pass over the same, and while in the exercise of great care, his wagon and team, by reason of said negligent construction and maintenance, fell down the west approach, whereby the plaintiff was precipitated from his wagon to the ground, and thereby injured.

The facts found in answer to interrogatories are, in substance, as follows: The plaintiff was injured while driving west on the Haw Creek Road at a point where the defendant's railroad intersects said highway with a grade above that of the highway. At the point of intersection the highway runs east and west, and the railroad north and south. The defendant's track was higher than the travel highway, and to enable travelers to get over the railroad the defendant had constructed approaches, but these approaches were not, any part of them, suitable for travel, and were unsafe for an ordinary farm wagon drawn by two horses to be driven over them. When injured the plaintiff was driving two animals hitched to a farm wagon loaded with farm implements, and with a corn planter tied and trailing behind. The team plaintiff was driving was gentle, and easily managed, and had often been safely driven by the plaintiff over that crossing. The condition of the crossing was such as to cause the plaintiff's wagon, when it left the center of the railroad track and started down the west side, to run against the team and force

Chicago, etc., Ry. Co. v. Leachman

it over the embankment. The corn planter tied on behind and the implements in the wagon in part caused the wagon to run down against the team when it started down the west side. The plaintiff stopped his wagon at the foot of the east approach, and caused his wife and children, who were riding with him, to leave the wagon. The plaintiff was familiar with the crossing and its condition, and knew it was unsafe for one to ride in a wagon, loaded as his was, over the crossing, and down the west approach, but did not believe his wagon, loaded as it was, would force his team over the embankment, or cause any other injury. The plaintiff knew that the only safe way to go over the crossing was to leave the wagon and walk on the ground. While descending the grade he stood up, and had the brakes set, and the wheels of his wagon locked.

It is the law that one is not always bound to abandon travel on a highway because he knows it to be defective and dangerous. See cases collected in *Gosport v. Evans*, 112 Ind., at page 138, 13 N. E. 258, 2 Am. St. Rep. 164; *Board v. Mutchler*, 137 Ind. 140, 148, 36 N. E. 534; *Board v. Brown*, 89 Ind. 48. It is doubtless the duty of the traveler to avoid all threatening situations by going another way when he may reasonably do so, but he is entitled to travel the highway, and when he has no alternative, as in this case, he is not bound to forego an effort to pass, provided the highway is not so defective as to make it obvious to a person of ordinary understanding that it cannot be encountered without injury. *City of Ft. Wayne v. Breese*, 123 Ind. 581, 23 N. E. 1038. A traveler must, however, in all cases observe due, or ordinary care; that is, his care must be great or slight, in the particular case, according to the degree of peril that confronts him, and in no case less than he might, under the circumstances, reasonably and honestly believe sufficient to avoid injury. And if the place is no impassable, or known to be so defective as to make injury probable by entering into it at all, he will be justified in proceeding if he observes that degree of care and caution which a person of ordinary prudence, in like place, would deem sufficient to successfully guard against the threatening danger. *City of Huntingburgh v. First*, 15 Ind. App. 552, 555, 43 N. E. 17; *Gosport v. Evans*, 112 Ind. 133, 138, 13 N. E. 256, 2 Am. St. Rep. 164. In the last case cited it is said by Mitchell, J., that "the doctrine to be extracted from the cases is that, although a sidewalk or highway may be in an apparently defective or dangerous condition, yet a person with knowledge of the defect or danger is not on that account obliged to abandon travel upon the highway, if, by the exercise of care proportioned to the known danger, he may reasonably expect to shun or avoid the defect." There is no question of assumed risk in this case, however well appellee knew of the defective condition of the crossing. Appellant, in the construction of

Chicago, etc., Ry. Co. v. Leachman

its railroad, having intersected an established highway, it became its imperative statutory duty "to restore the * * * highway thus intersected to its former state, or in a sufficient manner not to unnecessarily impair its usefulness, and in such manner as to afford security for life and property." Section 5153, ch. 5, Burns' Rev. St. 1901; Railroad Co. v. State, 158 Ind. 189, 191, 63 N. E. 224, and cases cited. Whatever danger or risk, obvious or otherwise, resulted from the failure of appellant to perform its specific statutory duty to keep the crossing safe and in good condition for travel, was assumed by appellant, who wrongfully created it, and not by appellee. The appellee is answerable only for his conduct in dealing with the defective conditions as he found them. As relates to him, the question is: (1) Was it negligence to undertake it all to drive his team and load over the crossing in its known condition, and, (2) if he might reasonably undertake it, in his effort to do so did he neglect the observance of any care or precaution required by ordinary prudence under the circumstances? If he might rightfully undertake to cross, and he used such care as an ordinarily careful and cautious person would observe in driving a like team and load over the crossing, he cannot be adjudged guilty of fault. Davis Coal Co. v. Pollard, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319; Monteith v. Enameling Co., 159 Ind. 149, 64 N. E. 610, 58 L. R. A. 944. What do the answers to the interrogatories show? It has been so often decided by this court as to make it appear supererogation to cite the cases that a general verdict will prevail against special findings of fact in answer to interrogatories, unless it clearly appears that the general verdict, after being reinforced by the assumed proof of all favorable facts provable under the issues, and all natural inferences arising from such facts, in its relation to such special findings, is so incompatible and contradictory on some material point that both cannot possibly be true. The rule is rooted in the theory that the general verdict is the jury's deduction from all the facts proved in the case, and in its support it will be presumed that isolated adverse facts specially found were overcome by other proved facts, if such other facts might have been properly proved under the issues. It is shown by the findings that appellee was familiar with the condition of the crossing; that his team was gentle, and he had often safely driven it over; and we must assume, in support of the verdict, because not shown to the contrary, that in his previous successful efforts his team had drawn like or heavier loads. It is also found that he believed at the time of the accident that he could safely drive over, and, if he had safely driven the same team, with an equal load, over the crossing, frequently before, the jury had the right to consider this circumstance in adjudging the quality of his conduct.

Stress is laid upon the following questions and answers:

Albert v. Boston Elevated Ry. Co

"(26) Did the plaintiff know that it was a dangerous crossing? Ans. Yes. (27) Did the plaintiff know that it was then unsafe for one to ride in the wagon, loaded as his was, * * * over said crossing, and down the west embankment? Ans. Yes. (30) Did the plaintiff know that the only way in which he could safely go over said crossing at the time was to leave the wagon, and walk on the ground? Ans. Yes." The term "safe," as here employed, is used in a relative sense. One almost daily encounters something that is not entirely safe. We say that riding behind a nervous horse or walking on an icy pavement is dangerous, but ordinarily neither is accounted negligence per se, nor negligence at all, if one exercises care commensurate with the danger. Here the appellee knew the crossing was in some degree (not shown), dangerous, and that riding over it in the wagon would be in some degree unsafe; but he had encountered it frequently before, and by the observance of certain precautions had always safely avoided the danger by riding and driving in his wagon. On this occasion he lightened his load by causing his family to get out, set the brakes, and locked the wheels of his wagon, and stood up the better to manage and guide his team down the embankment. We cannot say, from what is disclosed, as a matter of law, that his conduct amounts to negligence; and the jury having found in their general verdict, from all the evidence, that he acted as an ordinarily prudent person would have acted under the circumstances, we are not permitted to disturb their verdict.

Judgment affirmed.

ALBERT v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 26, 1904.)

[70 N. E. Rep. 52.]

Street Railroads—Operation—Injury to Newsboy—Jumping on Moving Car—Duty and Liability of Company.*

Plaintiff, a newsboy, 12 years of age, jumped on the running board of one of defendant's moving street cars for the purpose of selling papers. He testified that he was in the habit of jumping on and off moving cars, and it appeared that the car in question was going through a busy part of the city at about the usual speed, which the evidence, however, did not show was either increased or diminished before he was hurt. According to testimony in the case he became frightened at a motion from the conductor on the rear platform, and what he understood as an order from him to get off, and thereupon jumped off and was injured. His only right on the cars at any time to sell papers was under a contract which gave the right to enter and leave by the rear platform when not in motion, and not otherwise: *held*, that he was a trespasser, to whom defendant owed no duty except to refrain from willfully or recklessly and wantonly exposing him to injury.

*As to the care due trespassers on train, see foot-note appended to *Harris v. Southern Ry. Co.* (Ky.), 8 R. R. R. 753, 31 Am. & Eng. R. Cas., N. S., 753, where all the preceding authorities in this series are collected.

Albert v. Boston Elevated Ry. Co

Exceptions from Superior Court, Suffolk County; J. B. Richardson, Judge.

Action by one Albert, by his next friend, against the Boston Elevated Railway Company, for personal injuries. There was a judgment for defendant, and plaintiff brings exceptions. Exceptions overruled.

Charles W. Bartlett, Elbridge R. Anderson, and Robert Levi, for plaintiff.

P. H. Cooney and L. F. Hyde, for defendant.

KNOWLTON, C. J. The plaintiff, a newsboy 12 years of age, jumped upon the running board of an ordinary open street car as it was passing through Congress street, near State street, in Boston, for the purpose of selling his papers. He testified that he was in the habit of jumping on and off such cars when they were in motion. The testimony showed that the car was going at about its usual rate of speed, which we suppose was not great in that busy part of the city. There was no evidence that the speed was increased or diminished after he attempted to get on until after the accident. As he was changing hands, and trying to get out a paper to deliver to a man who sat near the middle of the car, he fell off, or intentionally jumped off, and was injured. There was testimony that the conductor, who was standing on the rear platform, made a motion and said something which the plaintiff did not understand, but thought was, "Get out of here!" or "Get off!" and that the plaintiff, being frightened, jumped off. He was on the running board but a very short time. To use his expression, "It all happened in a jiffy."

The plaintiff was a trespasser. His only right on the defendant's cars to sell newspapers at any time was under a contract between the defendant and his employer, in which it was stipulated that "newsboys shall enter and leave the cars by the rear platform, and while said cars are not in motion, and not otherwise." To him, as a trespasser, the defendant owed no duty except to refrain from willfully or recklessly and wantonly exposing him to injury. *Metcalf v. Cunard Steamship Company*, 147 Mass. 66, 16 N. E. 701; *Heinlein v. Boston & Province Railroad Company*, 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369. In speaking to the plaintiff, the conductor was only trying to enforce the rule which the plaintiff was violating. He was not near the plaintiff, who was in the middle of the car. He had no reason to expect that his command would cause the plaintiff serious injury. There was no evidence that he acted wantonly or recklessly in telling the plaintiff to get off. The case is fully covered by *Mugford v. Boston & Maine Railroad*, 173 Mass. 10, 52 N. E. 1078, and by *Bjornquist v. Boston & Albany Railroad Com-*

Searles v. Elizabeth, etc., Ry. Co

pany, 70 N. E. 53. See, also, *Leonard v. Boston & Albany Railroad Company*, 170 Mass. 318, 49 N. E. 621; *Planz v. Boston & Albany Railroad Company*, 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835.

Exceptions overruled.

SEARLES et al. *v.* ELIZABETH, P. & C. J. RY. CO.

(Supreme Court of New Jersey, Feb. 24, 1904.)

[57 Atl. Rep. 134.]

Accident at Crossing—Care Required of Motorman to Avoid Collisions with Other Vehicles.*

It is the duty of a motorman upon a street railway, when approaching an intersecting street to have his car so far under control that he will not endanger the safety of other persons, on foot or in vehicles, engaged in the lawful and customary use of the highway in question.

Excessive Verdict.

In an action for damages for personal injuries growing out of a trolley accident, the defendant sought a new trial on the ground of excessive damages.

Same—New Trial.

If the disability resulting from the injuries was likely to be permanent, the damages would not be regarded as so excessive as to warrant an interference with the verdict. But it appearing that the trial was brought on so soon after a surgical operation on the patient that sufficient time had not elapsed to enable the physicians to determine as to whether the operation would result in her complete or partial recovery—a result which they regarded, however, as highly probable—and it thereby appearing that justice had not been done by the verdict, it was *held* that, in the exercise of its sound discretion, it became the duty of the reviewing court to set aside the verdict and grant a new trial.

(Syllabus by the Court.)

Action by Myra R. Searles and husband against the Elizabeth, Plainfield & Central Jersey Railway Company. Judgment for plaintiffs. Rule to show cause made absolute.

Argued November term, 1903, before GUMMERE, C. J., and DIXON, SWAYZE, and HENDRICKSON, JJ.

Craig Marsh, for plaintiffs.

Frank Bergen, for defendant.

HENDRICKSON, J. The plaintiffs in this case, who are husband and wife, brought suit against the defendant company for damages resulting from a collision between a carriage in which the wife was riding and the defendant's trolley car. The carriage was overturned, and the wife sustained severe bruises of the head, limbs, and spinal column. The trial was had at the Union circuit, and the jury awarded as damages to the wife \$12,000, and to the husband \$3,000.

*See foot-note appended to *Westphal v. St. Joseph, etc., St. Ry. Co.* (Mich.), 9 R. R. R. 435, 32 Am. & Eng. R. Cas., N. S., 435, where all the preceding authorities in this series are collected.

Searles v. Elizabeth, etc., Ry. Co

A rule to show cause was allowed by the trial judge. The grounds relied on in the application for a new trial are (1) that the verdicts were against the weight of the evidence; and (2) that they were excessive.

Under the first ground, the contention is that negligence on the part of the defendant was not shown. The accident occurred at the intersection of Madison avenue and Fourth street, in the city of Plainfield. For convenience, I will refer to the wife as plaintiff. She was riding in a buggy with her sister, who was driving along Madison avenue in a southerly direction; and, as they approached Fourth street, which runs east and west, along which ran the defendant's railway, the driver halted, as plaintiff's witnesses testify, when the horse was about 20 feet from the track, and the driver looked east to Arlington avenue, distant about 265 feet, and saw no car, and then looked west, and saw no car, but saw a lumber wagon approaching the crossing rapidly from that direction. She then started to cross with her horse on a slow trot across the track. There was evidence also tending to prove that, when the car was 200 feet away, the horse was within 20 feet of the track, and in plain view from the motorman's position. The evidence of the driver and the plaintiff is that while in the act of crossing, and when the horse and the two front wheels were over the track, they heard a noise to the left, and looked, and the car was virtually upon them, and immediately struck the hind wheels of the buggy, causing its overturn. As to the speed of the car, one or more witnesses described it as rapid, and one as about seven miles an hour, while the motorman described it as "a pretty good speed," which he designated as "ordinary speed." The motorman further testified that when the car was about 40 feet from the crossing he first saw the carriage, and that then the driver held up her lines as if she meant to let him pass; that he then put on his brake and reversed the power, stopping the car as quickly as he could. The car went over the middle of the avenue before it was brought to a stop.

Do the facts in evidence present a case for the jury? It is contended for the defendant that the car must have been in sight when the driver looked, and that the failure to see cannot aid the plaintiff in proof of negligence against the Company; citing *P. R. Co. v. Richter*, 42 N. J. Law, 180. But the fact here assumed is at least debatable. There was evidence that the defendant's car, at the rate of seven miles an hour, would make the distance in 25 seconds. So it is quite probable that the car may not have been in view when the driver looked. The law cited had relation to the question of contributory negligence in approaching a steam railroad. Neither of these conditions exist in the present case. The question of contributory negligence does not arise, because the plaintiff was only a passenger in her sister's buggy

Searles *v.* Elizabeth, etc., Ry. Co

at the time of the collision. The trolley has no supreme right to the use of the public street. *Woodland v. Street Railway Co.*, 66 N. J. Law, 455, 49 Atl. 479. And it cannot be run at a rate of speed incompatible with the lawful and customary use of the highway by others with reasonable safety. *Railway Company v. Block*, 55 N. J. Law, 605, 27 Atl. 1067, 22 L. R. A. 374. Due care on the part of the motorman in approaching this crossing required that he should have his car under such control that the safety of the careful traveler thereon would not be endangered. *Traction Company v. Glynn*, 59 N. J. Law, 432, 37 Atl. 66.

Another principle involved in this case is that a driver at a crossing may obtain the right of way over a street railway, when, in the reasonable exercise of his rights, he reaches the point of crossing in time to safely go upon the track in advance of an approaching car; the latter being sufficiently distant to be checked or stopped, if need be, by the exercise of due care. *Railway Co. v. Miller*, 59 N. J. Law, 423, 36 Atl. 885, 39 Atl. 645; *Earle v. Traction Co.*, 64 N. J. Law, 573, 46 Atl. 613. See, also, *Traction Co. v. Lamberton*, 59 N. J. Law, 297, 36 Atl. 100.

We think the facts developed at the trial fairly raised the question of negligence on the part of the defendant company, and that the evidence is sufficient to support the verdict upon that question.

But the second ground of the application impresses us more favorably. If the plaintiff's disability from her injuries should be permanent in character, we would not deem it to be our duty to disturb the verdict. Nor, under ordinary circumstances, would we be inclined to question the finding of the jury upon that subject. But it is disclosed by the evidence that at the time of the trial the plaintiff was unable to sit up, and had to be brought into court in a reclining posture. This was not due to a condition directly caused by her injuries, but to the effect of a recent surgical operation, which was expected to bring about the patient's complete recovery. The evidence shows that the plaintiff's injuries for some time after the accident did not appear to be so serious as they did later on. She was about in two weeks, and could walk or ride unattended. She suffered much with her back, and sought the treatment of an expert surgeon in New York on November 22, 1902, which was three months after the accident. She could then walk. She came to the doctor's office unattended, and sat while telling the history of her case. The doctor said in his testimony that she was apparently a great sufferer, and showed a disinclination to sit long in one position, saying she could not do so. The result was that, after a month or six weeks of ordinary treatment, the patient still complaining as much as ever, the doctor testified that an operation was resolved upon, which consisted of the removal by an incision of the coccyx at the end of the spine. This was

Searles v. Elizabeth, etc., Ry. Co

done on April 4, 1903, and the trial took place on May 6th following. According to the medical testimony, a lapse of a month or six weeks is necessary after the operation before relief to the patient may be expected. In reply to a question of plaintiff's counsel as to whether, if there was to be a recovery, it would be a matter of months or years, under the most favorable circumstances, the surgeon testified as follows: "A. Well, I don't quite like to say years; yet I am willing to say months. Now, my reason for this hesitancy is Mrs. Searles' extraordinary good looks—that she is apparently well nourished and developed. She seems to be a woman of a good deal of character; a woman of a good deal of fortitude; a good deal of physical resistance—that is, resisting power; and I confess to a degree of disappointment that she has not got better up to the present time. If Mrs. Searles should be a sufferer three or five years from now, I don't know that I should be disappointed, yet I see no reason why she should not ultimately recover from this affection." Upon the question as to the final result of the operation, he further testified on cross-examination that the time had hardly been sufficiently long to predicate an opinion upon it; that he thought the parts were not quite healed as yet, and that it was hardly fair to assume yet that this was not going to be followed by a certain amount of relief; and that it was his earnest hope that the operation would be followed by a complete recovery. Another of the plaintiff's physicians testified that he did not think sufficient time had then elapsed to get the full benefits that might follow from the operation. We think that to permit the verdicts to stand under these circumstances might work injustice to the defendant, while the granting of a new trial would give the parties an opportunity to retry the cause with the added light as to the nature and character of the plaintiff's injury and disability which the lapse of further time would naturally develop. This is a power the court may exercise in its sound discretion, where, by reason of mistake or surprise at the trial, it can see that justice has not been done by the verdict. *Hutchinson v. Coleman*, 10 N. J. Law, 74; *Moore v. R. Co.*, 24 N. J. Law, 277 (Potts, J.).

The result is that the rules will be made absolute, and a new trial granted.

LOUISVILLE RY. CO. *v.* TEEKIN.

(Court of Appeals of Kentucky, Feb. 9, 1904.)

[78 S. W. Rep. 470.]

Street Railways—Injuries to Teams—Punitive Damages—Gross Neglect—Evidence—Sufficiency.

Evidence that a street car was running through a narrow city street, after dark, at a rate of from 12 to 20 miles an hour; that it failed to sound its gong at the crossing; and that the motorman was looking back, and not ahead—was sufficient to show gross neglect and authorize punitive damages in an action for injuries by a driver of a team.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by Joseph Teekin against the Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Farleigh, Straus & Farleigh, for appellant.
Chatterson & Blitz, for appellee.

O'REAR, J. The decisive question in this case is whether an instruction allowing punitive damages should have been given. Appellee was driving his delivery wagon over one of the streets of Louisville after dark, about 8 o'clock at night. The street was so narrow that appellant's double-track street railway took up the most of it. Appellee's wagon was being driven on one of the tracks, when, being warned by a car coming up in his rear, he drew off to the other track (there being not enough room to the side of the track next to the curbing), when another car, coming in the opposite direction, struck his horse, killing it, demolishing the wagon, and injuring appellee. This last-named car, according to the evidence for appellee, was being run at a high rate of speed—from 12 to 20 miles an hour. It failed to sound its gong at the street crossing near which the accident occurred. The motorman was looking back, and not ahead. We are of opinion that this evidence was enough to base an instruction on for punitive damages, allowable for gross neglect.

Judgment affirmed, with damages.

MITCHELL *v.* NEW ORLEANS & N. E. R. CO.

(Supreme Court of Mississippi, Feb. 29, 1904.)

[36 So. Rep. 1.]

Railroads—Killing Animals on Track—Evidence.

Whether the engineer was negligent in the killing of a horse on the track is a question for the jury, the track having been straight for more than a mile from the place, it having been a clear starlight night,

Bjornquist v. Boston & A. R. Co

the engineer testifying that he saw the buggy on the track when he was "within 100 yards, or thereabouts," and that he sounded no alarm, and made no effort to stop the train, because he did not know there was a horse attached to the buggy, and knew it would be impossible to stop the train in time.

Appeal from Circuit Court, Hancock County; J. H. Neville, Judge.

Action by C. J. Mitchell against the New Orleans & North-eastern Railroad Company. Judgment for defendant. Plaintiff appeals. Reversed.

J. R. Tally and Wm. Williams, for appellant.
Fewell & Son, for appellee.

TRULY, J. The case should have been submitted to the jury for decision upon the facts. The undisputed testimony shows that the horse was killed near a trestle, where the track, in the direction from which the train was approaching, was perfectly straight for more than a mile and a half; that the accident occurred upon a clear starlight night. The engineer testified that he saw the buggy standing on the track when "he was within a hundred yards, or thereabouts"; that he made no effort to stop the train, and sounded no alarm, for the reason that he knew it would be impossible to stop within the distance before striking the object; and that he did not know that there was any horse hitched to the buggy. From this state of facts it was for the jury to say whether the engineer did all in his power to prevent the accident, and whether, under the circumstances, it was or not an exercise of ordinary diligence not to sound an alarm, and whether, considering the location of the wounds on the animal, it could have been struck in the manner testified to by the engineer. This record fails to show any reason why the animal might not have gotten off the track in time to save its life, if the alarm had been sounded in due time.

Reversed and remanded.

BJORNQUIST v. BOSTON & A. R. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 25, 1904.)

[70 N. E. Rep. 53.]

Trespassers on Trains—Scope of Employment.

On evidence that a railroad servant was managing cars, there being nothing to show that any other person was in control of them at the time, the jury could find that it was within the scope of such servant's employment to keep trespassers away from cars.

Same—Care Due.*

To a trespasser on its cars a railroad owes no duty, except to refrain from willfully or wantonly and recklessly exposing him to danger.

*See foot-note appended to *Harris v. Southern Ry. Co.* (Ky.), 8 R. R. R. 753, 31 Am. & Eng. R. Cas., N. S., 753, where all the preceding authorities in this series are collected.

*Bjornquist v. Boston & A. R. Co***Same—Recklessness and Wantonness—Use of Language.**

Recklessness and wantonness on the part of a railroad servant in dealing with a trespasser on its train is not to be inferred from the mere use of language intended to influence the trespasser's voluntary action, though the language used is not necessary or proper, but only where it is so unreasonable or improper in reference to its probable effect on the safety of the trespasser as to indicate a wanton and reckless disregard of probable dangerous consequences.

Same—Same—Ordered from Moving Train.

Plaintiff, a boy of from eight to nine years of age, who lived near a railroad, and was familiar with trains, was injured in jumping off a slowly moving freight car, on which he was stealing a ride. The immediate cause of his jumping was an order of the brakeman to get off, "or I'll break your neck": *held*, that there was no such apparent probability of the injury caused as to indicate in the language of the brakeman a wanton and reckless disregard for harmful consequences.

Same—Same—Burden of Proof.

In an action for injuries to a boy trespassing on a freight car, the burden was on plaintiff to show reckless and wanton misconduct on the part of defendant's servant.

Exceptions from Superior Court, Suffolk County; Robt. J. Harris, Judge.

Tort for personal injuries by Charles Bjornquist, by next friend, against the Boston & Albany Railroad Company. There was verdict for plaintiff, and defendant excepted. Exceptions sustained.

S. A. Fuller and W. E. Bowden, for plaintiff.

Samuel Hoar and Geo. P. Furber, for defendant.

KNOWLTON, C. J. The defendant was moving two or three oil tank cars on a short side track used for loading and unloading freight, close by its freight yard in Cambridge. The switching engine was behind the cars without being coupled to them, and the cars were pushed or "kicked" a short distance on the tracks, and left to stop from their own inertia. These were platform cars, constructed with a large tank extending longitudinally between points about two feet from the ends of the car, and with stakes set at intervals along the sides of the car at the edge of the floor, with an iron rod passing through the top of the stakes, leaving room to pass between the tank and the rod on each side. The plaintiff, a boy of ordinary intelligence, about 8½ years of age at the time of the accident, was a trespasser on the forward one of these cars; lying on his stomach, with his feet and legs hanging over the side of the car. At that point there was an iron step on the side of the car, and he had climbed up, taking hold of the stake, and was riding as the car was pushed by the engine. The floor of the car was about as high from the ground as his shoulders when he was standing, or, as he testified, about as high as the crutch which he used at the time of the trial. One Perry, a companion, three years older than he, had got up on the opposite side of the car with his feet on the step, which was an iron strap or loop attached underneath to the side of

the car, and was riding, holding onto the upright stake which was near the end of the car. One of the defendant's servants, who is described as a brakeman, had uncoupled the engine from the car next it, and was riding on the car, when he saw one or both of these boys near the forward end of the forward car, and called out in a loud tone, "Get off there, or I'll break your neck." The boys immediately started to jump off, and the plaintiff fell so that his feet came upon the track, and he was seriously injured. His language in testifying was: "When I was going to jump off, I slipped. * * * There was a step there. I put my foot in that, and I was going to jump, and I slipped and went under the wheels." The defendant's servant was acting in the management of the cars just before the accident, and it does not appear that any other person was employed at that time in the control of them. On this evidence the jury might well find that it was within the scope of his employment to try to keep trespassers away from them. To the plaintiff, as a trespasser, the defendant owed no duty, except to refrain from willfully or wantonly and recklessly exposing him to danger. This is the uniformly recognized rule in regard to the management of a proprietor's business, and the performance of his ordinary duties. A question may be raised whether the rule is the same if the proprietor does anything which is directed to the trespasser, and is intended to affect immediately his conduct or condition. We are of opinion that in ordinary cases this makes no difference, if the action is in the exercise of the legal rights of the proprietor, and in other respects is in the proper performance of his duties. When this action takes the form of the intentional use of force upon the person of a trespasser, the force must be limited to that which is reasonable under the circumstances, in the exercise of his legal rights. Any excess may be punished as an assault and battery. This is because force upon the person of another is ordinarily harmful and injurious. One who uses it must guard his conduct so as not to go beyond his legal rights. So, if an action is brought for reckless and wanton negligence in dealing with a trespasser, and if the conduct relied on is the intentional use of force upon the person in an attempt to exercise one's legal rights, it may well be that, because of the injurious nature of the agency employed, wantonness and recklessness would ordinarily be inferred from any excess of intentional force beyond that which was reasonably necessary. But this principle is not applicable to a use of language which is intended to have no further effect than to influence the voluntary action of another. In the latter case the question is not whether the use of the language is entirely reasonable and proper, but whether it is so unreasonable or improper, in reference to its probable effect upon the safety of the person to whom it is addressed, as to indicate a wanton and reckless disregard of probable dangerous consequences.

Bjornquist v. Boston & A. R. Co

In the present case, all that the brakeman did which is relied on as reckless and wanton negligence was to call out as above stated, and to walk forward in an ordinary way. According to the testimony of two of the plaintiff's witnesses, he was not on the car on which the plaintiff was, but on the one behind it. According to the testimony of the plaintiff, he was at the rear end of the car on which the plaintiff was, and from there was walking forward. If we assume that he was in charge of the cars, it was his duty to do all that he reasonably could to keep trespassers away from them. It was his duty, not only in reference to the interests of his employer, but in reference to the interests of the trespassers themselves. The dangers to trespassers about moving cars, especially in freightyards, are great and constant. The persons with whom the employee has to deal, whether vagrants trying to steal rides upon freight trains or boys seeking amusement upon moving cars in freightyards, are almost always of a bold and lawless kind. Sober reasoning, friendly advice, and gentle admonition, after they have accomplished their purpose, would in most cases be entirely ineffectual to prevent or diminish trespassing by such persons. From the necessity of the case, appeal must be made in some form and to some degree to fear, as a motive to induce obedience to proper rules. It is necessary and proper, in a reasonable way, to interfere with the enjoyment of boys taking rides in such places, rather than to permit them to complete their rides pleasantly. The evidence is that the plaintiff lived only 300 or 400 yards from the place of the accident, and that between his home and the railroad were open fields, where the boys were accustomed to play ball and other games. He testified that just before the accident he was returning from fishing, and had stopped with two other boys to play tag on the platform of one of the buildings of the oilworks at which cars were unloaded, and that as he saw the two tank cars and the engine, he called to Perry, his companion, "Come on, let's take a ride," and that they then ran and got upon the car furthest from the engine. It is hardly to be supposed that boys living so near and accustomed to play close by moving cars were ignorant of orders of their parents or others which forbade them to get upon the freight cars which were being switched back and forth in or near the yard. It is reasonable to infer that in dealing with such boys, quite as much for their own safety as for the interests of the railroad company, some show of severity would be needed on the part of the defendant's employees. These conditions are important in considering the conduct of the defendant's servant. He gave a single command, accompanied with a threat which no intelligent boy would interpret literally, but which implied a severe reproof, and a possibility of punishment if disobedience was repeated and persisted in. Except the use of this expression, which apparently was instantaneous,

Bjornquist v. Boston & A. R. Co

and perhaps almost involuntary, there was nothing said or done by him to which exception could be taken. Is this evidence of a wanton and reckless disregard for the personal safety of the boys? The conduct which creates a liability to a trespasser in cases of this kind has been referred to in the books in a variety of ways. Sometimes it has been called "gross negligence," and sometimes "willful negligence." Plainly it is something more than is necessary to constitute the gross negligence referred to in our statutes and in decisions of this court. The term "willful negligence" is not a strictly accurate description of the wrong. But wanton and reckless negligence in this class of cases includes something more than ordinary inadvertence. In its essence, it is like a willful, intentional wrong. It is illustrated by an act which otherwise might be unobjectionable, but which is liable or likely to do great harm, and which is done in a wanton and reckless disregard of the probable injurious consequences. This is a wrong of a much more heinous character than common inadvertence. See *Aiken v. Holyoke Street Railway Company* (Mass.) 68 N. E. 238, and cases there cited. In the present case there is no evidence to show when the brakeman first saw either of the boys, nor whether he had seen more than one of them before he spoke. His language seems to refer to but one person. It is at least as probable that he was speaking to the larger boy, Perry, who was standing on the step on the right-hand side of the car, as to the plaintiff. Perry's position was far more prominent than that of the plaintiff, who was lying on the floor of the car. The fact that the brakeman subsequently walked forward on the side where the plaintiff was is not significant, for, upon all the testimony, there was then nothing threatening in his attitude or manner. When he spoke the cars must have been going very slowly, for the testimony of both of the boys is that they started to jump off as soon as he spoke, and the cars moved only about 50 feet after the plaintiff fell. There was no evidence that the brakes were set at any time. Moreover, Perry testified that when he jumped off he passed around in front of the car and went away. If the cars, stopping of their own inertia, moved only 50 feet after the accident, they had then come almost to a state of rest. The question relates to the state of mind of the brakeman, which can be inferred only from the circumstances. If his language was addressed to the plaintiff, was there, from his point of view, such a probability that he would jump off before the car stopped as to involve any danger of falling? If the plaintiff should start to jump off before the car stopped, was there such a probability that he would get under the wheel as to indicate wantonness and recklessness on the part of the brakeman? There was a stake and a strap or loop step attached to the side of the car, just where the plaintiff was. Besides, the side of the car projected out beyond the track,

Bjornquist v. Boston & A. R. Co

and, if the plaintiff fell perpendicularly, he would not be likely to fall upon the track. The brakeman had no reason to think that a boy riding upon a car in that way would fail to use such care as he was capable of in getting off, whether he started before the car stopped or afterwards. The undisputed evidence shows that the plaintiff was not acting involuntarily, but was trying to jump from the step, when his foot slipped.

The right of a brakeman upon a train to perform his prescribed duties, even though performance involves something of peril to a trespasser, is stated in *Leonard v. Boston & Albany Railroad Company*, 170 Mass. 318, 49 N. E. 621. In *Planz v. Boston & Albany Railroad Company*, 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835, where the trespasser was injured in jumping from a moving freight train at the command of a brakeman, it was held that there could be no recovery. *Mugford v. Boston & Main Railroad*, 173 Mass. 10, 52 N. E. 1078, is very similar to the present case, and it was held that there was no evidence of negligence on the part of the defendant's servant. In that case the plaintiff was a boy a little older than the present plaintiff, but the cars seem to have been running considerably faster than these. See, also, *Bolin v. Chicago, St. P., M. & O. Railway Company*, 108 Wis. 333, 84 N. W. 446, 81 Am. St. Rep. 911. In view of the duties which the defendant's servant had to perform, and the circumstances attending the accident, we discover no evidence that when he gave his command there was such an apparent probability that it would cause serious injury to the plaintiff as to indicate a wanton and reckless disregard for harmful consequences. If he had owed the plaintiff a duty to make provision for his safety, or to refrain from action which might in any degree expose him to danger, the case would be very different. If the question were whether he exercised such care for the plaintiff's safety as would be deemed reasonable for one charged with a positive duty to look out for him and protect him, it might well be submitted to the jury. If the brakeman's command was given to the plaintiff, as distinguished from the larger boy, in a different situation, it might well be found that he did not exercise a high degree of care for the plaintiff's safety. But such an omission falls short of recklessness which is equivalent to a willful wrong for which he would have been subject to criminal punishment if the accident had caused the plaintiff's death. The burden of proof was upon the plaintiff to show this grave misconduct of the defendant's servant. While we feel that the case is not free from difficulty, we are of opinion that there was no evidence which tends to show that he was guilty of a wanton and reckless disregard for human life and personal safety.

Exceptions sustained.

KEEFE v. NORFOLK SUBURBAN ST. RY. CO. et al.

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 27, 1904.)

[70 N. E. Rep. 46]

Personal Injuries—Release—Fraud—Evidence.

Plaintiff, after testifying, in regard to a release signed by her, that defendant's agent gave her an order on a physician, and then handed her the paper to sign, saying to her, "Sign that slip of paper, so that I can show it to the company, so they can see I have sent you to a doctor," and that she signed it without seeing anything on it, and without knowing that she was making a settlement, may testify that just after she signed the paper the agent told her to come to him after she was well, and he would settle all her claims; this having a bearing, at least, on her claim of fraud.

Appeal—Evidence—Objections.

The objection that witness' answer was not responsive may not be made for the first time on appeal.

Personal Injuries—Damages—Evidence—Woman's Age.

Evidence, in an action for personal injury to a woman 40 years old, held sufficient, as to the likelihood of her climacteric occurring before she should fully recover, to take to the jury the question of its being an element of damages.

Exceptions from Superior Court, Suffolk County; Robert O. Harris, Judge.

Action by Nellie Keefe against the Norfolk Suburban Street Railway Company and another for personal injuries. Verdict for plaintiff, and defendant excepted. Exceptions overruled.

Defendant introduced a paper purporting to be a release to the Norfolk Suburban Street Railway Company (which was absorbed by the West Roxbury & Roslindale Street Railway Company, the defendant in this case) of all claims and demands against the Norfolk Suburban Street Railway Company by reason of the accident for which the plaintiff sued. The plaintiff acknowledged that the signature upon the paper was hers, but stated that the paper was blank when she signed it, and that there was no writing or printing upon it. She testified that she rode on another car to the mill where she worked, where she remained all day; that on the afternoon of the accident an agent of the railroad called for her at the mill; that she learned after meeting him that he was giving money to other girls who had been on the car and claimed injury, but that she did not know whether she learned it before meeting him or not; that she was sent down into the office of the mill, where she talked with him and told him she was injured. She testified that he then suggested her having a doctor, and she told him she had a family physician, to wit, Dr. Hodgdon; that thereupon he gave her an order upon Dr. Hodgdon for medical treatment, a copy of which order is annexed to this bill of exceptions, marked "B"; that thereupon he handed her a paper upon which she saw neither print-

Keefe v. Norfolk Suburban St. Ry. Co

ing nor a seal, and asked her to sign it; that he did not read the paper to her; that when she signed the paper and received the order on the doctor she did not know that she was making a settlement of the case; that he said to her, after giving her the order on the doctor, and presenting the paper to her, "Sign that slip of paper, so that I can show it to the company, so they can see I have sent you to a doctor;" that thereupon she signed the paper. Plaintiff further testified: "After I signed the note he told me when I was all better to come down to Quincy, and he gave me his name and address, but I have forgotten it. He said he would settle all my claims. I have never been able to get that far, and I have never seen him since. He knew where I lived, but he never came to me."

James E. Cotter and Thomas F. McAnarney, for plaintiff.
Henry F. Hurlburt and Damon E. Hall, for defendant.

HAMMOND, J. 1. We think no error of law appears in the admission of the statements made to the plaintiff by McAloon in the same conversation in which she alleges she was fraudulently induced to sign the release, although they were made after she had signed it. While it may be true that they could not have formed any part of the statements which induced her to sign, yet they were a part of the conversation during which the paper was signed, and had a bearing, at least, upon her good faith in pressing the claim of fraud, and to meet the argument likely to be made by the defendant that this claim was an after thought on her part. It is argued by the defendant that this part of the plaintiff's testimony was not responsive to the question put to her. It was certainly responsive to the question as originally put, and the colloquy between the two counsel does not show that her counsel ever withdrew that question; but, however that may be, the point that the answer was not responsive to the question was not then taken by the defendant, and it is manifest that the court understood, and properly, that the objection of the defendant was based solely upon the ground that the testimony was not admissible. The objection that it was not responsive cannot now be of avail to the defendant.

2. At the time of the trial the plaintiff was 39 years and 11 months old, and her contention was that, if she should reach her climacteric before she had fully recovered, her suffering might be prolonged as one of the results of the accident. The defendant contended that upon the evidence the possibility that the plaintiff would reach her climacteric before her full recovery from the accident was so remote that it should not be considered by the jury as an element of damage, and at the close of the evidence asked the court so to rule. The court declined to rule as requested, and submitted this question to the jury, with instructions to which we do

Illinois Cent. R. Co. v. Burton

not understand the defendant to object, except so far as inconsistent with the ruling requested. While the evidence tended to show that the average age of married women at the time of the climacteric is about 45 or 46 years, and of unmarried women a year or two earlier, yet it tended also to show that sometimes it occurred when the woman was only 30 years of age, and sometimes not until after she was 55; and the physician who attended the plaintiff testified that she was at the age when the change of life might come, and "if that should come at the age of 40, as it often does with unmarried women, it might prolong her nervous condition and keep her from rapidly recovering her health." An expert physician called by the plaintiff testified that she was getting better now, and that it was "only a question of time when she will get well, provided the climacteric does not come on very soon"; that this period in the case of an unmarried woman "is liable to come at 40 years of age." Another expert called by the plaintiff testified that, "if the change of life should develop within the course of the next two years, I think that that would have a tendency to delay the recovery very much." It is true that there was much testimony to show that, after all, the chances seemed to be against the occurrence of the climacteric until after full recovery; still, in view of all the evidence, it cannot be said as matter of law that the likelihood that the climacteric would not occur until after full recovery from the effects of the accident was so remote as to call for the instruction requested by the defendant. The whole question was one of fact for the jury. The remaining exceptions, having been waived, are not considered.

Exceptions overruled.

ILLINOIS CENT. R. CO. v. BURTON.

(Court of Appeals of Kentucky, March 3, 1904.)

[79 S. W. Rep. 231.]

Injury to Employee—Negligence—Torpedo on Track—Violation of Rule for Protection of Passengers.

Where a rule of a railroad company prohibited the placing of torpedoes on the track at or near stations, where they might explode, and injure persons getting on or off trains, the placing of a torpedo at a "flag station," where some passenger trains did not stop, was a violation of the rule entitling an employee injured by a torpedo so placed to recover on the theory that a violation of the rule was negligence.

Same—Same—Same—Same.

Where a rule of a railroad company forbade the placing of torpedoes at stations where they might injure passengers, a violation of the rule was negligence per se entitling an employee injured by a torpedo so placed to recover.

Appeal.

Where appellant on motion for a new trial did not object on the ground that the jury was composed of but 11 men, that objection could not be raised on appeal.

Illinois Cent. R. Co. v. Burton

Appeal from Circuit Court, Hickman County.

"Not to be officially reported."

Action by J. W. Burton against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. M. Dickinson, Pirtle & Trabue, and N. P. Moss, for appellant.

Joe W. Bennett and John R. Evans, for appellee.

PAYNTER, J. The appellee was an employee of the appellant, and his business required him to approach a station known as "Krebs" on a hand car. "Within the line where passengers get off and on trains" the hand car ran over a torpedo which had been placed there by an employee of the appellant. It exploded, and a piece of the covering penetrated the calf of appellee's leg, which resulted in an injury from which he did not recover for several weeks, and from which he suffered physical pain and mental anguish. The appellee based his right to recover upon the ground that it was against the rules of the company to place torpedoes at or near stations, which might explode, and injure persons getting on and off of trains and employees of appellant whose business might call them at and about the station. The case was tried upon the theory that, if the torpedo was so placed within the limits where passengers got on and off at Krebs, the plaintiff was entitled to recover. While the appellant objected to an instruction given by the court which was predicated upon that theory, still it offered instruction "a," which is substantially the same as the court gave. It reads as follows: "The court instructs the jury that if they believe from the evidence the defendant the Illinois Central Railroad Company's agents or servants placed the torpedoes which exploded and injured plaintiff, if they believe he was injured, on the railroad track near the station Krebs, in violation of the rules of said company, they will find for plaintiff whatever sum they think he has sustained, not to exceed \$1,999.99, by the reason of the explosion of said torpedoes." This instruction was equivalent to the one which the court gave. However, before this instruction was offered, the appellant offered instruction "b," which reads as follows: "The court instructs the jury that if they believe from the evidence that Krebs is not a town or a railroad station where passenger tickets are sold, but is only a railroad passing, or place where trains pass each other, and where only the section boss of defendant railroad lives, they will find for defendant, notwithstanding they may believe from the evidence that certain accommodation trains of defendant do stop there occasionally upon being flagged, and take on passengers, and, upon request, to let passengers off." This instruction is based upon the theory that, because Krebs was only a flag

station, the appellee was not entitled to recover. A flag station is a station in the meaning of the rule, the same as it would be if all the passenger trains stopped there. Presumably, at a flag station fewer passengers get off and on trains than at a station where all the trains stop, hence the per cent. of danger to passengers would be less at a flag than at regular stations. It seems to us, however, the rule is violated if a torpedo is placed at a flag station the same as it would be at a regular station. So the appellant tried the case upon the theory that it would have been liable if a torpedo had been placed within the limits of a regular station, and had exploded, and injured appellee. Had the court been in error (and we do not think it was) in allowing a recovery upon appellee's theory, the appellant did not, on the trial of the case, endeavor to extricate the court from its error in assuming there could be a recovery for the infraction of the rule which resulted in appellee's injury. The court was of the opinion that it was per se negligence to place the torpedo where it exploded, and in this view we concur.

The bill of exceptions shows that the parties appeared by their attorneys, and thereupon a jury was sworn, and their names are given. From the statement in the bill of exceptions the jury which tried the case was composed of only 11 men. It is quite certain that the parties agreed to try the case with 11 jurors (although it is not so recited in the record), or the clerk omitted the name of the twelfth juror in making the transcript. However, it is not proper, and we do not assume, that either of these theories is correct. The record fails to show that the appellant assented to a trial with 11 jurors. Of course, it was entitled to have its case tried by 12 jurors. In the grounds for a new trial no objection was made to the verdict because it had been returned by 11 jurors. In *Ayers v. Barr*, 5 J. J. Marsh. 286, it appeared that there were only 11 jurors, and that the plaintiff in error was not present in court, and therefore did not waive the objection to the number. In *Oldham v. Hill*, 5 J. J. Marsh. 300, it appeared that only nine jurors were sworn, and the court held that, as there was no waiver on the record, express or implied, of the objection to the number of the jury, the case should be reversed. It does not appear in either case that the verdict was objected to in the lower court. Presumably, an exception was reserved, so as to give this court the right to review the action of the lower court. In *Ross v. Neal*, 7 T. B. Mon. 408, 13 jurors were sworn and tried the case. It appeared in that case that no exception to the verdict had been taken in the lower court, and that the appellant was silent until he reached this court. The court held that it was not proper to permit him to attack the verdict here for the first time. Under the numerous adjudications of this court, if the error complained of occurred during the progress of the trial, and was not made

Weed v. Chicago, etc., Ry. Co

the subject of an objection in the grounds for a new trial, this court will not consider it. Our opinion is that the appellant is not entitled to have its attack upon the verdict sustained, because it failed to complain in its grounds for a new trial that the jury was composed of 11 men.

The judgment is affirmed.

WEED v. CHICAGO, ST. P., M. & O. RY. CO.

(Supreme Court of Nebraska, May 18, 1904.)

[99 N. W. Rep. 827.]

Liability for Injuries to Employees.*

Employers are not insurers. They are liable for the consequences, not of danger, but of negligence; and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business.

Duty to Warn Employees of Dangers.†

A servant, who, from the length or character of previous service or experience, may be presumed to know the ordinary hazards attending the proper conduct of a certain business, is not entitled, as an absolute right, to the same or similar notice of dangers incident to the employment as if he were ignorant of, or inexperienced in, the particular work. *Omaha Bottling Co. v. Theiler*, 80 N. W. 821, 59 Neb. 257, 80 Am. St. Rep. 673.

Negligence—Ordering Brakeman to Board Moving Car.

It is not negligence per se for a conductor of a freight train, while engaged in switching cars at a station, to order an experienced brakeman to board and stop a car moving at a speed of from four to six miles an hour.

Same—Same.

In such case, where it appears from the evidence that the act ordered to be performed is a usual and customary act, performed by freight brakemen generally under like circumstances, the giving of the order will not be imputed to the company as negligence.

Assumption of Risk—Doing Dangerous Work in Obedience to Orders.‡

Where an order is given by a master to a servant to do a dangerous

*As to the degree of care due from railroad to its employees, see foot-note appended to *Scott v. Seaboard Air Line Ry. Co. (S. Car.)*, 9 R. R. R. 148, 32 Am. & Eng. R. Cas., N. S., 148; *Bodie v. Charleston & W. C. Ry. Co. (S. Car.)*, 9 R. R. R. 95, 32 Am. & Eng. R. Cas., N. S., 95 (care required in adopting appliances); *Pennsylvania Co. v. Fishack (C. C. A.)*, 9 R. R. R. 85, 32 Am. & Eng. R. Cas., N. S., 85 (degree of care required in maintaining tracks and appliances, and in operating road); foot-note appended to *Roche v. Denver & R. G. R. Co. (Colo.)*, 8 R. R. R. 955, 31 Am. & Eng. R. Cas., N. S., 955 (care required in furnishing appliances).

†As to the duty of a railroad company to instruct and warn its inexperienced or ignorant employees, see foot-note appended to *Gay's Adm'r v. Southern Ry. Co. (Va.)*, 8 R. R. R. 537, 31 Am. & Eng. R. Cas., N. S., 537.

‡As to the assumption of risks incident to the discharge of hazardous duties, see foot-note appended to *Simmons v. Southern Traction Co. (Pa.)*, 10 R. R. R. 362, 33 Am. & Eng. R. Cas., N. S., 362, where all the preceding authorities in this series are collected.

As to the assumption of risks of, and contributory negligence in

Weed v. Chicago, etc., Ry. Co

act, which must be done at once or not at all, and the servant knows and realizes the dangerous character of the act, and has time to consider and does consider and decide which of several known methods of performing the act he will adopt, and such act, though dangerous, is not unusual, but customary, in the conduct of the business in which he is employed, he assumes the risk of obeying the order.

Same—Same—Contributory Negligence.

And, in such case, if there are several methods of carrying the order into effect, varying in degree as to attending danger, and he selects the most dangerous of those methods, and is injured, he cannot recover therefor.

Direction of Verdict.

A trial judge is no longer required to submit a case to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in proceeding to find a verdict in favor of the party introducing such evidence. *Ry. Co. v. Sporer* (Neb.) 94 N. W. 993.

Same.

Evidence examined, and held amply sufficient to sustain the peremptory instruction given by the court.

Commissioners' Opinion. Department No. 2. Error to District Court, Douglas County; Read, Judge.

"Not to be officially reported."

Action by Corydon M. Weed against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. There was judgment for defendant, and plaintiff brings error. Affirmed.

Jefferis & Howell, for plaintiff in error.

B. T. White and J. B. Sheean, for defendant in error.

FAWCETT, C. This is an action brought by plaintiff in error (hereinafter styled plaintiff) against defendant in error (hereinafter styled defendant) to recover for injuries received June 10, 1898, at Ft. Calhoun, Neb. Plaintiff was a brakeman upon one of defendant's freight trains, and, while attempting to mount a moving flat car on the date mentioned, slipped and fell in front of the car. Two wheels of the car passed over one of his legs, and one wheel passed over the other. Upon the trial, and after both sides had rested, the court instructed the jury to return a verdict in favor of the defendant. A motion for new trial was overruled, and judgment entered on the verdict, from which plaintiff prosecutes error.

The motion for new trial contains the following two assignments of error:

"First. Error of occurring upon the trial and duly excepted to at the time by plaintiff.

"Second. The court erred in instructing the jury to return its verdict against the plaintiff and in favor of the defendant, to which instruction plaintiff duly excepted at the time."

doing dangerous work in obedience to orders, see foot-note appended to *Wrightsville & T. R. Co. v. Lattimore* (Ga.), 9 R. R. R. 58, 32 Am. & Eng. R. Cas., N. S., 58, where all the preceding authorities in this series are collected.

It will be seen that the first assignment above set out contains an important omission. Strictly speaking, it does not assign any error. But it being apparent that the omission is the mistake of the stenographer of plaintiff's attorneys, we have supplied the word "law," and will treat the assignment as if it assigned "errors of law occurring upon the trial, duly excepted to."

We have read the record through carefully from beginning to end, and have not been able to find any errors in the rulings of the court on either the admission or exclusion of testimony which would justify a reversal of his rulings. Indeed, in justice to the trial court, we feel constrained to say that the record is exceptionally free from errors of that character. The only question that we shall discuss, therefore, is that raised by the second paragraph of plaintiff's motion for new trial—that "the court erred in instructing the jury to return its verdict against the plaintiff, and in favor of the defendant."

The plaintiff, in his written statements made after the injury, and also while testifying upon the stand, was very frank in all of his declarations. His answers to the questions asked him indicate not only that he is a frank and truthful man, but also that he is a man of much more than average education and intelligence for one occupying the position of brakeman. There is very little conflict in the evidence. The undisputed evidence establishes the following facts: That for 10 years prior to the time of the accident plaintiff had been a brakeman in the employ of the defendant and other railroads, working as a brakeman and switchman for the different roads. That at the time of the accident he was working as head brakeman, and was engaged, with one Bassinger, a fellow brakeman, in switching cars at the station of Ft. Calhoun. That one car had been thrown in on one of the side tracks. That plaintiff had assisted in this work, and was then standing about 150 feet north of what is termed the "passing-track switch." That, while standing there, Bassinger threw the house-track switch, uncoupled the north car, and signaled plaintiff to the effect that he need not ride it in on the house track. The car was being "kicked" in on this track, as the witnesses designate it. That is to say, the engine had been run rapidly up to the switch, the car in question uncoupled, the engine reversed, and the car allowed to run down the track by the momentum thus given it. That the car in question was about to go over a public crossing. That it was the duty of one of the brakeman to ride a car in under these circumstances. That, when the signal from Bassinger was given, the car was moving north towards the house track. That the conductor, who was standing some distance north of the plaintiff, saw that the car was about to go over a public crossing, and directed the plaintiff to "catch that car." That the car was then opposite, or a short distance north of, plaintiff. That the plaintiff ran after the car,

Weed v. Chicago, etc., Ry. Co

and along the west side thereof, until he got ahead of it, when he stepped in front of it, between the rails, and attempted to mount on the northeast corner of the car, by throwing one foot on the brake beam in front and the other on the journal on the side. One hand had hold of the stake pocket on the side, and the other had hold of the brake staff. That when in this position his left foot slipped from the journal, and he fell in front of the car, sustaining the injuries complained of. That the car, at the time Bassinger signaled him, and also at the time he attempted to mount it, was going at a speed of from four to six miles an hour. That it was an ordinary flat car, similar in style and equipment to flat cars used on all railroads.

Plaintiff, in his petition, alleges that the defendant "had negligently failed to equip said car with the necessary steps or means of boarding the said car," but practically abandons that claim on the trial. If not abandoned, it could not be maintained, for the reason that the evidence shows the car was constructed, equipped, and had all the appliances that cars of its class have, on all railroads. *Omaha Bottling Co. v. Theiler*, 59 Neb. 263, 80 N. W. 821, 80 Am. St. Rep. 673; *O'Neill v. Ry. Co.*, 92 N. W. 731; *Titus v. R. R. Co.*, 136 Pa. 618, 20 Atl. 517, 20 Am. St. Rep. 944. In *Titus v. R. R. Co.*, the Supreme Court of Pennsylvania say: "Absolute safety is unattainable, and employers are not insurers. They are liable for the consequences, not of danger, but of negligence, and the unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business."

Plaintiff's main contention is that defendant was guilty of negligence, in this: That the conductor, while plaintiff was standing in a place of safety, ordered him to catch this moving car; that it was a sudden order, which must be obeyed at once or not at all; that amounting a car moving at the rate of speed at which this car was moving was not an act within the scope of plaintiff's employment; that it was a dangerous act, and known to be so by the conductor who gave the order; that plaintiff, in attempting to obey the order of the conductor, did not have time for reflection, and was not guilty of negligence himself in attempting to carry out the order of the conductor, under the circumstances then existing. Defendant contends that the mounting of cars of all kinds, including flat cars, while in motion, and while running at as high a rate of speed as the evidence shows this car was running, was usual and customary by all brakemen, including plaintiff, and was one within the scope of his employment; that the danger connected therewith was well known to plaintiff; that it was an order the conductor had a right to give; that, in executing the order of the conductor, plaintiff had to run a considerable distance to overtake the car; that while he was so running he had ample time for reflection, and did reflect; that there were five different ways in which he

could have mounted the car; that while he was running after the car he considered the question, and deliberately made up his mind which method he would adopt; that in making his election he elected to attempt to mount the car by the most dangerous method of the whole five; and that for these reasons the defendant is not liable: First, because defendant is not shown to have been negligent; second, plaintiff was guilty of contributory negligence; and, third, that plaintiff's injuries resulted from risks and dangers open and obvious to him, which were assumed by him in his contract of employment, and by his continued service with the defendant.

We think all three of these reasons are sound. The undisputed evidence shows that the rate of speed at which this car was running at the time the conductor gave the command to the plaintiff was not an unusual rate of speed, but that cars were often propelled at as high a rate of speed while switching in the yards, and that it was a usual thing for brakemen to mount cars like the one in question while running as fast as this one was. The conductor saw the car running down the track and about to cross a public street or highway without any brakeman on it. The plaintiff was standing near, and the conductor ordered him to catch the car. That was the only order he gave. He left to the brakeman the determination of the question as to how the car should be caught. He knew that the plaintiff was a brakeman of many years' experience; that he knew, as well as he, all about the danger of catching the car, and the best method to be employed in doing so. He did not have time to instruct plaintiff how to execute the order, and, if he had had time, he would, as argued by defendant's counsel, have made himself ridiculous by attempting to tell the plaintiff how to do a thing which the plaintiff knew how to do as well as, and perhaps better than, he.

In our view of the case, the order given by the conductor was a proper one; and, if so, then negligence cannot be imputed to the defendant by reason of his having given it. Sullivan, J., in speaking for this court in *Norfolk Beet Sugar Company v. Hight*, 59 Neb., on page 106, 80 N. W. 278, says: "But if the danger is in fact known to the servant, or if the accident could be avoided by the exercise of ordinary care on his part, the doctrine of contributory negligence forbids a recovery." The danger of mounting this car was in fact known to the plaintiff. He knew it fully as well as, if not better than, the conductor; and, having had ample time for reflection while running after the car, and having it in his power to have avoided the accident which occurred, by adopting any one of the four methods of mounting the car which he rejected, instead of the one which he adopted, it seems to us, forbid a recovery in this case. The risk was not an unusual one. It was one clearly within the scope of his employment. In attempting to perform it, he chose the

most dangerous method of doing so, and also violated a rule of the company, made for his protection, and well known to him at the time, which forbade "stepping upon, or from, front end of moving engines or cars." He knew well the dangerous character of the act, and knew all about the construction of the car. He says himself that he knew the risk of getting on "that moving car"; that all the time he was running after the car he could see it; could see how it was equipped in mounting apparatus; had time to, and did, select and determine which way he would get on; that he pursued the method he decided upon, and that he had ample time to think which was the best way; that, as a switchman, it was his duty to mount all kinds of moving cars, including flat cars; that it was usual and customary to get on moving cars. He says: "In my work as a brakeman, it was a common occurrence to catch and mount cars moving as fast as this one; and I have no fault to find with the conductor for telling me to catch this car, for the danger was no more in catching that car than we often incur in catching other cars." He adds: "But it was unnecessary in this case, because I would have mounted this car up by the switch, without having to run to catch it, if the brakeman [Bassinger] had not given me the signal to let it go in without." The trouble with this qualification of his admission is that at the time Bassinger gave him the signal he was 150 feet away, and, according to his own statement, the car was then running as fast as it was when he attempted to mount it. It will be seen from this that he was not near the car when it was kicked onto this track, and could not have mounted it before it started on its way, or at any time before it had attained the rate of speed at which it was running at the time he attempted to mount it.

Numerous authorities are cited by the plaintiff in his brief—among them, *C., R. I. & P. Ry. Co. v. McCarty*, 49 Neb. 475, 68 N. W. 633—but none of them justify a recovery under facts similar to those in the case at bar. The facts in *Railway Co. v. McCarty* are so essentially different from the facts in this case that nothing could be gained by a comparison of them. In *C., R. I. & P. Ry. Co. v. Sporer* (Neb.) 94 N. W. 993, Sedgwick, J., says: "Judges are no longer required to submit a case to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence."

The undisputed evidence so clearly and overwhelmingly sustains the trial court in directing a verdict for defendant that it would have been a clear shirking of duty and responsibility to have done otherwise. We recommend that the judgment be affirmed.

Southern Ry. Co. v. Cheaves

DUFFIE and GLANVILLE, CC., concur.

PER CURIAM. The conclusions reached by the Commissioners are approved, and, it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the judgment of the district court be affirmed.

SOUTHERN RY. CO. v. CHEAVES.

(Supreme Court of Mississippi, May 23, 1904.)

[36 So. Rep. 691.]

Injury to Fireman—Contributory Negligence.

In an action against a railroad company for injuries to a fireman caused by the negligence of the engineer in going to sleep and allowing his train to collide with another at a station, evidence considered, and held not to show the fireman guilty of contributory negligence.

Injury to Employee from Act of One Having the Right to Direct His Services—Application of Constitutional Provision.

Under Const. 1890, § 193, providing that an employee of a railroad company may recover for injuries resulting from the negligent act of one having a right to direct his services, the employee's right to recover is not limited to cases where he is injured whilst executing at the very time of his injury some special command or order given by his superior officer, but he is entitled to recover if injured by the negligence of a superior officer, or a person having the right to direct his services, whether he is at the time obeying any special command, or engaged merely in the discharge of his ordinary duties; the superior officer or person also being engaged in discharging simply the primary duties of his station, and not the positive duties of the master.

Appeal from Circuit Court, Lowndes County; E. O. Sykes, Judge.

"To be officially reported."

Action by Ira F. Cheaves against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

For former opinions, see 33 South. 649; 34 South. 385.

Plaintiff was a fireman, and was injured by the collision of two trains at Columbus, Miss., caused by the negligence of the engineer in charge of the engine on which plaintiff was at work, in going to sleep. The evidence showed that there was a train standing alongside the station at Columbus, on what was known as the "house track," ready to go out. An incoming freight train of 35 cars from the East, being pulled by the engine on which the plaintiff and the sleeping engineer were, crashed into the one standing on the switch at a rate of speed variously estimated at from 15 to 30 miles per hour. There was a whistle board about a mile east of the Columbus depot, at which it was the duty of the incoming engineer to blow the whistle and slow up to a speed not exceeding 10 miles an hour, with his train under complete control. There was a side track 600 yards east of the sta-

tion, on which all freight trains from the east always went. Columbus was a terminal station, and the engine, when brought in, was turned over to a hostler, and the yardmaster, with the yard engine, took charge of the train. There were five public crossings between the whistle board and the side track, at all of which the whistle should have been blown and the bell rung. This was never done, and the train came in without warning of any kind. The yardmaster, who was in the eastern part of the yard, tried very hard to flag the train, but his efforts were not heeded. When this east-bound train left Steen's, the nearest station east of Columbus, 11 miles away, the engineer told the plaintiff to keep the engine red-hot; he was going in. This was the last word spoken by the engineer to the fireman. There were verdict and judgment for the plaintiff for \$7,500. Defendant's motion for a new trial was overruled, and it appeals. The opinion of the court contains a further statement of the facts.

A. F. Fox, for appellant.

Orr & Harrison and H. C. Peebles, for appellee.

WHITFIELD, C. J. We have already, in the original opinion in this case, and in response to the suggestion of error, held that under rule 574 of the company, providing that "when with an engine they must obey the orders of the engineman," as applied to the facts of this case, this engineer was the superior officer of the fireman, and a person having the right to control and direct the services of the fireman, within the meaning of section 193 of the Constitution of 1890. That holding is the law of this case. No sound principle requiring the fireman, in the interest of the safety of the traveling public, carefully to discharge all the duties of his station in the varying circumstances of different cases, should be disregarded. We deal with this case on its particular facts, and under the rule we have quoted. The engine in this case was leaky, and the coal and water short. The train had been delayed many hours on account of a wreck. It was not only requisite that the train should reach Columbus, but that the engine, when it did reach Columbus, should have a good fire, since the engine was to be turned over to the hostler to coal it up and get it ready to go out again soon after. The distance from Steen's to Columbus was only 8 or 9 miles. The train was running at a rate, perhaps, of 20 to 25 miles an hour. Some witnesses stated 15, and some 30, miles an hour. At the lowest estimate it would only take about half an hour, and at the highest a quarter of an hour, to run into Columbus. The engineer had told the fireman to keep her "red-hot; we are going in"; "Keep her red-hot"—meaning, of course, for the fireman to give his concentrated attention to keeping up the steam. The fire had to be constantly fed. The coal had to be removed twice to get it out from the rear of the tender to

the fire box. A disinterested witness shows that the furnace door was open as the engine approached the train with which it collided. The fireman was evidently working hard at his job of keeping the furnace hot. The fireman was under the duty of obeying the directions of the engineer, which directions amounted to a command to him to be especially attentive to keeping the furnace red-hot for the few minutes it would take to run into Columbus. The fireman did not know or suspect that the engineer was asleep. The engineer was at his accustomed place. The fireman was at work behind him, the engineer's back being towards him. The work of the fireman took him, back and forth, from the rear of the tender, the sides of which would naturally shut off his view, and the glare of the furnace might well have blinded his eyes to a greater or less extent. The engineer gave no long whistle at the yard limits to warn the fireman that the train had come to the yards, as it was his duty to have done. In addition to this, the testimony shows that the grade was such at the coal chute as to require the engine to go fast to get up it. The distance from this coal chute to the place of collision was about one-half mile. It would not have taken exceeding one to two minutes to run that distance at the rate at which the train was moving. The fireman was shown not to have been familiar with the yard. The night was dark and foggy. The attention of the fireman was called to the engineer just before the collision, and he sprang to awaken him, saw the head light of the opposite engine, turned too late to jump, and was caught. The fireman had never been in the city of Columbus in the day time but twice, and was accustomed to go right to his boarding house on leaving his engine. The command of the engineer to the fireman evidently meant, in view of the very little coal and very little water they had, and of the great delay which had been caused by the wreck, that he was going to do all he could to make up time, and get to Columbus with the small supply of coal and water he had before it gave out; and his order "to keep things red-hot" the fireman was proceeding to diligently execute from the time it was given until the collision. It is impossible to hold, under this testimony, that the fireman was guilty of contributory negligence.

The chief contention of learned counsel for appellant is that the clause in section 193 in the Constitution of 1890 making the company liable to an employee, where his injury results from the negligent act of one having a right to direct his services, should be so construed as to mean that such employee can so recover only if and when the employee is injured whilst executing at the very time of his injury some special command or order given by his superior officer, or by the person having the right to control or direct his services, while such superior officer or such person having the right to direct his services is at the time in the exercise of

the right to superintend him or to so direct his services, and this argument is pressed with great ingenuity and ability. The authority chiefly relied on by learned counsel for appellant is the case of *Dantzler v. Bardeleben Coal & Iron Co.*, 101 Ala. 309, 14 South. 10, 22 L. R. A. 361. But so far as that case touches this particular contention, it rests upon the express language of the Alabama employers' liability act, which provides that the employee cannot recover in such case unless the negligent act of the person vested with superintendence is done "while such person is in the exercise of superintendence entrusted to him." There is no such language in our Constitution. The Supreme Court of Alabama says that their act is modeled after the English statute, which also contains a similar clause to the one cited. A single consideration will show the inapplicability of the Alabama case. Suppose the Alabama statute should be so amended as to leave out this clause above cited, and an injury should occur under the new statute, which would then be like section 193 of our Constitution; would counsel, in Alabama, be heard to argue, with that clause left out, that the employee could only recover by showing that the superior officer, by whose negligence he was injured, was at the time in the exercise of his superintendence—giving him some special order or command which caused the injury? Manifestly not. The conclusive reply would be that, when the Legislature dropped the clause cited, it meant to enlarge the liability beyond such as would obtain merely whilst the superior officer was in the exercise of his superintending power. And that is just the condition and effect of our Constitution and statute, which are not limited by any such words as "while in the exercise of superintendence entrusted" to such superior officer, or such person having the right to direct the services of the employee. There seem to be three classes of employer's liability acts. In many states the Legislature has entirely abrogated the fellow-servant rule. Others, as Massachusetts and Alabama following the English statute, have adopted statutes, which have declared the master liable only when the superior officer intrusted with superintendence is actually engaged in giving his orders as superior officer when the injury occurs. It is proper to note that the Alabama statute to this effect was adopted in 1885, some years before our Constitution was adopted. It is perfectly plain that the framers of our Constitution intended to go beyond this rule. The gross absurdity of the extreme application of the old common-law rule as to fellow servants, illustrated in this state in the Cases of *Lagrome* and *McMaster*, had become intolerable, and the very object of the constitutional provision was to enlarge materially the right of employees to recover; and so section 193 expressly provided, as do the employers' liability acts of many other states, that the injured employee

Southern Ry. Co. v. Cheaves

should have the right to recover where the injury resulted from the negligence of a superior agent or officer, or of some person having the right to direct or control the services of the party injured, and also in certain other specific categories. This is the rule of our Constitution (section 193), and of section 3559 of the Code of 1892, passed in pursuance thereof. It would be the most manifest departure from proper construction to give a narrow, restricting interpretation to these plain provisions in our organic law, framed with the view of expanding and enlarging the rights of injured employees, and abrogating, in part, the harsh rules of the common law on this subject. It has been expressly held that all of these employer's liability acts are, in view of the object of their passage, to be construed liberally in favor of employees. *Labat's Master & Servant*, vol. 2, § 639, through section 663.

Our Constitution plainly means that wherever an employee is injured by the negligence of a superior officer, or of a person having the right to direct or control his services, such employee is entitled to recover, whether he is at the time obeying any special command born of the exigencies of the occasion, or is engaged merely and simply in the discharge of his ordinary routine duties; such superior officer or person also being engaged in discharging simply the primary duties of his station, and not the positive duties of the master. No such exception can be justly ingrafted on the plain stipulation of our Constitution and statutes. We find the construction which we announce already well settled in many states construing similar statutes. In *South Carolina*, in the case of *Rutherford v. Southern Railway*, 56 S. C. 446, 35 S. E. 136, the court construed the Constitution of South Carolina adopted in 1895, which is an exact rescript of section 193 of our Constitution, just as we here construe ours. This case is very persuasive, because it is upon an identical constitutional provision. In *Criswell v. Montana Cent. Ry. Co.*, 17 Mont. 203, 42 Pac. 769, the court was called upon to construe a statute along this line, and said: "The action of the court in respect to these instructions was confessedly based upon the opinion that section 697 [division 5] p. 817, Comp. St. 1887, which reads as follows: 'That in every case the liability of the corporation to a servant or employee acting under the orders of his superior, shall be the same in case of injury sustained by default or wrongful act of his superior, or to an employee not appointed or controlled by him, as if such servant or employee were a passenger'—constituted the law fixing the liability of the defendant in the case, and that the declaration of law, as requested, was in conflict with that statute. This statute is therefore brought before this court for the first time for judicial interpretation. The counsel for the defendant contends that under the common law the defendant corporation had performed its

whole duty to the plaintiff, as its employee, when it has used ordinary and reasonable care in providing (1) safe machinery, (2) furnishing a safe place to work, and (3) competent fellow servants to prosecute the common employment, and that the statute in question does not increase or change the defendant's liability at common law; that it does not change the common law in relation to fellow servants; that it does not establish the superior servant doctrine, and enlarge the common-law liability of the defendant in any respect, and was not so intended by the Legislature. The learned counsel for the defendant, in his able and exhaustive brief, has cited numerous authorities in support of the common-law rule applicable in such cases, but these authorities do not attempt to discuss the effect of such legislation as is here involved upon the common-law rule. It cannot be disputed that the common-law rule has been modified, if not changed, both in England and in many of the American states, by recent legislation on the subject. So we think we may omit a discussion of the common-law rule, and look to the course and effect of modern legislation on this subject. Beach, in his work on Contributory Negligence (section 376), says: 'It became evident early in the course of the development of the law upon this point that, in order to preserve to the employee any vestige of the right of action which the common law gave him against his employer, in a proper case, for personal injuries attributable to the negligence of another, and received in the course of the common employment, the tendency to extend the rule which had its inception in England in the case of *Priestly v. Fowler*, 3 Mees. & W. 1, and in the United States in the early cases of *Murray v. Railroad Co.*, 1 McMul. (S. C.) 385 [36 Am. Dec. 268], and in *Farwell v. Railroad Co.*, 4 Metc. (Mass.) 49 [38 Am. Dec. 339], and under the operation of which the defense of a common employment had come to be urged to the practical destruction of all such rights of action, would have to be checked, and could only be checked by legislation. Accordingly, on the 7th of September, 1880, Parliament changed the law of England by passing the employers' liability act (43 & 44 Vict. c. 42), which pending its final enactment was popularly known as the "Gladstone Bill," and which at the time attracted much attention both here and in England.' Section 377 of the same work contains a resume of this act of Parliament, and subdivisions 2 and 3, as the author has subdivided the act, are instances in which the master is liable for injuries received by a servant from the negligence of a superior. These subdivisions are as follows: '(2) By reason of the negligence of any person entrusted with superintendence. (3) By reason of the negligence of any superior workman whose orders the injured person was bound to obey.' The same author, in section 379, says: 'Comparatively recent legislation in several of the states of the Union has in some degree modi-

Southern Ry. Co. v. Cheaves

fied, for us in this country, the rule of nonliability which the courts of every jurisdiction, as we have seen, have uniformly declared. In California, Dakota, Georgia, Kansas, Iowa, Mississippi, Montana, Rhode Island, Wisconsin, Wyoming, Alabama, Massachusetts, and Missouri, statutes, the substance of which is set out in the notes, have been passed, under the wholesome operation of which the old rule of non-liability is practically abrogated. Except in California and Dakota, it may be said that in each of the states just mentioned the old rule is entirely abandoned, and an adequate remedy provided by the statutes for the proper protection of railway employees, while in California and Dakota the statutes define the limit of liability, and, quoad hoc, recognize and assert the propriety of legislation upon this subject.' So it will be seen that, in the opinion of this author, the common-law rule of nonliability in such cases is practically abrogated by such legislation, and entirely abandoned in the states named, including Montana, except in the case of California and Dakota. But we are not without further light and assistance in the interpretation of the statute under discussion. It has been the subject of direct construction by two of the most respectable courts of the country. In the United States Circuit Court of the Northern District of Iowa, in the case of *Ragsdale v. Railroad Co.*, 42 Fed. 383—a case involving directly the construction of this statute and its effect upon the common-law rule insisted upon in this case—Judge Shiras, delivering the opinion of the court, said: 'On part of plaintiff it is further claimed that the statute of Montana in force when the accident happened modifies the common-law rule in regard to the liability for the acts of fellow servants,' and after quoting the statute he continues: 'This statute does not go to the length of abrogating the general rule that the master is not liable to an employee for the consequence of the negligence of a co-employee, but it does enact, in effect, that a superior is not a co-employee with an inferior, and that one may be a superior, as compared with another, even though the former does not control the latter. The enactment is based upon the known fact that in carrying on the business of railroading there are recognized grades among numerous classes of employees, and, while they are all working for a common master, and for an ultimate common result, they are practically not all servants. The present plaintiff was a fireman, and his duties were limited generally to attending to the furnace and other matters upon the engine. He did not belong to that class of employees that were charged with the duty of controlling the movement of the train. The answer expressly avers that the collision was caused by the negligence of the officials in command of the movement of train No. 1, and there is no fact averred which tends to show that, as to them, the plaintiff occupied any other position than that of an inferior, within the mean-

ing of the statute of Montana. The act of negligence set up in the answer is that train No. 1 was moved past the telegraph station in violation of the rule of the company, and it is averred that this was done by those in command of such train. It will certainly not be claimed that a fireman upon the engine is an employee charged with the control of the moving of the trains—a duty primarily imposed upon the conductor—and it is certainly the fair inference that in the moving and running of trains the conductor is the superior of a fireman. In other words, the conductor, or party charged with the control of the train, is a superior, as compared with a fireman, within the meaning of the Montana statute. Under this section the corporation is made liable to any one of its employees who, without negligence on his part, is injured by the default or wrongful act of a superior, even though the latter has no control over the former. Whether, therefore, the liability of the defendant corporation is to be determined under the common-law rule, or under the statute of Montana, the facts set forth in the answer do not show that the act of negligence causing the collision and consequent injury to plaintiff was the act of a co-employee, but, on the contrary, it would appear therefrom that such an act of negligence was the act of the representative of the corporation who was also the superior of the plaintiff. This being the conclusion, it follows that the answer is insufficient, and the demurrer thereto is sustained.' "

After sustaining the demurrer in the case, as shown above, the defendant amended its answer, and alleged that plaintiff's injuries were the result of the negligence of the engineer of the train on which plaintiff was employed, whereas in its original answer the defendant had alleged that the injuries of plaintiff resulted from the negligence of the conductor of another train. The court sustained a demurrer to the amended answer, and, in doing so, Judge Shiras, said: "The amended answer shows that the engineer was primarily charged with the duty of halting the train at Evaro Station, and that he negligently failed in the performance of this duty. It seems to me that the same rule must be applied to the one case as to the other, and that the reasons which sustain the liability of the company in case of the negligence of the conductor apply with equal force to the negligence of the engineer, when such negligence occurred in a matter touching the actual movements of the train, and which was at the time wholly under the control of the engineer. In such matters the engineer represents the company, and for his negligence the company must respond. In the Circuit Court of Appeals, Eighth Circuit, in *Northern Pac. R. Co. v. Mase*, 11 C. C. A. 63, 63 Fed. 114, decided July 16, 1894—a case involving directly the interpretation of the Montana statute under discussion, and its effect upon the common law rule—Judge Sanborn, speaking for the court, said, 'The result is

that the right of recovery in this action, if it exists at all, must rest in the statute of Montana,' and, after citing the statute, proceeded as follows: 'This section is found in a chapter of the general laws of Montana relating to railroad corporations, and it seems to affect the liability of such corporations only. It goes without saying that the purpose of this statute was to extend the liability of railroad companies to their servants for the negligence of servants of a higher grade. * * * The statute is inartificially drawn, but its meaning is not doubtful, and its obscurity at once disappears if the clause "or to an employee not appointed or controlled by him" is transposed to its grammatical and logical position in the sentence, and placed before the verb. Then the statute would read: "That in every case the liability of the corporation to a servant or employee acting under the orders of his superior, or to an employee not appointed or controlled by him, shall be the same in case of injury sustained by default or wrongful act of his superior as if such servant or employee were a passenger." Now, the conductor whose negligence in leaving the switch open caused the death of the fireman on another train in this case was the superior of that fireman in the employment of the same master. His rank or grade in the service was higher. The fireman, it is true, was not acting under his orders, and was not one of the first class protected by the statute, but he was an employee "not appointed or controlled" by this superior, whose default caused his injury; and he was clearly one of the second class, to whom a right of action for such a default was given by this statute. The effect of the statute is to give a cause of action against the railroad company to every servant who is himself without fault for the default or wrongful act of any superior servant, whether or not the latter appointed or exercised any control over the former before or at the time of the infliction of the injury.' " It is to be observed that this is a decision materially aiding us here. Another decision from Montana, cited by learned counsel for appellant, rendered after this one, was simply a decision construing the common-law principle after the repeal of the statute considered in 17 Mont., 42 Pac., supra.

In *Peirce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280, the court, through Justice Harlan, of the Supreme Court of the United States, construing the following statute of Ohio: "In all actions against the railroad company for personal injury to, or death resulting from personal injury of, any person, while in the employ of such company, arising from the negligence of such company or any of its officers or employees, it shall be held in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employee of such company, is not the fellow servant, but superior, of such other employee; also that every

person in the employ of such company having charge or control of employees in any separate branch or department, shall be held to be the superior and not fellow servant of employees in any other branch or department who have no power to direct or control in the branch or department in which they are employed"—said: "It is next contended by the plaintiff in error that if Van Dusen was injured by the negligence of Bartley, the conductor, he is not entitled to recover, for the reason that the latter was not negligent in the performance of any duty imposed by law on the master personally, but only in respect of the performance of work pertaining to him and other employees in the same work. The principal authorities cited in support of this view are *Railroad Co. v. Keegan*, 160 U. S 259, 16 Sup. Ct. 269 [40 L. Ed. 418], and *Stockmeyer v. Reed* (C. C.) 55 Fed. 259. If this contention were sustained, the statute of Ohio would be deprived of all practical value, and the manifest object of the Legislature in passing it would be defeated. The *Keegan* and *Stockmeyer* Cases enforced the general rule that a foreman or superintendent of a body of employees doing a particular service was a fellow servant of those under him, and consequently the common employer was not liable to one of them for the negligence of the other. The very object of the statute before us was to prevent the application of that rule in Ohio as between a railroad company and its employees. Hence it is declared that every person in the employ of a railroad company, 'having power or authority to direct or control any other employee of such company, is not the fellow servant, but the superior, of such other employee.' If, by force of this statute, Bartley was not a fellow servant, but the superior, of Van Dusen, he did not become, within the meaning of the statute, a fellow servant, simply because he did some work of the kind done by Van Dusen. The object of the statute was to make one, to whom is committed by a railroad company the authority to direct and control employees in the same service, the representative, in respect of that service, of the common employee, so that his acts, within the scope of his employment, are the acts of the company, and his negligence its negligence."

In the case of *C. & D. R. Co. v. Thiebaud*, 114 Fed. 918, 52 C. C. A. 538, it was held that the provision in the statute of Indiana (Laws 1893, pp. 294, 295, c. 130) allowing recovery by one employee for injuries sustained through negligence of a co-employee—"The person injured who is obeying or conforming to the order of some superior, at the time of such injury, having authority to direct"—was applicable, though the person injured was not acting at the time under any special direction of a superior, but merely acting in the line of his duty as an employee.

In Utah (Rev. St. 1898, § 1342, which, it is to be noted, was passed after the decision in the *Baugh* Case, 149 U. S.

368, 13 Sup. Ct. 914, 37 L. Ed. 772, cited by learned counsel for appellant) the statute provides "that all persons engaged in the service of any corporation, who are entrusted by such corporation, as employer, with the authority of superintendence, control or command of other persons in the employ or service of such employer, or with the authority to direct any other employee in the performance of any duties of such employee, are vice principals of such employer and are not fellow servants." A fellow servant was killed by injuries which he received in a collision caused by the negligence of his engineer in running his engine too rapidly in approaching yard limits. The court held that he was entitled to recover, notwithstanding the fact that the negligence was committed while the engineer was discharging the primary duties of the engineer, and not the positive duties of the master. It was held further that the master was liable for the negligence of said superior servant, the engineer, whether the negligence was committed while he (the engineer) was exercising his authority to command or superintend others or not. The statute construed in this case is substantially identical with the one we are construing in the case before us. The court, in the course of its opinion, fully recognized the old law of master and servant in its most extreme application, but it correctly held that this statute was a plain departure from the general rule of law; that there was no ambiguity in the terms, no uncertainty in its meaning, and no possible doubt of the meaning of the Legislature in its enactment; that it was too positive to be disregarded, and its manifest legal effect could not be ignored; and, further, that to write into the statute that the master would not be liable unless the negligent servant was actually engaged in exercising his authority of superintendence or control would be to so amend it as to deprive it of the greater portion of its effect, in violation of its terms and of the intention of the Legislature which its words clearly disclose. This case is precisely in point, and meets our hearty approval. It would seem utterly unreasonable to hold that an employee, under our Constitution, can only recover where the engineer is attending at the same time to the positive duties of the master, for the obvious reason that the employee could have so recovered under the common-law rule in such case, and it needed no constitutional or statutory provision to give him this remedy.

We have examined with the greatest care all the authorities referred to by the learned counsel for the appellant. Many of them are decisions under the common law. In some of the cases statutes like ours were passed and were in force when the decisions were rendered, but the injuries occurred before the adoption of such statutes. The Baugh Case, modifying *C. & M. R. R. Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, by a divided court, did not rest upon the Ohio statute which was construed in *Pierce v. Van*

Dusen, *supra*, but rested on common-law principles as construed by that court.

We conclude this opinion with the following observations of the court in the case of *Southern Pac. Co. v. Schoer*, 114 Fed. 467, 52 C. C. A. 268, 57 L. R. A. 707. The court says: "The main complaint of the company is that the court below charged the jury that, under the statutes of the state of Utah, the engineer of the locomotive on which the deceased was a fireman was the representative of the company, and that his negligence, if any, in following the first section of the train too closely, and in running his engine too rapidly as he approached the yard limits at Terrace at the time of the collision, was the negligence of the company. It is not denied that the engineer in charge of the engine upon which the deceased was employed at the time of his death was intrusted by the company with authority to superintend and direct him in the performance of his duties, but it is contended that this master was not responsible for his negligence, because the negligence which caused the injury was committed while the engineer was discharging the primary duty of a servant, and was not engaged in performing one of the positive duties of the master, and because this negligence was committed while he was not exercising his authority to superintend the action of the fireman, or to direct him in the performance of any of his duties. The argument in support of the first contention is: Under the general law the master was not liable for the negligence of the engineer, because he was discharging one of the primary duties of the servant, and was not performing one of the positive duties of the master, when he committed the fatal act of negligence. The purpose and effect of the section of the statute of Utah which have been cited were not to change or to extend the liabilities of masters for the negligence of their servants, but their sole object and effect were to give an authoritative legislative definition of the terms 'vice principal' and 'fellow servant,' and to leave the liabilities of the masters for the acts of their servants as they were before these sections were enacted. Therefore, since the Southern Pacific Company would not have been liable for the negligence of this engineer under the general law, it is not liable for it under this statute. The truth of the major premise of this syllogism is conceded. In the absence of a statute, the liability of a master for the negligence of his servant is a question of general law, upon which the decisions of the state courts are not controlling upon the federal judiciary, and, unless the negligent servant is the general manager or general superintendent of the business of the master, it is not his grade, rank, or authority over other employees, but it is the nature of the duty he is discharging when he is guilty of the negligence, that determines whether he is a vice principal or a fellow servant, and when the master is liable or exempt from liability for the injury

Southern Ry. Co. v. Cheaves

caused by his carelessness. If he is discharging one of the absolute duties of the master, the latter is liable for his acts and for his negligence. But if he is discharging one of the primary duties of a servant, his employer is exempt from liability. *Railroad Co. v. Baugh*, 149 U. S. 368 [13 Sup. Ct. 914, 37 L. Ed. 772]; *Railroad Co. v. Conroy*, 175 U. S. 323 [20 Sup. Ct. 85, 44 L. Ed. 181]; *City of Minneapolis v. Lundin*, 58 Fed. 525 [7 C. C. A. 344]; *Coal Co. v. Johnson*, 56 Fed. 810 [6 C. C. A. 148]. The construction and maintenance of a railroad is the business of the master. Its operation is the business of his servants. The failure to exercise reasonable care in construction and maintenance is the negligence of the master. The failure to exercise such care in the operation of a railroad is the negligence of the servant, for which the master is not liable. The alleged negligence of the engineer of the second section of this train in running his engine too close to the preceding section, and too rapidly as he approached the yard limits at Terrace, was negligence in the operation of the railroad, for which the Southern Pacific Company was not liable, in the absence of a statute which changed the rules and principles of the general law. *Railroad Co. v. Needham*, 63 Fed. 107 [11 C. C. A. 56, 25 L. R. A. 833]; *Railroad Co. v. Mase*, 63 Fed. 114 [11 C. C. A. 63]; *Brady v. Railroad Co.*, 114 Fed. 100 [52 C. C. A. 48, 57 L. R. A. 712]. These principles and authorities amply sustain the first proposition of counsel for the plaintiff in error. But the correctness of the second premise of their syllogism is not so obvious. A vice principal is the representative of the master, for whose acts and negligence the master is responsible. *City of Minneapolis v. Lundin*, 58 Fed. 525 [7 C. C. A. 344]. The rule that the master is liable for the negligence committed by a servant while he is discharging one of the positive duties of the master, and that he is not liable for his negligence when he is performing one of the primary duties of a servant, was not adopted to measure the liability of the master for the acts of a vice principal. It was established to determine who were and who were not vice principals. The master has been invariably held liable by all the courts for the acts and for the negligence of his vice principals. The question upon which they have disagreed—the question which has occasioned debate—has been who were vice principals. Under the general law in the federal courts and in many of the state courts that question has been answered by the rule which has already been stated, based upon the nature of the duty the servant was discharging when the negligence was committed. In this condition of the law and of the decisions, the Legislature of the state of Utah enacted the statute which has been quoted. It declares that employees who are intrusted by their employers with the authority to superintend other employees of the same master, or with the authority to direct

any other employee in the discharge of any of his duties, are vice principles of such employee. This declaration is a plain departure from the general rule of law which we have been considering—an unequivocal declaration that servants who have the authority to direct and superintend other servants are vice principals of their masters, whether they are engaged in discharging the duties of their employers or the duties of their servants. There is no ambiguity in the terms, no uncertainty in the meaning of this statute, and no possible doubt of the purpose of the Legislature in enacting it. It is too positive to be disregarded, too plain for construction, and its manifest legal effect cannot be ignored. To sustain the position of counsel for plaintiff in error that this clear and authoritative declaration of the relation of superior servants to their masters in the state of Utah did not modify or extend the liability of the master beyond that fixed by the general law would be to defeat the manifest object of the Legislature in passing this act, and to arbitrarily strike down a law which that body had the undoubted right to enact and to enforce, for the unquestioned rule is that the states have the right to regulate, within reasonable limits, the relation between employers and employees within their borders, and to fix by legislative enactment the liabilities of the former for the acts and negligence of the latter. *Railroad Co. v. Baugh*, 149 U. S. 368 [13 Sup. Ct. 914, 37 L. Ed. 772]; *Railroad Co. v. Hogan*, 63 Fed. 102 [11 C. C. A. 51]. Our conclusion is that sections 1342 and 1343 of the Revised Statutes of Utah of 1898 make all servants employed in the service of a master doing business in that state, who are intrusted by him with authority to command his other servants, or with the authority to direct another of his servants in the discharge of his duties, vice principals of their master, and charge him with liability for their negligence, whether it was committed in the discharge of the positive duties of the master, or in the performance of the primary duties of the servant. Another reason why counsel for the plaintiff in error insist that the Southern Pacific Company is not liable for the negligence of this engineer is that, when he committed the acts of negligence charged, he was not engaged in exercising his authority to superintend the fireman, or his power to direct the performance of any of his duties. It is earnestly contended that it is only when the superior servant is guilty while he is actually engaged in exercising his authority of superintendence and control over those subject to his direction that his master is liable for his negligence under the provisions of this statute. In support of this position, *Shaffers v. Navigation Co.*, 10 Q. B. Div. 356, 357, *Fitzgerald v. Railroad Co.*, 156 Mass. 293 [31 N. E. 7], *Brittain v. Railway Co.*, 168 Mass. 10 [46 N. E. 111], and *Dantzler v. Iron Co.*, 101 Ala. 309 [14 South. 10, 22 L. R. A. 361], have been cited, and these

Fullmer v. New York Cent., etc., R. Co

cases adopt and enforce the rule for which counsel contend. But they enforce it because the limitation which counsel seek to read into the statute of Utah was written into these statutes which these decisions were interpreting by the legislative bodies which enacted them. The employers' liability act of 1880 (43 & 44 Vict. c. 42) § 1, subsec. 2, which the opinion in Shaffer's Case was construing, charged the master with liability for injuries caused 'by reason of the negligence of a person in the service of the defendants, who had superintendence intrusted to him, while in the exercise of such superintendence.' The Alabama and Massachusetts statutes under which the cases from these states arose contain a like limitation. *Dantzler v. Iron Co.*, 101 Ala. 318 [14 South. 10, 22 L. R. A. 361]; *St. Mass.* 1887, p. 900, c. 270, § 1, subd. 2. The statute of Utah under which the case arose contains no such limitation, and no indication that the Legislature intended to adopt any such restriction. On the other hand, it plainly declares that all persons intrusted by the master with the authority of superintendence of other persons in his employ are vice principals, and are not fellow servants. This is a declaration that they are vice principals not only when they are engaged in performing acts of superintendence and control, but at all times when the authority of superintendence and control is vested in them, and they are engaged in discharging their duties as servants of their master. This statute is so plain that it cannot be lawfully construed. To write into it the limitation suggested by counsel, and found in the laws of England, Alabama, and Massachusetts, would be to so amend it as to deprive it of its greater portion of its effect, in violation of its terms and of the intention of the Legislature which its words clearly disclose. It would be judicial legislation, which it is not the province of the courts to enact."

It follows from these views that the judgment is affirmed.

FULLMER v. NEW YORK CENT. & H. R. R. CO.

(Supreme Court of Pennsylvania, April 11, 1904.)

[57 Atl. Rep. 1062.]

Fellow Servants—Car Inspector and Brakeman.*

An inspector of air brakes, in working in a freightyard under a car, was injured by the negligence of a brakeman in failing to open and close certain switches: *held*, that the brakeman was a fellow servant of the inspector.

Injury to Brake Inspector—Failure to Close Switch—Absence of Signal Target—Proximate Cause.

Where a brakeman in a freightyard negligently failed to close a

*As to whether inspectors of appliances, etc., and other railroad employees are fellow servants, see foot-note appended to *Marsh v. Lehigh Valley R. Co.* (Pa.), 9 R. R. R. 545, 32 Am. & Eng. R. Cas., N. S., 545, where all the preceding authorities in this series are collected.

Fullmer v. New York Cent., etc., R. Co

certain switch, whereby an inspector of air brakes under a car in the yard was injured, the absence of a signal target which had been formerly used at such switch was not the proximate cause of the injury, where its presence would not have reminded the switchman of his duty, and its absence did not mislead the inspector.

Appeal from Court of Common Pleas, Lycoming County.

Action by Herman Fullmer against the New York Central & Hudson River Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before DEAN, FELL, MESTREZAT, POTTER, and THOMPSON, JJ.

Seth T. McCormick, for appellant.

Otto G. Kaupp and W. R. Peoples, for appellee.

FELL, J. The plaintiff was employed in the defendant's repair yard to inspect and repair air brakes. All the tracks in the yard were connected at one end with a track, by means of which cars were transferred to different parts of the yard. The tracks and switches were in the exclusive use of the yard crew, and when men were working under the cars a blue flag was used as a signal of warning to this crew. The plaintiff had been employed in the yard nearly a year, was familiar with its management, and knew the dangers incident to his employment. On the morning of the accident, while working under a car on track No. 6, which was the outside track on the south side of the yard, he was notified that a freight car which had been placed on this track the night before was to be removed. He left his work while this was being done. When he returned a few minutes later, he looked to see whether the blue flag had been replaced, and where the yard crew were. He saw a fellow workman in the act of replacing the blue flag between the rails of track No. 6, and saw the crew at work on the connecting track between tracks No. 8 and No. 10. He then resumed his work under the car. The crew, after removing the car from track No. 6, took a train of cars from another track to transfer them to different parts of the yard. They placed two cars on track No. 10, and then pushed, or, in the vernacular of the shifting crew, "kicked," the other cars, in order to make them run onto track No. 7. The brakeman whose duty it was to open and close the switches forgot to open the switch leading onto No. 7, and to close the one connecting No. 6, which he had opened a few minutes before, when the car was removed from that track. He stood at track No. 8, looking north, in the opposite direction from the switch, when the cars passed him. They ran past track No. 7 and onto track No. 6, and over the blue flag, and collided with the car under which the plaintiff was working. This brakeman, called by the plaintiff, testified that it was his duty to close the No. 6 switch and to open the No. 7; that he forgot to do it; and that he

Camp v. Chicago Great Western Ry. Co

did not look in that direction as the cars came down the connecting track.

The negligence alleged was the employment of an incompetent brakeman, and the failure to supply signal targets at the switches. There was no proof in support of the first allegation of negligence. To sustain the second, it was shown that at one time a signal target had been in use at the switch connecting track No. 6, and that it had been broken or removed six months or a year before the accident. And testimony was admitted, under objection, based on the incompetency of the witness to testify as an expert to show that targets were in general use in repair yards. The jury were instructed that the brakeman was a fellow servant of the plaintiff, and that, if his negligence was the proximate cause of the accident, there could be no recovery, but that there could be a recovery if the proximate cause was the failure of the defendant to provide a device necessary for the safety of its workmen and in common use.

The want of a signal was not the proximate cause of the accident, nor did it concur in producing it. Its presence would not have reminded the brakeman of his duty, because he did not look toward track No. 6, but stood with his back to it, looking in the opposite direction. Its absence did not mislead the plaintiff, who knew no signal had been in use for months, and who looked only to see that the yard crew had left track No. 6, and that the blue flag was in place. There was only one conclusion to be drawn from the testimony produced by the plaintiff, and this was so clear and free from all doubt that the court should have instructed the jury to find for the defendant. The accident was the direct and immediate result of the negligence of a fellow workman, who opened the switch and forgot to close it.

The judgment is reversed, and judgment is now entered for the defendant.

CAMP v. CHICAGO GREAT WESTERN RY. CO.

(Supreme Court of Iowa, May 12, 1904.)

[99 N. W. Rep. 735.]

Injury to Trackman—Contributory Negligence—Failure to Look Again—Speed in Violation of Ordinance.

Plaintiff, a trackman in defendant's employ, after having cleared snow from certain frogs and switch points, looked to the rear, and seeing no train for a distance within which a train approaching from that direction could have reached him while he was traveling 182 feet to a toolhouse, provided the train was running at the maximum speed allowed by a city ordinance covering the place in question, started to such toolhouse, walking on the ends of the ties along the track, and when within about 25 feet of the toolhouse he was overtaken and struck by an engine backing toward him from the rear, and severely injured; *held*, that plaintiff's act in walking on the ends of the ties as he did, and his failure to look a second time as he was proceeding to the toolhouse, did not constitute contributory negligence as a matter of law.

Camp v. Chicago Great Western Ry. Co

Same—Assumption of Risk—Speed in Violation of Ordinance.*

A city ordinance limiting the rate of speed of railroad trains within the city limits is for the protection of the employees of the railroad walking along the track, as well as those having occasion to go on or across the tracks, and hence a railroad employee does not assume the risk of the failure of the company to observe the requirements of such ordinance, unless he continues in the railroad's employment with knowledge that the ordinance is habitually violated.

Same—Evidence—Manner of Switching Engine—Harmless Error.

In an action for injuries to a railroad trackman by being struck by an engine approaching him from the rear, the erroneous admission of evidence as to how the engine might have been switched so as to accomplish the purpose in view, without being operated on the track where plaintiff was injured, was not prejudicial to defendant.

Instructions Not Sustained by Evidence—Reversal.

A reversal on appeal will not be decreed for the giving of an instruction which there is no evidence to sustain, where such instruction was so guarded by the language of the court that no prejudice could have resulted therefrom.

Contributory Negligence—Instruction.

In an action for injuries the court charged that if the jury found that defendant was negligent as alleged, and that the plaintiff was injured as the direct result of such negligence, and was in no manner "or to any material degree negligent himself," or in no manner or to any extent contributed to his own injury, he was entitled to recover: *held* that the language quoted referred to the amount of care required, and not to the extent of contribution to the injury by reason of plaintiff's failure to exercise care, and was therefore not erroneous.

Previous Action—Dismissal—Further Prosecution—Conditions—Payment of Costs.

Where plaintiff dismissed a former action by reason of his inability at that time to prove certain facts which became material during the trial, and he did not then know of any witnesses by whom he could prove such facts, and on a subsequent trial he made a poverty affidavit, it was not error for the court to refuse to stay the second trial until plaintiff had paid the costs of the first.

Appeal from District Court, Marshall County; O. Caswell, Judge.

Action to recover damages for personal injury received by plaintiff, while in the employ of defendant, by reason of the alleged negligence of defendant's servants in operating a locomotive engine, causing it to run against and strike plaintiff. Verdict for plaintiff for \$1,500. From judgment on this verdict defendant appeals. *Affirmed.*

Carr, Hewitt, Parker & Wright and J. L. Carney, for appellant.

J. M. Parker and H. C. Lounsberry, for appellee.

McCLAIN, J. Just before the accident resulting in injury to plaintiff, he had been engaged, as an employee of defendant company, in clearing the snow from the frogs and switch points in defendant's yard at Marshalltown. Having completed his work at a certain frog on the main line of track running east and west, he proceeded westward along the track to go to a toolhouse situated beside the track and about 182 feet distant, and when within about 25 feet of the tool-

*See extensive note appended to *Martin v. Chicago, R. I. & P. R. Co.* (Iowa), 1 R. R. R. 397, 24 Am. & Eng. R. Cas., N. S., 397.

house, and while walking on the ends of the ties along the track, he was struck by the tender of an engine coming from the east, and severely injured.

1. The ground for reversal especially relied on is that the evidence shows without conflict that plaintiff was guilty of contributory negligence in failing to exercise any reasonable care to avoid the danger incident to being so near the track that he was liable to be struck by an engine moving on the track. The testimony of the plaintiff, as a witness, tended to show that after completing his work at the frog he looked eastward along the main track, and, as he saw no engine approaching, proceeded westward, without any further precaution for his safety, until he was overtaken and struck by an engine coming from the east. It was unquestionably plaintiff's duty to use reasonable care in looking out for his own safety, and if he failed to do so, and such failure contributed to his injury, he cannot recover. The fact that he was an employee did not relieve him from the duty to exercise care. The case was not one where plaintiff was privileged from exercising the care for his own safety which is ordinarily required, on account of his necessary employment. He was not at the time engaged in any occupation calculated to distract his attention, and should have had in mind the fact that engines and cars might be moved along the track at any time. But it appears from his testimony that, when he looked eastward at the frog along the track, it was unobstructed to such distance that he could have seen an approaching engine, if near enough to him to overtake him, approaching at the rate of six miles an hour, the maximum speed allowed by the ordinances of the city of Marshalltown, before he should reach the toolhouse, and, if he did look, and there was no engine or train in sight coming from that direction, and near enough, approaching at that rate of speed, to overtake him before reaching the toolhouse, he was not guilty of contributory negligence in not looking again before reaching the toolhouse, or in not keeping far enough away from the track so as not to be struck by the engine. It is certainly not necessary, as a matter of law, for one who is an employee, walking along or near a railroad track in the discharge of his duty, to be looking backward at every instant of time, nor is it necessary for him to select a place to walk which is beyond the reach of passing cars or engines, if, in the exercise of reasonable care, he has ascertained that he is not in danger from any car or engine approaching at a lawful rate of speed. The argument for appellant is predicated on the assumption either that if plaintiff while at the frog had looked eastward he must have seen the engine approaching, or that his view of the main track toward the east, where there was a curve, was in some way obstructed by a pile of ties near the track, or freight cars on an adjoining track, or a water tank which was also near the

Camp v. Chicago Great Western Ry. Co

track, so he could not see an engine approaching, and should therefore have stepped aside from the track to get a better view before proceeding to the toolhouse. But if there is any theory of the evidence on which the jury could find, as they did in answer to a special interrogatory, that plaintiff was not guilty of contributory negligence, then the verdict is supported by the evidence and must stand. We think the jury might have found, and it appears that on this theory they based their verdict, that, at the time plaintiff looked eastward from the frog, the engine was concealed from his view by the water tank, or pile of ties beside the track, or freight cars on an adjoining track and on the inside of the curve, and that it was therefore more than 300 feet from the frog when plaintiff started from that point to walk to the toolhouse. If he walked at the rate of three miles an hour, he would have reached the toolhouse before the engine, coming at a rate of speed not exceeding six miles an hour, could have overtaken him. The only theory consistent with plaintiff's evidence would be that the engine was running at a greater rate of speed than six miles per hour. As to its rate of speed, there was therefore a conflict in the evidence between the testimony of plaintiff that in less than a half minute after he started west from the frog, going at an ordinary rate of speed, he was struck by the engine, and the testimony of defendant's witnesses that the engine was not running faster than six miles per hour. It was for the jury to weigh this evidence, and they were justified in reaching the conclusion that the speed was greater than six miles per hour, and that the fact that the engine was thus running at an unlawful rate of speed was the cause of the injury to plaintiff, and, furthermore, that this was without any failure of plaintiff to use ordinary care in anticipating the danger from the approach of an engine.

The principles of law involved in the conclusion which we reach, that there was some evidence to support the finding that plaintiff was free from contributory negligence, are so well settled that it would be useless to cite authorities or discuss the cases referred to in arguments of counsel. We have conceded to appellant every proposition of law for which counsel contend, save one, which is that the ordinances of the city of Marshalltown were not admissible in evidence for the purpose of determining whether defendant was negligent in operating its engine at a greater rate of speed than six miles per hour, and whether plaintiff was justified in assuming that no engine or cars would come along the track from the east at a higher rate of speed. Since this case was tried in the lower court, we have held in the case of *Martin v. Chicago, R. I. & P. R. Co.*, 118 Iowa, 148, 91 N. W. 1034, 59 L. R. A. 698, that such an ordinance has for its object not only the protection of those having occasion to go on or across the tracks, but also employees

Camp v. Chicago Great Western Ry. Co

of the railroad, and that an employee does not assume the risk of the failure of the company to observe the requirements of a city ordinance in regard to the rate of speed at which it operates its trains within city limits. In that case it appeared that the employee, by continuing in his employment, assumed the risk of an habitual violation of the ordinances of the city as to the rate of speed, such habitual violation being necessarily known to him in consequence of his continued employment on trains running at a rate of speed in violation of the ordinances; but there is no evidence in this case that there was any such custom on the part of the defendant company, or that plaintiff had knowledge of such custom if it existed.

We do not wish to be understood as holding that an employee can omit reasonable precaution for his safety where he is not in a dangerous situation, and if it appeared that plaintiff, with knowledge that the engine was approaching, even if at a negligent rate of speed, had failed to get out of the way, we think he would have been guilty of contributory negligence, but it is not conclusively shown that he had such knowledge. While he was bound to know that engines or cars might come along the track at any time, he was not bound to know nor to anticipate that they would come at an unlawful rate of speed, and, if he took such precaution as would be suggested to a reasonable man against being injured by engines or cars lawfully operated, we think he was not guilty of contributory negligence. The evidence is in conflict as to whether the bell on the engine was rung as the engine approached the street crossing just west of the point where plaintiff was struck; nor can we say, as a matter of law, that plaintiff must have become aware, had he been in the exercise of ordinary care and watchfulness, of the approach of the engine by reason of the noise which it would make in moving. There was a fresh snow on the tracks, and the noise made by the moving engine may have been less than usual on that account. If plaintiff heard the bell or the noise of the engine, the question would no longer be whether it was moving at a lawful rate of speed, but whether, being advised of its proximity, plaintiff used reasonable care to avoid being struck. We reach the conclusion that there was enough evidence to go to the jury on the question of contributory negligence.

2. Error is assigned with reference to the admission, over objection, of the testimony of a witness as to how the engine might have been switched so as to accomplish the purpose in view in backing it along the track where plaintiff was injured, without operating it on that track at all. It is clear that, if the engine was being properly operated at the time of the accident, it would be wholly immaterial that it might have been run on some other track to accomplish the same purpose. We do not understand how this evidence could be

material, but possibly it had some bearing on the issue as to whether defendant was negligent in not employing a sufficient number of men to properly operate its engine and tender, the claim being that a switchman should have been provided so that the engineer or fireman need not have left the engine in order to throw a switch; but we do not care to go into this branch of the case, for we cannot believe that the evidence, even if immaterial, was in any way prejudicial to the defendant.

3. An instruction given by the court is criticised on the ground that defendant's duty to use care in the employment of servants to operate its engine was referred to, although there was no evidence that the engineer or fireman was incompetent. We think the objection is well taken, and that the matter should not have been referred to, but we feel justified, under the record, in disposing of the question by quoting the following language found in *Trapnell v. Red Oak Junction*, 76 Iowa, 744, 747, 39 N. W. 884: "If this instruction was the only error shown by the record, we might not be disposed to disturb the judgment; for while the instruction submits a question to the jury upon which there is no evidence, and is therefore erroneous, it might be well said that the instruction is so carefully guarded by the language of the court that no prejudice could have resulted from it."

4. In one instruction the following language is used: "If you find that the defendant was negligent as alleged, and that the plaintiff was injured as the direct result of such negligence, and was in no manner or to any material degree negligent himself, or in no manner or to any extent contributed to his own injury, then he is entitled to recover all damages naturally and directly resulting to him from such injury." Another paragraph of the charge is in this language: "If, then, you find that the plaintiff has established by a preponderance of the evidence the allegations of his petition, or some one or more of his material allegations, charging negligence on the part of the defendant, and you further find that the plaintiff was in no manner and to no material degree negligent that contributed to his alleged injury and damage, and you further find that the plaintiff was injured and damaged as the direct result of defendant's alleged negligence, then your verdict should be for the plaintiff." In the recent case of *Root v. Des Moines Railway Co.* (Iowa) 98 N. W. 291, we held that an instruction was erroneous in which the jury was told that plaintiff in actions for personal injury must show that he did not by his own acts or conduct contribute in any material degree to his injury. It is pointed out in that case that if the negligence of plaintiff contributed in any degree or to any extent to bring about his injury he must fail. But, in the instructions just quoted, the term "material degree" does not relate to the extent of plaintiff's contribution to his injury, but

Camp v. Chicago Great Western Ry. Co

to the extent of his negligence. In *Jerolman v. Chicago G. W. R. Co.*, 108 Iowa, 177, 78 N. W. 855, an instruction was held erroneous in which plaintiff, suing for personal injury, was required to establish by preponderance of evidence that she was "free from all fault or negligence that contributed to produce the fall" which resulted in her injury, or, as stated in another instruction, "that such fall was not in any manner due to any fault or negligence on the part of the plaintiff herself," or, again, "that she was free from all fault or negligence which contributed directly to produce the fall in question." And the following language is used in the opinion: "The vice of the instruction emphasized in the passage quoted from others is that all negligence is excluded, and the plaintiff held to the exercise of extraordinary care for her safety. Had 'fault' or 'negligence,' as used, been defined, this would have been obviated. Without such limitation, the jury was warranted in understanding that any negligence whatever on the plaintiff's part, however slight, required a verdict for the defendant." Many cases are cited supporting the conclusion reached by the court. In the instructions which we are now considering, the phrase objected to is used in directing the jury in determining whether plaintiff was negligent, and they were properly instructed that if negligence on the part of the plaintiff contributed to the injury there could be no recovery. As pointed out in the *Jerolman Case*, supra, if the degree of negligence on the part of plaintiff was that sometimes denominated "slight," the plaintiff would not thereby be barred from recovering, for he was only bound to use ordinary care, or such care as a reasonably prudent person would use under such circumstances to avoid danger. As the instruction reads, he was barred from recovery if he was, to paraphrase the language, materially negligent. We do not say that in this respect the instruction was correct, and the language used is certainly not to be commended, but it is not open to the objection that plaintiff was thereby permitted to recover if his negligence did not contribute to a material degree to his injury. It may be that the instruction required a higher degree of care on the part of plaintiff than should be required, but it certainly does not require a less degree of care than should be required, and the defendant has no ground of complaint. In short, we hold that the phrase "material degree" relates to the amount of care required, and not to the extent of contribution to the injury by reason of failure to exercise such care. In other instructions contributory negligence is correctly defined, and we reach the conclusion that there was no prejudice to defendant in the instructions quoted.

5. It was made to appear to the court that there had been a previous trial in the same court of an action in which plaintiff sought to recover from defendant on account of the

Camp v. Chicago Great Western Ry. Co

same injury, and that at the conclusion of the evidence in such former action the plaintiff, to avoid the direction of a verdict against him, dismissed his action; and on these facts counsel for defendant in this case predicated a motion, made before the trial was commenced, that the trial be postponed until judgment rendered against plaintiff for costs in the former action had been paid. This motion was overruled, and errors are assigned on such ruling. While we find many cases in other jurisdictions supporting a rule to the effect that plaintiff in a second action, for the same cause of action, should not be allowed to proceed until the costs of the former action in which he was nonsuited or which was voluntarily dismissed had been paid by him, we do not find that any such rule has been adopted in this state. The question seems not to have been considered in this court. It is enough for the present to say that, even where such a rule is recognized, the plaintiff is allowed to make a showing of excuse for prosecuting a second action notwithstanding his dismissal of the former one. The object of the rule is to discourage vexatious litigation, and where a reasonable excuse is shown the court may, in the exercise of a reasonable discretion, refuse to inflict the penalty. *Union Pacific v. Mertes* (Neb.) 52 N. W. 1099.

In this case the plaintiff, in resistance to the motion to postpone, showed not only that he was without means, and so crippled by the injury complained of as to be unable to earn a living, but also, by affidavits of counsel, that the first case was dismissed for want of material evidence which could not be procured after its materiality became apparent on the trial. Of course, if the counsel had known the names of the witnesses by which the material facts could be proven, and had shown that such witnesses, while not then available, could probably be secured for another trial, they might have protected the rights of their client by asking for a continuance; but it appears they were unable at the time to ascertain whether such evidence could be procured, and we think they cannot be charged with promoting vexatious litigation in preserving the opportunity to bring a second action after such evidence should be discovered. On the whole, we are satisfied that the court acted in the scope of its reasonable discretion in refusing to postpone the trial until plaintiff should pay the cost of the first proceeding.

The judgment of the lower court is affirmed.

OMAHA BRIDGE & TERMINAL CO. *v.* HARGADINE et al.

(Supreme Court of Nebraska, March 17, 1904.)

[98 N. W. Rep. 1071.]

Injury to Employee of Independent Contractor—Defective Tool—Liability of Railroad.*

A contractor engaged with the O. B. & T. R. Co. to perform all the work of constructing a pile of timber trestlework across Cut Off Lake for a stipulated price. H. was employed as a carpenter upon the work by one acting under the contract, and was injured because of a defective tool furnished by his immediate employer: *held*, that such company is not liable to H., it not having furnished, or agreed to furnish, any tools.

Same—Same—Same—Effect of Reservation of Right to Inspect and Oversee.

The fact that the company reserved such right to so inspect and oversee the work as is reasonably necessary to see that it conforms to the contract in result, does not make the employer of H. its agent so as to make it liable to H. for a neglect of duty growing out of the contract of employment between H. and his employer. In such case the relation of master and servant between the company and H. does not so obtain as to raise a duty in the company to furnish safe tools for H. either directly or through the contractor.

Master and Servant—Duty to Furnish Safe Tools.

The duty to furnish safe tools to a workman for use rests upon the contract of employment, and liability to such workman for furnishing unsafe tools is upon the employer who furnishes them.

Liability for Negligence of Independent Contractor.

The owner of property causing an improvement to be made thereon by a contractor who engages to do the work may be liable to third persons for injuries caused by the negligence of the contractor in leaving the premises in a dangerous condition, or so doing the act he is engaged to do as to injure third persons or adjoining property, and yet not be liable upon the contracts of the contractor, or for his failure to perform a contract duty to a workman in his employ.

Commissioners' Opinion. Department No. 2. Error to District Court, Douglas County; Read, Judge.

"Not to be officially reported."

Action by Charles H. Hargadine and others against the Omaha Bridge & Terminal Company. Judgment for plaintiffs, and defendant brings error. Reversed.

W. S. Kenyon and Wharton, Baird & Sons, for plaintiff in error.

Nelson C. Pratt, for defendants in error.

GLANVILLE, C. This is a proceeding in error from the district court of Douglas county seeking to reverse a judgment recovered against the plaintiff in error by Charles H. Hargadine, defendant in error. The action was one for personal injuries, received by falling from the trestle work of a viaduct being constructed for the plaintiff in error, upon which defendant in error was working as a bridge carpenter, and was brought against plaintiff in error, Gilbert H.

*See foot-note appended to *Reilly v. Chicago & N. W. Ry. Co.* (Iowa). 10 R. R. 418, 33 Am. & Eng. R. Cas., N. S., 418, where all the preceding authorities in this series are collected.

Omaha Bridge & Terminal Co. v. Hargadine

Schribner, Jr., Edward W. Raymond, and the Illinois Central Railroad Company. Neither Gilbert H. Schribner, Jr., nor Edward W. Raymond were served with summons or made appearance, and the court instructed a verdict in favor of the Illinois Central Railroad Company. The only mention of any of the defendants in the action made in the petition, outside of the caption, except where they are mentioned as "defendants," is where the two defendant companies are named in the allegation of their incorporation. The discussion will be easier, and more easily followed, if we designate the plaintiff in error as the "company," and the defendant in error by name.

The contentions of the company requiring attention are practically confined to two questions: First. Under the pleadings and proof, is any one liable to the defendant in error for the injuries received? Second. Under the pleadings and proof, can the company be held liable? If the second question shall be answered in the affirmative, it will be necessary to consider the other; but, if such question is determined the other way, it will dispose of the case before us. The viaduct in question was to be used for railroad purposes, and the company had entered into a contract with one Gilbert H. Schribner, Jr., for its construction, which contract, in so far as it need be quoted, is as follows: "This agreement, made and entered into this Seventeenth (17th) day of March, A. D., 1900, by and between Gilbert H. Schribner, Jr., of Chicago, Illinois, party of the first part, and the Omaha Bridge & Terminal Railway Company, party of the second part, witnesseth: That in consideration of the payments and agreements hereinafter mentioned to be made, performed and fulfilled by the party of the second part, the party of the first part hereby agrees to perform in the most substantial and workmanlike manner, and to the satisfaction and acceptance of the chief engineer of the party of the second part, all the work of constructing a pile of timber trestlework, across Cut Off Lake, * * * according to the specifications hereto attached and all plans prepared or approved by the chief engineer of the party of the second part, and the directions of said chief engineer, and the following agreements and stipulations: The party of the first part shall not be relieved from the immediate charge and responsibility of the work, and no part thereof shall be transferred or sublet to any other party or parties, except by the formal written consent of the party of the second part. The party of the first part shall not retain in his employ in the prosecution of the work under this contract, any person or persons to whom the said chief engineer shall object. It is expressly agreed that no compensation for extra work, and no compensation for any work other than the compensation herein stipulated, shall be paid to the party of the first part, unless such extra

Omaha Bridge & Terminal Co. v. Hargadine

work or additional compensation shall be ordered or agreed to in writing by the said engineer. The party of the first part hereby agrees to relieve the party of the second part and save it harmless from any liability * * * on account of loss of life, or injury to any person or persons which shall be in any way attributable to any negligence or want of care on the part of the party of the first part, or any of his employees or servants; and the party of the first part agrees to give all needful and proper attention to any of his employees that may be so injured." The making of this contract by the parties named, and the fact that the viaduct was being constructed under its provisions at the time of the accident in question, are pleaded by the answer and expressly admitted by the reply. The only allegation in the petition as to Hargadine's contract of employment is as follows: "That on the 21st day of June, 1900, the above-named plaintiff was employed by the above-named defendants as a carpenter to perform certain work in the line of his trade upon a certain bridge or viaduct being constructed by the said defendants across and over what is commonly called 'Cut Off Lake,' in the city of Omaha, Douglas county, Nebraska." The only evidence as to how or by whom he was employed as his own, which shows that the first applied to Raymond, and then to Raymond's foreman, one J. F. Cody, who employed him. This Mr. Cody is the person who, he says, directed him to continue working with the defective bar which he claims was the cause of the injury. Cody was called as a witness for Hargadine, and his evidence shows that he went there as foreman for Raymond; that his authority permitted him to hire and discharge workmen, and that he did so; and that those who were working for him received orders from him, and were supposed to obey them. The evidence also shows that there was no other or different contract between the company and Schribner than the one above quoted from. This is all the evidence shows to aid us in deciding the question under consideration.

The contention of the company is that under the facts thus established Hargadine was working under an independent contractor, and that the relation of master and servant never obtained between him and the company, and that, if any neglect or wrongful act was committed by any person in furnishing him with a defective tool with which to work, it was not committed by any of its agents or servants, and that it is in no wise responsible therefor. This contention was urged in objections to testimony and motions for peremptory instructions to the jury, and has at all times been insisted upon.

Hargadine's contention is that under this contract the relation of master and servant obtained between the company and all parties connected with the construction of the viaduct; or that the parties who directly employed him, paid him

Omaha Bridge & Terminal Co. v. Hargadine

his wages, furnished him with tools with which to work and directed him how and where to work, where the agents of the company in so doing, and that the company is therefore responsible to him for any negligence of any of such parties resulting in his injury. The trial court adopted the latter view, and gave the following instruction: "The parties agree that the work in which the plaintiff was engaged at the time of the alleged injury, in the construction of the viaduct, was being done under a contract entered into between the defendant Gilbert H. Schribner, Jr., of Chicago, Illinois, and this defendant, which contract was dated March 17, 1900. This contract was read to you, and a copy thereof is attached to the defendant's answer. The interpretation of this contract, in so far as it effects the parties to this suit, is a duty which the law imposes upon the court alone. Under this contract the relation of principal and agent or master and servant was created between the defendant the Omaha Bridge & Terminal Railway Company and said Gilbert H. Schribner, Jr., and all of those employed on said work." If this instruction is wrong, the judgment must be reversed.

A consideration of the argument and citations made by counsel for Hargadine in his brief leads us to conclude that he has overlooked an important distinction between this case and those relied upon to sustain the judgment. His principal reliance seems to be upon the holding in *N. O. M. & C. R. Co. v. Hanning*, 82 U. S. 649, 21 L. Ed. 220, and his first quotation therefrom is: "The rule extracted from the cases is this: The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize, or did not know of, the acts complained of. So long as he stands in the relation of principal or master to the wrongdoer, the owner is responsible for his acts. When he ceased to be such, and the actor is himself the principal and master, not a servant or agent, he alone is responsible." There may be a relationship, then, that shall require a holding that certain things done by the contractor are done by the contractor as agent of the owner, and in other things he may be the principal and master. In *City of Detroit v. Correy*, 9 Mich. 165, 80 Am. Dec. 78, this rule is announced: "Although, in all ordinary transactions, the relation of contractor excludes that of principal and agent or master and servant, yet there is not necessarily such a repugnance between them that they cannot exist together. The difference between them is that a contractor acts in his own right, and for himself, whereas an agent or servant acts for and in the name of another. In the case before us both relations exist, and must necessarily exist, from the peculiar character and circumstances of the case." Now, in the *Hanning Case*, the defendant had engaged one to furnish timber, planking, ironwork, and all

Omaha Bridge & Terminal Co. v. Hargadine

labor necessary for the rebuilding of its wharf in front of its depot grounds. The court said: "Here the general management and control of the work was reserved to the company." It found that the contract required a great amount of care and direction on the part of the company, and said, "the company reserves the power not only to direct what shall be done, but how it shall be done." It also found that the defendant retained possession of the premises. The damages awarded against the company were for an injury received by one while rightfully crossing the pier by falling through where it had been negligently left in a dangerous condition. There is not the slightest reasoning found in the case to indicate that the company would have been held liable to the laborers employed by the contractor for their wages because of any agency. No more is there anything to indicate a holding that the company would be required to furnish proper tools for the workmen. That was a matter of contract between them and the contractor. They might furnish their own, or have them furnished by the party that hired them and paid them their wages. In that regard the contractor had become "the actor." He "is himself the principal and master, not a servant or agent; he alone is responsible." Take another case cited and quoted from—*Schwartz v. Gilmore*, 45 Ill. 455, 92 Am. Dec. 227. The court held that Schwartz (the owner of premises upon which a building was being constructed by contract under direction of one declared to be his superintendent) could not be considered as having surrendered to the contractor the entire control over the work and premises, so as to relieve himself from liability for injuries occasioned by the negligence of the contractor. He was held liable for injury to the person and property of one occupying adjoining property, occasioned by the falling of an illy constructed wall. He had been warned that the wall was leaning, and took no precaution to avoid the injury. This by no means looks toward a holding that the contractor was the agent and servant of the owner for all purposes, so that his acts and contracts were all acts and contracts of the owner as principal. Take another case cited—*City of Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408. Counsel quoted from the opinion the following extract: "Master cannot exonerate himself from responsibility to third persons, which the law imposes upon him, for injury resulting from the misconduct of his servant, by contracting with the servant that he will not exercise any control over him." In that case it is said: "The city claimed it had hired Ardner to go into a quarry owned by the city, and quarry stone at a stipulated price per perch," and had "reserved no right to control or direct him." The court say: "We concede the general rule of law to be that an independent contractor is alone responsible for an injury inflicted by him upon third persons, and that his em-

Omaha Bridge & Terminal Co. v. Hargadine

ployer is not within the principle upon which the doctrine of respondeat superior rests. Yet it is equally certain that the employer is also liable for the wrongful act of the contractor under circumstances which show that he, as clearly as the contractor, was the author and promoter of the injury." In doing just what he was hired and expected to do, he caused injury to adjoining property. He was the agent of the city in charge of its property, using that property under license, and the city was at fault in that it did not reserve and exercise such a right to so control his use of its property as to protect the property of adjoining owners. This by no means is equivalent to a holding that the quarryman's helper could have recovered from the city if he had been injured by attempting to use a defective bar, furnished by the quarryman. In *Lowell v. Railroad*, 40 Mass. 24, 34 Am. Dec. 33, also cited, the city sued to reimburse it for the amount it had paid upon a judgment for damages recovered by one who had fallen into an excavation the defendant had been authorized to make across a street. Defendant had for a time protected the excavation by barriers, but afterwards, for a night, neglected to replace the protection, which had been removed in doing the work. The company was held liable. It had hired a contractor to make the excavation, had actively assumed the duty of providing the barrier, and then, without notice to the city, failed to see to it that it remained in position.

These cases furnish no help in deciding the one before us, except as they suggest the distinction that should be borne in mind when considering quotations therefrom. To illustrate this distinction a little further, in *Davis v. City of Omaha*, 47 Neb. 836, 66 N. W. 859, this court held: "If a lot owner be licensed by a municipal corporation to build a sidewalk in front of his lot, which walk it is the duty of the corporation to build and maintain, and in the performance of such work the lot owner negligently leaves an obstruction in the street, which causes an injury, the city is liable therefor." Can it be held that if such lot owner, in building the sidewalk, furnished a defective tool to a workman, who was thereby injured, the city would be liable? Yet if it be true that, when the rule respondeat superior applies as to one act of negligence, it must necessarily apply to all negligent acts of the same party connected with the same enterprise, such liability would necessarily follow. We have not examined all the authorities cited by defendant in error, but all those we have examined are distinguished from the one before us as above indicated, and we have not found a case that would justify a holding that the plaintiff in error is liable for the injury complained of. *Slater v. Mersereau*, 64 N. Y. 138, also cited, is a direct authority against the rule contended for; a contractor being held liable for his own negligence, but expressly not so for that of his subcon-

Omaha Bridge & Terminal Co. v. Hargadine

tractors, though the injury complained of was to adjoining property. *King v. N. Y. C. & H. R. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 317, was where an employee of one Dillon, who had contracted to handle railroad iron for the company, was injured by the falling of a derrick claimed to be defective. The derrick was owned by the defendant, but was in safe condition when furnished to Dillon. The lower court charged the jury, "that it was the duty of the defendant, if there was no special agreement as to the inspection and keeping the derrick in order, to provide a suitable and proper derrick, and keep it in order; also that, if the agreement was that defendant was to make repairs when notified by Dillon that repairs were needed, and no notice was given, yet the defendant was liable if the agreement was not known to plaintiff, and the accident occurred from neglect to repair, and without any negligence on the part of plaintiff." In the course of the opinion it is said: "He employed laborers to assist him in performing the contract, and, among others, the plaintiff. These persons were employed and paid by him, and were not subject to the control of the defendant. The negligence of Dillon to inspect and repair the derrick, if he was chargeable with negligence for omitting to do so, was not the negligence of the defendant, and it is not responsible therefor. Dillon stood as the employer and master of the plaintiff, and for his negligence the plaintiff's remedy is against him alone. If there was a duty resting upon the defendant to keep the derrick in repair, so that it could be safely used, it may be conceded that the omission of this duty would give a right of action to the plaintiff for an injury caused thereby. In the absence of a contract by the defendant with Dillon to keep the derrick in repair, I am unable to see any ground for inferring a duty on its part to do so." "The plaintiff knew that Dillon had taken the contract for unloading the iron, and the cases which hold it to be the duty of a master to furnish safe and suitable machinery for the use of his servants have no application, because that relation did not exist between the plaintiff and defendant. Where one person has sustained an injury from the negligence of another, he must, in general, proceed against him by whose negligence the injury was occasioned. If, however, the negligence which caused the injury was that of a servant, while engaged in his master's business, the person sustaining the injury may disregard the immediate author of the mischief, and hold the master responsible for the damages sustained. * * * But it is not enough, in order to establish a liability of one person for the negligence of another, to show that the person whose negligence caused the injury was at the time acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them." The judgment was reversed.

Hughbanks v. Boston Inv. Co., 92 Iowa, 267, 60 N. W. 640, was where the agent of the owner in charge of the erection of a building contracted with one Wakefield to do the carpenter work. A derrick furnished by Wakefield fell, and injured plaintiff, an employee. Plaintiff had judgment against the owner, but the case was reversed. It is announced in the syllabus: "Where one engaged in the erection of a building is to furnish labor and material at prices to be fixed by him, and to use such machinery and appliances as are deemed by him necessary, the owner reserving no right to control the manner of the performance of the contract, he is not an agent or servant of the owner of the building. The relation existing between parties being shown by written agreements, it is for the court to construe the agreements, and to instruct the jury as to their legal effect." The contract contained the following provisions: "Said second party agrees with the first party, for the consideration hereinafter mentioned, to well and truly execute and perform, in a true, perfect, and workmanlike manner, all work required in the erection and completion of * * * the Bay State Block, * * * and will furnish and provide, at his own expense, all materials and labor necessary to fully complete and perform said work * * * under the superintendency of said Mainland (or his deputy), and subject to the approval of the Boston Investment Company, superintendent, for the sum of \$25,681. * * * It is further agreed and understood that the said first party shall not in any way or manner be answerable or accountable * * * for any injury to any person or persons, either workmen or the public, or for any damage to adjoining property, either by said second party or his workmen, or any one employed by him, against all which injuries and damages to person any property said second party must and shall properly guard against, and must make good all the damage from whatever cause, being strictly liable and responsible for the same." It is said by the court: "It is claimed by the appellees that Wakefield was not an independent contractor, but that in performing his contract he was under the control of the company, and acted as its servant. We do not think this claim is well founded. The company reserved no right to control Wakefield in performing his contract. He could procure labor and material in his own way, at such prices as he should elect to pay, and had the right to use such machinery and appliances as he deemed proper, provided that it did not unnecessarily injure the building, nor interfere with work being done by others. The superintendent of the company could only require that the material and labor furnished be what the contract demanded. He could not control Wakefield in the selection of machinery which should be used by him, nor direct the method of its use." In *Pack v. City of New York*, 8 N. Y. 222,

Omaha Bridge & Terminal Co. v. Hargadine

it was ruled that, to make a city liable for the negligence of the servants of a contractor, it must have the power to direct and control the manner of performing the very work in which the carelessness occurred. This was followed in *Kelly v. Mayor*, 11 N. Y. 432, and *Vogel v. Mayor*, 92 N. Y. 18, 44 Am. Rep. 349. In *Charlock v. Freel*, 125 N. Y. 357, 26 N. E. 262, it was ruled the city was not liable where it had nothing to do with the manner of the performance of the work, and no control over the workmen. In *Pack v. City of New York*, supra, a contractor agreed to conform his work to such further direction as might be given by the city. The court held that this clause did not change the relation of the parties; saying: "It gave the corporation power to direct as to the results of the work, but without control over the contractor or his workmen as to the manner of performing it, which control alone furnishes ground for holding the master liable for the acts of the servant or agent."

We are unable to find that the plaintiff in error had any right, under its contract with Schribner, to control the defendant in error in any way, or that it owed him any contract duty. He was not its employee in any sense. The duty of furnishing tools for him to work with was a matter of contract between him and the contractor who employed him. It was a matter of indifference to the company, and a matter beyond its right to dictate, whether Hargadine furnished his own tools or had them furnished by his employer. The failure of his employer to furnish him safe tools does not render the plaintiff in error liable. This disposes of the case. The instruction quoted above is wrong, and the judgment must be reversed.

Whether the defendant in error had waived the defect in the bar by his continued use of it in handling timber on a trestle 37 feet above the lake, after fully knowing its defects, under the conditions disclosed by the evidence, we are not required to decide. *Indianapolis, etc., R. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. Rep. 578, and *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612, may be read with profit upon this question. We recommend that the judgment of the district court be reversed, and the cause remanded.

ALBERT and BARNES, CC., concur.

PER CURIAM. The conclusions reached by the Commissioners are approved, and, it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the judgment of the district court be reversed, and the cause remanded for further proceedings according to law.

LOUISVILLE & N. R. CO. v. SULLIVAN TIMBER CO.

(Supreme Court of Alabama, Nov. 12, 1903.)

[35 So. Rep. 327.]

Instructions.

A general affirmative charge for defendant on certain counts of the complaint eliminates from consideration on his appeal all questions arising on the pleadings and on the trial as to those counts.

Fires—Contributory Negligence—Duty to Minimize Damages.*

The doctrine that if one commits a wrong whereby another is affected, or is apparently likely to be affected, it is the legal duty of the latter to exercise reasonable diligence to avoid or minimize the resulting injury, and, if he negligently fails to do so, he cannot recover of the wrongdoer for such damages as he could have thus escaped, is not confined to cases of breach of contract and personal injury, but is applicable to cases of injury to property, including the negligent setting fire to property by sparks emitted from a passing locomotive.

Same—Same—Combustibles Near Right of Way—Violation of Ordinance.

A plea which alleged that plaintiff constructed sheds of inflammable material along a street and within 30 feet of defendant's railroad track passing along the street; that dry grass and other inflammable matter accumulated on the street and sidewalk in front of plaintiff's building; that the weather was dry; that defendant's locomotive engine passing along there every day frequently threw out sparks in dangerous quantities, and this plaintiff knew; that plaintiff, though required by the city ordinance to sweep the sidewalk, failed to do so, and negligently allowed the matter to remain in the street, though the danger of fire escaping from defendant's engine was apparent, and known to it; and that plaintiff's president saw the engine throw out sparks that caused the fire, but negligently went away without looking to see if the grass had been ignited—set up plaintiff's contributory negligence subsequent to the alleged negligence of defendant, counted on as the cause producing the injury complained of, and was therefore sufficient as against a demurrer.

Same—Same—Same—Same—Ignorance of Danger.

The mere failure of an owner of a building constructed of inflammable material along a street and within 30 feet of defendant's railroad track passing along the street to comply with the ordinance of the city as to sweeping the sidewalk was not alone, and without a knowledge on plaintiff's part of defendant's negligence in permitting its locomotives passing along the track to throw out sparks, and of the probable consequences thereof, sufficient to prevent a recovery for the destruction of its building by fire set from sparks thrown from a locomotive.

Same—Negligence—Issues—Instruction.

Where, in an action for the loss of property by fire set by defendant's locomotive engine, the counts of the complaint which remained after certain counts were eliminated did not charge defendant with failing to keep its right of way clear of combustible material, an instruction fixing a liability on defendant for the damages resulting from the fire caused by the falling sparks emitted from the engine and igniting the grass on its right of way because it failed to keep its right of way clear of grass likely to be ignited by sparks, was erroneous.

Same—Same—Instruction Not Warranted by Evidence.

Where, in an action for the loss of property by fire set by defendant's

*See *Armistead v. Shreveport & R. R. Val. Ry. Co. (La.)*, 3 R. R. R. 868, 26 Am. & Eng. R. Cas., N. S., 868; note, appended to *Louisville & N. R. Co. v. Hine (Ala.)*, 14 Am. & Eng. R. Cas., N. S., 382 (duty to avoid increasing damages); *Gulf, C. & S. F. R. Co. v. Reagan (Tex. Civ. App.)*, 3 Am. & Eng. R. Cas., N. S., 433.

Louisville & N. R. Co. v. Sullivan Timber Co

locomotive engine, there was no evidence to show that the fire originated from sparks falling in the grass on the right of way, an instruction making defendant liable for the damages resulting from the fire by the sparks emitted from the engine igniting the grass on its right of way because of its failure to keep the right of way clear of grass was abstract.

Same—Same—Same.

Where in an action for the loss of property there was no evidence to show that a properly constructed and operated engine would not throw sparks to a distance of 28 feet, and such fact could not be said to be a matter of common knowledge, an instruction authorizing the jury to find for plaintiff if they found that a properly constructed and operated engine could not throw burning sparks 28 feet was erroneous.

Same—Same—Same.

An instruction, in an action for the loss of property by fire set by defendant's engine, authorizing the jury to find for plaintiff if they found that a properly constructed and operated engine could not emit burning sparks and propel them for a distance of 28 feet, was erroneous, as ignoring the evidence that a strong wind was blowing at the time.

Same—Same—Instructions.

An instruction, in an action for the loss of property by fire set by defendant's engine, that, if the fire was caused by sparks emitted from defendant's engine in "dangerous quantities," then the burden was on defendant to show proper construction and management of the engine, and, though defendant introduced such evidence, it remained a question for the jury whether or not the fire originated from sparks emitted from the engine in "dangerous quantities," and if it did so originate, and the construction and management of the engine were improper, a verdict for plaintiff was authorized, was erroneous as leading the jury to believe that from the fact that a fire occurred sparks were emitted in dangerous quantities.

Same—Same—Same.

Where, in an action for the loss of property by fire set by defendant's engine, the complaint averred that fire escaping from the engine fell on plaintiff's property, and charged that defendant negligently cut down grass and weeds in the space between the track and plaintiff's property, and that the sparks fell into the grass and weeds, setting fire to the same, which was communicated to plaintiff's property, and there was evidence that defendant cut the grass and weeds, and also contradictory evidence, an instruction authorizing a verdict for plaintiff though the jury believed that the grass was not cut down was erroneous.

Same—Same—Speed—Application of Ordinance.

A municipal ordinance limiting the speed of trains was not intended to impose any duty on the railroad company in reference to buildings along its track, but was intended for the protection of the people using the streets of the city.

Directing Verdict.

Where the evidence is conflicting, an affirmative charge in favor of one party is improper.

Same—Absence of Negligence—Liability.†

A railway company is not liable for a fire set by sparks emitted

†*Wabash R. Co. v. Ordelheide* (Mo.), 7 R. R. R. 96, 30 Am. & Eng. R. Cas., N. S., 96 (railroad liable regardless of negligence, under Missouri statute); monograph, 15 Am. & Eng. R. Cas., N. S., 495; *White v. New York, P. & N. R. Co.* (Va.), 20 Am. & Eng. R. Cas., N. S., 588 (effect of proving use of best appliances to prevent the escape of sparks); *Peck v. New York Cent. & H. R. R. Co.* (N. Y.), 22 Am. & Eng. R. Cas., N. S., 808 (not liable in absence of negligence); *Baltimore & O. R. Co. v. Kreafer* (Ohio), 18 Am. & Eng. R. Cas., N. S., 99 (absolute liability under Ohio statute).

Louisville & N. R. Co. v. Sullivan Timber Co

from its engine and thrown on the property destroyed by fire, where the engine was furnished with a spark arrester and other appliances of approved character to prevent it, so far as possible, throwing sparks, and where it was properly handled by the engineer.

Same—Liability—Argumentative Instruction.

A requested instruction, in an action for the loss of property by fire set by an engine, that the jury had no right to speculate as to how the fire arose, and that before they could find a verdict for plaintiff the evidence must satisfy them that the fire arose from a spark from defendant's engine, and was communicated to plaintiff's property in one of the methods alleged in the complaint, and that, if the evidence failed on both or either of these points, the verdict should be for defendant, was properly refused as being argumentative.

Appeal from Circuit Court, Mobile County; Wm. S. Anderson, Judge.

Action by the Sullivan Timber Company against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

It was shown by the evidence that the sawmill, lumber, lumber sheds, etc., owned by the plaintiff, and located on the east side of Water street, in the city of Mobile, just south of Texas street, was totally destroyed by fire on September 29, 1896; that on said day one of defendant's trains passed plaintiff's property running at a rate of speed variously estimated by witnesses at from 12 to 25 miles an hour, and that a short time after the train passed, the plaintiff's property was discovered to be on fire; that the origin of the fire was variously located, but always some distance from a switch light or post which was on the defendant's road in Water street. There was evidence tending to show that the defendant's employees, some days prior to the fire, had cut down grass and weeds between its track and plaintiff's shed, and left the grass and weeds lying where they were cut. There was also evidence tending to show that near the switch post the defendant's employees had thrown some waste or packing used for cleaning the switch lamp, etc., which was saturated with oil. There was evidence further tending to show that 15 or 20 minutes after a train of the defendant passed the plaintiff's property fire broke out and was discovered to be on the outside of the shed next to the railroad track; that there was also discovered fire in the trash on the ground outside the shed; that fire broke out first in the roof of the shed; that nothing was stored under the shed at the place where the fire was started; that at the time the fire was started the wind was blowing strong from the northwest. The defendant introduced witnesses who testified that they were between the track and the shed after the fire commenced, and that there was no fire west of the shed. The defendant's evidence also tended to show that the fire originated either side or on top of the shed. One of the defendant's witnesses, who had on that day and before the fire inspected this

engine from which it is alleged the sparks causing the fire had escaped, testified that the engine was in first-class condition, and had the standard spark arrester, and that it was impossible for sparks large enough to set out a fire to escape from that engine that day; that said engine and train was properly handled that day; that a train going at the rate of 20 miles an hour would throw out more sparks than when going at 8 miles an hour. Defendant's engineer who had charge of this engine on that day testified that in passing appellee's property that day the train "was going at from ten to twelve miles an hour, and that the engine was not throwing out an unusual quantity of sparks; that more sparks are thrown out when going at twenty miles an hour than when going at eight miles an hour; the higher the rate of speed, the more sparks the engine will throw out." The city ordinance adopted in 1891 prohibited railroad trains to run within the city limits at a greater rate of speed than eight miles an hour.

Upon the introduction of all the evidence, the court, at the request of the plaintiff, gave to the jury the following written charges: "(1) Although a railroad company has the right to use fire in generating steam, yet if, by negligence in the condition of its property which contributed to the damage by reason of such fire, such railroad is liable for any damage that may so result. (2) A railroad has a right to use its property in the running of its trains. It has also the right to use fire to generate steam for the purpose of running its trains. But, while this is true, I charge you that the railroad company must so use its property and the fire necessary for the generating of steam in such a manner as to prevent injury to adjoining property, if it can reasonably do so. (3) If the jury believe from the evidence that the fire was caused by sparks from the engine of the railroad company igniting grass or combustible material on its right of way, then, though they should further find that the engine was properly equipped, and was in all respects properly managed, should the proof reasonably satisfy the jury that the railroad company failed to keep its right of way clear of grass, weeds, and combustible material likely to be ignited by sparks, this fact, if it be a fact, will make the defendant liable for the damage resulting from the fire. (4) If it be a fact shown in this case that the railroad company permitted any grass and other combustible materials to be and remain on its right of way liable to be ignited by sparks from its engine, then I charge you that this fact may be looked to by the jury to determine whether the railroad company was guilty of negligence. (5) If it be a fact shown in this case that the railroad company permitted dry grass and weeds to be and remain on its right of way, liable to be ignited by sparks from its engine, then I charge you that this was negligence in the company."

Louisville & N. R. Co. v. Sullivan Timber Co

"(8) If the jury find that a locomotive of the defendant, in passing plaintiff's premises, threw out or emitted sparks and fire in dangerous quantities, and thereby set fire to plaintiff's property at a distance from defendant's railroad track of about 28 feet; and if you further find from the evidence that a properly constructed and operated engine could not or should not emit such burning sparks, and propel them for such a distance—then you may find for the plaintiff, although the evidence of defendant's witnesses may tend to show that the locomotive was perfect, and its management skillful. (9) If the jury believe that the fire was caused by spark and fire emitted from the defendant's engine in dangerous quantities, then the burden is cast upon the defendant to show proper construction, appliances, and management of the engine; and, despite the fact that defendant introduces evidence of proper construction, appliances, and management of its engine, it still remains a question for the jury to determine from all the evidence in the case whether or not the fire did originate by the emission of fire and sparks from defendant's engine in dangerous quantities, and whether the construction and appliances and management of its engine were proper; and, if the jury find that the fire did so originate, and that such construction, appliances, and management were improper, then they are authorized to find for the plaintiff, unless the evidence shows that the plaintiff's own negligence contributed to cause the fire." "(11) That the owner of property near to a railroad track is not compelled to keep his property in such a condition as to guard against the negligence of the railroad company. (12) That contributory negligence of the plaintiff, in order to defeat a recovery, must be such as contributed as a proximate cause to the occurrences from which the damage arose, and it must be the negligence of the plaintiff, its agents, servants, or employees, and not that of a third person; and the burden of proof is on the defendant to prove it. (13) That, to charge the plaintiff with contributory negligence under the pleas in this case, the defendant must reasonably satisfy the jury by the evidence that there was a public street in front of plaintiff's property at the point where the fire originated, and that the plaintiff, through its agents and servants, negligently threw inflammable material into such street, and near to plaintiff's shed abutting on the edge of such street, and that the throwing of such material into such street proximately concurred in causing the fire or the spread of the fire to plaintiff's property, and which produced the destruction thereof, and that the burden of proof is on the defendant to show such contributory negligence. (14) That although, if the jury should believe that there was a public street in front of plaintiff's property at the point where the fire originated, still the plaintiff is not charged with the duty of keeping such street in good condition, or free from trash and combustible material; that if it

be a fact that there was a street there, and that there was trash and combustible material in it, but not placed there by plaintiff or its agents, servants, or employees, this would not constitute contributory negligence, so as to prevent plaintiff from recovering; that contributory negligence to prevent recovery must be some omission of duty which the plaintiff was compelled to perform, or some act by it concurring in the destruction of its property. (15) If the jury believed from the evidence that there was an open space of ground about 28 feet in width between plaintiff's shed that it was claimed was set on fire and defendant's railroad track, and that there were weeds and grass growing on said space of ground, and that defendant had said grass and weeds cut down a few days before the alleged fire occurred, and left them lying on the ground where they had been cut; and if the weather was then dry and warm, and such grass and weeds had become dry and inflammable, and liable to catch on fire from defendant's locomotive—then it was negligence in defendant to leave such dry grass and weeds so lying on the ground. (16) If the jury believe from the evidence that a steam locomotive and train of defendant passed by plaintiff's premises just before the alleged fire started which it is claimed destroyed plaintiff's property, and if said locomotive was being run at the time at a greater rate of speed than is prescribed in the city ordinance which is in evidence, then such running of said locomotive at such rate of speed would be negligence. (17) If the jury believe from the evidence that the fire was caused by the sparks and cinders thrown out by defendant's locomotive, and that it was so caused by the negligence of the defendant, and without any contributory negligence on the part of plaintiff, they must find for the plaintiff, even though they may be doubtful and uncertain whether it caught in the roof or in the grass at the foot of the shed, and whether the fire came out of the smokestack or from the ash pan of such locomotive. (18) If the jury shall find from the evidence that the fire was set by defendant's locomotive, and because of its being run at a rate of speed greater than eight miles an hour, then they must find for the plaintiff, even though the locomotive was properly equipped, unless they find the plaintiff guilty of contributory negligence. (19) If the jury believe from the evidence that a locomotive of defendant was running within the limits of the city of Mobile at a speed greater than that to which it was limited by the ordinance of said city, and was then throwing out a greater quantity of live sparks and cinders than it would have thrown out had it been running at no greater speed than that prescribed by such ordinance, and that then and there, under such circumstances, and within said city limits, fire was communicated by such sparks and cinders of said locomotive to the property of plaintiff, and such property was thereby damaged, and that plaintiff was not guilty of

any contributory negligence which proximately contributed to the fire, then the jury must find for the plaintiff for the amount of such damages as has been proven to their satisfaction, and interest at eight per cent. per annum thereon from the time such damage was inflicted to the date their verdict is returned, not to exceed twenty-five thousand dollars in all.

(20) The court charges the jury that it is not necessary for the plaintiff to prove to the jury beyond all reasonable doubt that defendant's locomotive set the fire complained of in order to fasten that fact upon the defendant. For that purpose it is sufficient if the evidence reasonably satisfies the minds of the jury that such was the fact."

The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by it: "(6) If the jury believe from the evidence that the defendant's engine was furnished with a spark arrester and other appliances, for the purpose of preventing the escape of fire or sparks, of a good character, and such as was in general use at the time by well-regulated railroads, and that such appliances were in good condition, and that the defendant was guilty of no negligence in operating its engine and train, but that fire nevertheless escaped and fell upon the plaintiff's premises and set it on fire, the jury ought to find a verdict for the defendant. (7) The jury have no right to surmise or speculate, independently of the evidence, as to how the fire arose, or as to how it was communicated to plaintiff's property, and then base their verdict thereon. Before they can find a verdict for the plaintiff, the evidence must reasonably satisfy them that the fire arose from a spark or fire from defendant's engine, and was communicated to plaintiff's property in one of the methods alleged in the complaint; and if the evidence fails to reasonably satisfy the jury on both of these points, and leaves their minds in doubt, confusion, and uncertainty as to them, or either of them, the jury ought to find a verdict for the defendant. (8) The court charges the jury that if they believe from the evidence that one of the defendant's engines threw sparks upon plaintiff's shed, or directly against it, and that the sparks so thrown themselves set fire to the shed, and that the burning shed communicated the fire to plaintiff's other property; and, further, that such engine was furnished with a spark arrester and other appliances of approved character to prevent, so far as possible, throwing sparks, and was properly handled by the engineer, and that such spark arrester and other appliances were in good condition, then they ought to find a verdict for the defendant. (9) If the jury believe from the evidence that sparks of fire escaped from defendant's engine drawing a passenger train that passed plaintiff's premises shortly before the fire occurred, and that such sparks or fire fell upon plaintiff's premises and set fire

be a fact that there was a street there, and that there was trash and combustible material in it, but not placed there by plaintiff or its agents, servants, or employees, this would not constitute contributory negligence, so as to prevent plaintiff from recovering; that contributory negligence to prevent recovery must be some omission of duty which the plaintiff was compelled to perform, or some act by it concurring in the destruction of its property. (15) If the jury believed from the evidence that there was an open space of ground about 28 feet in width between plaintiff's shed that it was claimed was set on fire and defendant's railroad track, and that there were weeds and grass growing on said space of ground, and that defendant had said grass and weeds cut down a few days before the alleged fire occurred, and left them lying on the ground where they had been cut; and if the weather was then dry and warm, and such grass and weeds had become dry and inflammable, and liable to catch on fire from defendant's locomotive—then it was negligence in defendant to leave such dry grass and weeds so lying on the ground. (16) If the jury believe from the evidence that a steam locomotive and train of defendant passed by plaintiff's premises just before the alleged fire started which it is claimed destroyed plaintiff's property, and if said locomotive was being run at the time at a greater rate of speed than is prescribed in the city ordinance which is in evidence, then such running of said locomotive at such rate of speed would be negligence. (17) If the jury believe from the evidence that the fire was caused by the sparks and cinders thrown out by defendant's locomotive, and that it was so caused by the negligence of the defendant, and without any contributory negligence on the part of plaintiff, they must find for the plaintiff, even though they may be doubtful and uncertain whether it caught in the roof or in the grass at the foot of the shed, and whether the fire came out of the smokestack or from the ash pan of such locomotive. (18) If the jury shall find from the evidence that the fire was set by defendant's locomotive, and because of its being run at a rate of speed greater than eight miles an hour, then they must find for the plaintiff, even though the locomotive was properly equipped, unless they find the plaintiff guilty of contributory negligence. (19) If the jury believe from the evidence that a locomotive of defendant was running within the limits of the city of Mobile at a speed greater than that to which it was limited by the ordinance of said city, and was then throwing out a greater quantity of live sparks and cinders than it would have thrown out had it been running at no greater speed than that prescribed by such ordinance, and that then and there, under such circumstances, and within said city limits, fire was communicated by such sparks and cinders of said locomotive to the property of plaintiff, and such property was thereby damaged, and that plaintiff was not guilty of

any contributory negligence which proximately contributed to the fire, then the jury must find for the plaintiff for the amount of such damages as has been proven to their satisfaction, and interest at eight per cent. per annum thereon from the time such damage was inflicted to the date their verdict is returned, not to exceed twenty-five thousand dollars in all. (20) The court charges the jury that it is not necessary for the plaintiff to prove to the jury beyond all reasonable doubt that defendant's locomotive set the fire complained of in order to fasten that fact upon the defendant. For that purpose it is sufficient if the evidence reasonably satisfies the minds of the jury that such was the fact."

The defendant separately excepted to the giving of each of these charges, and also separately excepted to the court's refusal to give each of the following charges requested by it: "(6) If the jury believe from the evidence that the defendant's engine was furnished with a spark arrester and other appliances, for the purpose of preventing the escape of fire or sparks, of a good character, and such as was in general use at the time by well-regulated railroads, and that such appliances were in good condition, and that the defendant was guilty of no negligence in operating its engine and train, but that fire nevertheless escaped and fell upon the plaintiff's premises and set it on fire, the jury ought to find a verdict for the defendant. (7) The jury have no right to surmise or speculate, independently of the evidence, as to how the fire arose, or as to how it was communicated to plaintiff's property, and then base their verdict thereon. Before they can find a verdict for the plaintiff, the evidence must reasonably satisfy them that the fire arose from a spark or fire from defendant's engine, and was communicated to plaintiff's property in one of the methods alleged in the complaint; and if the evidence fails to reasonably satisfy the jury on both of these points, and leaves their minds in doubt, confusion, and uncertainty as to them, or either of them, the jury ought to find a verdict for the defendant. (8) The court charges the jury that if they believe from the evidence that one of the defendant's engines threw sparks upon plaintiff's shed, or directly against it, and that the sparks so thrown themselves set fire to the shed, and that the burning shed communicated the fire to plaintiff's other property; and, further, that such engine was furnished with a spark arrester and other appliances of approved character to prevent, so far as possible, throwing sparks, and was properly handled by the engineer, and that such spark arrester and other appliances were in good condition, then they ought to find a verdict for the defendant. (9) If the jury believe from the evidence that sparks of fire escaped from defendant's engine drawing a passenger train that passed plaintiff's premises shortly before the fire occurred, and that such sparks or fire fell upon plaintiff's premises and set fire

Louisville & N. R. Co. v. Sullivan Timber Co

to its shed, they ought to find a verdict for the defendant, unless they are reasonably satisfied that such engine was not furnished with a spark arrester and other proper appliances of approved character to prevent the escape of fire, or that such spark arrester or other appliances were in bad condition, or that the train was improperly handled." "(11) If the jury believe from the evidence that sparks or fire escaped from defendant's engine drawing a passenger train that passed plaintiff's premises shortly before the fire occurred, and that such sparks or fire fell upon plaintiff's premises and set fire to its shed, they ought to find a verdict for the defendant, unless they are reasonably satisfied that such engine was not furnished with a spark arrester and other proper appliances of approved character to prevent the escape of fire, or that such spark arrester or other appliances were in bad condition, or that the train was improperly handled. (12) If sparks or fire escaped from defendant's passenger engine that passed plaintiff's premises and burned its property, then the burden is upon plaintiff to reasonably satisfy the jury by evidence that the spark arrester or other appliances with which such engine was fitted were not of the proper character, or were not in good condition, or that defendant's engineer was guilty of some negligence in operating such engine; and, if plaintiff has failed to do this, the jury ought to find a verdict for defendant."

Gregory L. Smith and Joel W. Goldsby, for appellant.
L. H. & E. W. Faith, for appellee.

DOWDELL, J. This is a suit by the Sullivan Timber Company, a corporation, against the Louisville & Nashville Railroad Company, to recover damages for the negligent burning and destruction by the railroad company of the plaintiff's property. The complaint, as originally filed, contained five counts, to which were subsequently added by way of amendment three other counts, making in all eight counts. The defendant pleaded not guilty to all of the counts, and, in addition, filed a number of special pleas of contributory negligence; to all except the third count, and to all of which special pleas, except the thirteenth, demurrers were sustained. The trial of the case resulted in a verdict and judgment in favor of the plaintiff, and from this judgment the defendant railroad company prosecutes this appeal.

The court gave, at the request of the defendant, in writing, the general affirmative charge as to the first, second, fourth, and fifth counts. This eliminates from consideration all questions that arose on the pleadings and on the trial as to these counts. Highland Avenue R. R. Co. v. South, 112 Ala. 642, 20 South. 1003.

The third count of the complaint, in connection with averments of negligence, etc., on the part of the defendant, as to the cause or origin of the fire which destroyed plaintiff's

property, counted on the falling sparks emitted from a passing locomotive of the defendant company that fell upon the shed of the plaintiff described in the complaint, setting fire thereto, and thence the fire was communicated to and destroyed the other property. The sixth count counted on the negligence of the defendant through its servants, throwing grass or weeds, which had been cut down under its direction, towards and near plaintiff's property, and negligently and wrongfully allowing the same to remain near the plaintiff's premises, by which means fire caused by sparks from a passing engine falling on the grass and weeds was communicated to and destroyed plaintiff's property. The seventh count counted on the sparks from the passing train setting fire to the dry grass, weeds, and greasy waste which the defendant had negligently and wrongfully thrown into the street between its railroad track and plaintiff's property, and near to plaintiff's premises, and negligently allowed the same to remain there, and whence the fire spread to and destroyed plaintiff's property. The eighth count counted upon the carelessness and negligence of the defendant in allowing fire to escape from its engine and set fire to the dry grass, weeds, and other combustible material in Water street, which fire spread to and destroyed plaintiff's property. The special pleas to which demurrers were sustained set up as a defense to the action in different ways an alleged negligent failure or omission on the part of the plaintiff, its agents or servants, to do certain things, whereby the injury complained of might have been averted, and that the alleged negligent failure or omission to do which contributed proximately to the injury complained of. The second plea averred that the plaintiff had constructed its shed of dry boards placed upright and covered with wooden shingles along the immediate east edge of Water street, and to the east of this had other wooden buildings, and a great deal of lumber, so situated as to be in great danger of burning should the shed catch on fire; that the defendant had a right to run its engine on said street, which engine frequently threw out sparks; and that the weather was at that time, and had been for a long time prior, very dry, and there was constant danger of these sparks setting fire to any dry grass or weeds or other inflammable material that might be on said street, and of said fire being communicated to plaintiff's property; and plaintiff, knowing all this, nevertheless negligently allowed the dry grass or weeds or other inflammable material to be and remain upon said street, which proximately contributed to communicating the fire complained of to plaintiff's property. The third plea is a repetition of the second, with the additional averment, in substance, that the fire was caused by sparks from defendant's engine, and that J. W. Black, the president of plaintiff's company, and who had the control and management of its property, saw the sparks fall into the

street, where he knew there was dry grass, etc., and, having the present means of preventing the spread of any fire that arose from falling sparks in the dry grass and weeds, negligently failed to take any steps to prevent said grass from burning, and went off without looking to see if said sparks had set fire to said grass and weeds, or was about to do so; and his said negligence also proximately contributed to the injury complained of. The fourth and fifth pleas are practically the same as the third, the difference being in averment that defendant's train frequently and daily passed along the street in front of plaintiff's property at a rapid rate, throwing burning sparks into the street where this dry grass, etc., was lying, which dry grass and weeds the plaintiff negligently allowed to remain in the street, and J. W. Black, plaintiff's president, knew these dangerous conditions, and saw the sparks fall into the street, but negligently went off without looking to see if said spark had set fire to said grass and weeds, although he had the means at hand with which he could have prevented the spread of the fire to plaintiff's property. The sixth, seventh, eighth (the ninth plea being withdrawn), tenth, eleventh, and twelfth pleas were substantially the same as the second, third, fourth, and fifth, except that each contained the additional averment that six feet on each side of the said street was by an ordinance of the city of Mobile devoted to sidewalks, and it was by ordinance of said city made the duty of the tenant of every piece of property to keep the sidewalk in front thereof clean and free from grass, etc., and that plaintiff had failed to do this, and that this omission of duty by plaintiff to clean or sweep this six feet was negligence on the part of the plaintiff, which contributed proximately to the injury complained of. The fourteenth, fifteenth, sixteenth, and seventeenth pleas are the same in substance as the sixth, seventh, eighth, tenth, eleventh, and twelfth, except that they set out the city ordinance requiring each tenant or occupant of a house to sweep the sidewalk in front of his house before 10 o'clock of each day. The second and third pleas to the complaint, as amended, are addressed to the sixth count, and state the contributory negligence of the plaintiff to consist in its knowledge that defendant's servants had negligently thrown large quantities of grass and other inflammable material near plaintiff's business, and of the danger of burning sparks escaping from defendant's engine and setting fire to this said grass, etc., and which would be communicated to plaintiff's property, but that the plaintiff negligently allowed said dry grass and other inflammable material to remain in said street, etc. The fourth and fifth pleas to the complaint, as amended, are addressed to the seventh count, and each plea, after rehearsing the several wrongful and negligent acts of the defendant set out in that count, then avers that the plaintiff negligently

failed to remove the said dry grass, greasy cotton waste, etc., and thereby proximately contributed to the injury complained of. The sixth plea to the complaint, as amended, is addressed to the eighth count, and states the contributory negligence relied on to consist of the knowledge on the part of plaintiff, through its president, that fire had escaped from defendant's engine as averred in said eighth count, and of the danger of igniting the dry grass and weeds and other combustible matter lying on the space of ground near Water street between the plaintiff's said premises and defendant's railroad track, and of being thereby communicated to plaintiff's property and the plaintiff, having then and there the means of preventing said fire from communicating to its said premises, negligently failed to take the necessary steps to that end, and that plaintiff's said negligence proximately contributed to the injury complained of. To all of said special pleas as stated above demurrers were sustained, except to the thirteenth special plea, which latter plea set up that the plaintiff negligently placed or threw the inflammable material into the street near its premises and that this negligence proximately contributed to the injury. And on the thirteenth special plea and the plea of the general issue the cause was tried.

The principal facts set up in these special pleas may be summarized as follows: That the plaintiff's shed was constructed of inflammable material along the immediate east side of Water street, within 30 feet of defendant's railroad track, which ran in and along said street; that dry grass, weeds, and other inflammable matter had accumulated on the street and sidewalk in front of the plaintiff's property; that the weather was dry; that the defendant's locomotive engine, passing along there every day, frequently threw out sparks in dangerous quantities, all of which was known to the plaintiff; that plaintiff was required by city ordinance to sweep the sidewalk, which it negligently failed to do, and negligently allowed the dry grass, weeds, and greasy waste to remain in the street; that the danger of fire escaping from defendant's engine and igniting the dry grass, etc., in the street and on the sidewalk was apparent, and known to plaintiff; that the plaintiff's president saw the engine throw out the sparks that caused the fire, and negligently went away without looking to see if the grass had been ignited. It is to be observed that in none of the special pleas to which demurrers were sustained in the alleged negligence counted on as proximately contributing to the injury complained of in the complaint is it charged that the plaintiff, its agent or servant, was guilty of any direct or positive act of negligence, but the alleged negligence consisted in the failure or omission to act. The theory of the defense set up in the special pleas is based on the principle that, if one commits a wrong, whether in tort or in contract, whereby another is affected, or is apparently

Louisville & N. R. Co. v. Sullivan Timber Co

likely to be affected, it is both the legal and moral duty of the latter to exercise reasonable diligence to avoid the resulting injury to himself, or minimize it as far as possible; and, if he carelessly or negligently fails to do so, he cannot recover of the wrongdoer such damages as he could have thus escaped. This doctrine is well established in cases of the breach of contract, and so recognized by this court in *Murrell & Whitney v. Whiting*, 32 Ala. 66, and *Strauss v. Meertief*, 64 Ala. 307, 38 Am. Rep. 8. But it is not confined to cases of contracts and to cases of personal injury, as suggested in argument by counsel for appellee. It is equally applicable in cases of injury and damage to property resulting from a tortious act, and no good reason exists why it should not apply in such cases. The doctrine was recognized and applied in *Lilley v. Fletcher*, 81 Ala. 237, 1 South. 273, in an action for injury to property resulting from defendant's negligence, and where the contributory negligence pleaded was similar in character and principle to that pleaded in the case at bar.

The pleas here are not inconsistent with or opposed to the principle asserted in *L. & N. R. Co. v. Marbury Lumber Co.*, 125 Ala. 260, 28 South. 438, to the effect that the owner of property cannot be required to anticipate the negligence of another, but, on the contrary, has a right to presume that the railroad company will use proper equipped engines, and will operate them in a careful manner. They do not involve the proposition of a duty on the owner of the property destroyed to anticipate negligence on the part of the defendant railroad company in the operation of its locomotives. The contributory negligence set up is subsequent to the alleged negligent act of the defendant counted on by the plaintiff as the cause producing the injury complained of. The negligence counted on as the causation of the injury and resulting damages was not left in anticipation at the time of the alleged contributory negligence pleaded. The negligent act of the defendant was a consummated fact, known to the plaintiff, and that it would likely result in injury to plaintiff's property unless prevented, and which could have been prevented by the exercise of ordinary care and diligence by the plaintiff or its agents. In 1 Sedgwick on the Measure of Damages (7th Ed.) p. 164, under the head "Avoidable Consequences not Allowed," the doctrine is thus stated: "The same principles which refuse to take into consideration any but the direct consequences of the illegal act is applied to limit the damages where the plaintiff, by using reasonable precautions, could have reduced them;" and on page 165, quoting from Mr. Starkie, it is said: "In an action for an injury occasioned by the negligence of another it is a good defense to show that the injury so far arose from the negligence of the plaintiff that he might, by ordinary care and caution, have avoided the injury." The following cases

Louisville & N. R. Co. v. Sullivan Timber Co

are cited as being in point, or bearing on the subject: *Eaton v. Oregon Ry. & Nav. Co. (Or.)* 24 Pac. 414; *I. C. R. R. v. McKay (Miss.)* 12 South. 447; *R. R. Co. v. McClelland*, 42 Ill. 359; *Tillery v. St. L. & S. T. Ry. Co. (Ark.)* 6 S. W. 8; *Mills v. Chicago, M. & S. P. Ry. Co.*, 76 Wis. 422, 45 N. W. 225. Our conclusion is that the court erred in sustaining the demurrers to the special pleas. It is, however, proper to say that, in our opinion, the mere failure on the part of the plaintiff to comply with the ordinance of the city as to sweeping the sidewalk, though such an omission of duty as might in law become negligence per se, would not alone, and of itself, and without a knowledge on the part of plaintiff of the defendant's act of negligence, and of the dangerous condition, and of the probable consequences of defendant's negligence, prevent a recovery by plaintiff for the defendant's wrong, which was the primary cause of the injury.

Several exceptions were reserved to the rulings of the court on the introduction of evidence. We have examined and considered the same, and failed to find that any error was committed in any of these several rulings. The defendant's railroad ran in and along a public street in the city of Mobile. Its right of way was limited to its track. The third charge given at the request of the plaintiff fixed a liability on the defendant for the damages resulting from the fire caused by the falling sparks emitted from the engine and igniting the grass on its right of way, although the engine was properly equipped and properly managed, for a failure to keep its right of way clear of grass, weeds, and combustible material likely to be ignited by sparks. None of the remaining counts of the complaint, after first, second, fourth, and fifth were eliminated, counted upon the failure of the defendant to keep its right of way clear of grass, weeds, and combustible material, and the charge, when referred to the counts not eliminated, was bad. Moreover, there was no evidence that the fire originated from sparks falling in the grass and weeds on the right of way, and the charge for this reason was abstract. Charges 4 and 5 are subject to the same criticism. There was no evidence to show that a properly constructed and operated engine would not throw sparks to a distance of 28 feet, and such cannot be said to be a matter of common knowledge. The eighth charge, therefore, was improper. Moreover, this charge ignores the evidence that a strong wind was at the time blowing. *L. & N. R. R. Co. v. Marbury Lumber Co.*, 125 Ala. 256, 257, 28 South. 438; *A. G. S. R. R. Co. v. Taylor*, 129 Ala. 246, 29 South. 673.

To rebut the presumption arising from the prima facie case circumstantially shown by the plaintiff, the defendant introduced evidence showing a proper equipment and management of the engine, which was uncontradicted. The ninth charge hypothesizes the emission of sparks from the

defendant's engine in dangerous quantities only, but not in quantities unusual for a properly constructed, equipped, and managed engine to emit. It is sufficient to put the burden upon the defendant to show that the engine was properly constructed and handled, that the fire originated from sparks emitted by the engine, and the very fact that the fire did so originate would show that sparks were emitted in dangerous quantities, and the charge was calculated to lead the jury to draw such an inference, and, when so construed, the facts hypothesized amounted to no more than the *prima facie* case made, which required the defendant to show proper construction and handling, and, as applied to the evidence, was directly opposed to the rule as stated in *L. & N. R. Co. v. Marbury Lumber Co.*, *supra*. If the charge had hypothesized the emission of the sparks in unusual and dangerous quantities, then it would have been good.

The third count avers that the fire that so escaped fell upon the plaintiff's property, while the eighth count charges that the defendant negligently cut down grass and weeds in the space between the track and the plaintiff's shed, and that the sparks fell into this grass and weeds, setting fire to the same, which was communicated to plaintiff's premises. There was evidence tending to show that the defendant cut the grass or weeds in this space and left the same lying where it was cut; but there was also evidence tending to show that the defendant did not cut any grass or weeds in this space, and that the grass and weeds between the track and shed were left standing. Under the instruction contained in charge 17, the jury were required to find for the plaintiff, although they might believe that the grass was not cut down, but was left standing, and although there was no count in the complaint covering such case as the pleading stood after the elimination of the first, second, fourth, and fifth counts. The charge therefore was bad. The remaining charges given at the instance of the plaintiff, when referred to the pleadings as they stood after the elimination of the several counts mentioned and to the evidence, correctly state the law, and no error was committed in the giving of them, except as to the eighteenth and nineteenth. The ordinance limiting the speed was not intended to impose any duty on the railroad company in reference to structures or buildings along the line of the railroad, but was intended for the protection of the people using the street.

Of the refused charges requested by the defendant, and here insisted on, the fourth and fifth were general charges to find for the defendant under the sixth and seventh counts of the complaint. As to these counts there was conflicting evidence—at least evidence authorizing different inferences; and for this reason these charges were properly refused. The sixth refused charge would have been proper if confined to the third count, but was bad in that it ignored other phases of

Norfolk & W. Ry. Co. v. Cheatwood's Adm'r

the complaint, and the evidence in the support thereof, upon which a recovery was sought. The ninth, tenth, eleventh, and twelfth refused charges were likewise faulty in ignoring phases of the complaint and evidence in support thereof on which a recovery was sought. The eighth charge was not subject to this ground of objection, as urged by counsel for appellee, and, as it correctly stated the law, should have been given. The seventh refused charge was argumentative, and for that reason, if no other, the court properly refused it.

For the errors pointed out, the judgment will be reversed, and the cause will be remanded. Reversed and remanded.

NORFOLK & W. RY. CO. v. CHEATWOOD'S ADM'X.

(Supreme Court of Appeals of Virginia, Jan. 12, 1905.)

[49 S. E. Rep. 489.]

Killing of Locomotive "Hostler"—Post of Duty—Question for Jury.

In an action against a railroad company for the death of a "hostler," injured while riding on a tender in a switchyard, evidence held to justify submission to the jury of the question whether deceased was at his post of duty at the time of the injury.

Same—Building near Track—Negligence—Use of Larger Tender.*

Where a railroad company maintained a building in its switchyard at such distance from the track that a person riding on a step at the side of the tenders ordinarily used in the yard could pass in safety, the use of a tender so large that a person riding as usual would be crushed against the building was negligence.

Death by Wrongful Act—Measure of Damages.

In an action for death by wrongful act, an instruction that plaintiff is entitled to a sum equal to the probable earnings of deceased considering his age, business capacity, experience, habits, health, energy, and perseverance is correct as to the element of damage referred to.

Constitutional Provision—Construction.

Where a constitutional provision of another state is incorporate in the Constitution of this state, the construction placed upon the provision by the courts of such other state before its adoption here must be adopted in this state.

Same—Same—Effect of Employee's Knowledge of Defects.

Const. § 162 [Va. Code 1904, p. cclix], and Acts 1901-02, p. 335, c. 322 [Va. Code 1904, p. 707, § 1294k], providing that a railroad employee's knowledge of defects in appliances shall not bar a recovery for injuries caused by such defects, does not do away with the defense of contributory negligence, or render knowledge of defects unimportant in determining the question of contributory negligence, but merely renders knowledge alone insufficient to defeat recovery.

*See foot-note appended to Choctaw, etc., R. Co. v. McDade (U. S.), 12 R. R. R. 26, 35 Am. & Eng. R. Cas., N. S., 26; foot-note appended to Withee v. Somerset Traction Co. (Me.), 12 R. R. R. 46, 35 Am. & Eng. R. Cas., N. S., 46; foot-note appended to Illinois Terminal R. Co. v. Thompson (Ill.), 12 R. R. R. 683, 35 Am. & Eng. R. Cas., N. S., 683.

Norfolk & W. Ry. Co. v. Cheatwood's Adm'r

Same—Same—Same—Contributory Negligence.

Under these provisions the servant's knowledge of defects is to be considered in connection with all the other evidence in determining whether the servant used due care, but, as such knowledge will not alone defeat a recovery, an instruction that the defense of contributory negligence is unaffected by the statutes is too broad.

Defenses—Contributory Negligence—Instructions.

Instructions that defendant is entitled to make the defense of contributory negligence, and defining what constitutes contributory negligence, are sufficient to preserve defendant's right to this defense.

Contributory Negligence.

Where a railroad employee had ridden on the side of tenders past a building so close to the track that there was barely room for his body, he was not guilty of contributory negligence in trying to ride past on the side of a larger tender, unless he knew it was larger.

Negligence—Question for Jury.

In an action against a railroad company for the death of a roundhouse "hostler" crushed to death between a building near the track and a tender on which he was riding in the usual way, but which was larger than any tender previously used in the yards, evidence held to justify submission to the jury of the issue of defendant's negligence.

Appeal from Corporation Court of City of Radford.

Action by the administratrix of W. J. Cheatwood against the Norfolk & Western Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

CARDWELL, J. The administratrix of W. J. Cheatwood, deceased, brought this action in the corporation court of the city of Radford, alleging that the death of her intestate was due to negligence of the defendant, the Norfolk & Western Railway Company, and recovered a judgment for \$6,250, to which the defendant obtained this writ of error.

Viewed as upon a demurrer to the evidence, the case before us is as follows:

Cheatwood, the deceased, was on the 10th day of July, 1903, and had been for at least 12 years prior, in the employ of the plaintiff in error on its yard at Radford as assistant "hostler." Upon the yard, among other things, were a roundhouse, watertank, sandhouse, and coal wharf. The duties of the deceased, among others, were to assist the hostler in taking engines over the yard, getting coal, water, and sand, and running them back to the roundhouse. In doing this he opened and closed the switches, and gave signals to the hostler for starting and stopping at the proper places. There was no rule of the company prescribing the place where he should ride on the engine, and when the engine was moving forward the usual place occupied by him and other employees performing the same duties was on the step on the right-hand side of the pilot at the front of the engine; and, when moving backward, on a step on the same side of the tender at the rear end, which, when moving backward, was in front, and which positions were the most con-

Norfolk & W. Ry. Co. v. Cheatwood's Adm'r

venient for the assistant hostler, and the usual position occupied by the assistant hostler for the transaction of his business.

A number of years prior to the accident resulting in the death of Cheatwood, a sandhouse was built on the north side of one of the tracks in the yard, and at a distance from the track which was free from danger to employees riding on the outside of the engines and tenders which were then in use; the plaintiff in error then using tenders holding only 4,000 gallons of water. There were four steps on each tender, one at each corner, all alike, and the steps projected from the sides of the tender to about 9½ inches from the sandhouse when passing it. Afterwards, and perhaps a year or more (just when does not appear) before the accident of Cheatwood, plaintiff in error increased the size of its tenders so that they would hold 5,000 gallons of water, which was accomplished by extending the sides of the tenders until they were flush with the inside of the steps, the steps being 7½ inches wide, but the distance of the steps from the center of the track, and consequently from the sandhouse, was not changed. Later plaintiff in error increased the size of some of its tenders so as to hold 6,000 gallons of water, this being accomplished by again extending the sides until they became flush with the outside of the steps, which still remained 9½ inches from the sandhouse, but practically under the tender, as the outside of the tender was flush with the outer edge of the steps. On the rear end of the tender was a cross-beam 8½ inches wide, extending the width of the tender. This was reached by a handhold on the corner of the tender, extending from the sill to within 12 or 14 inches of the top of the tender, and by catching this handhold a person could get up on the steps, and from there could step to the cross-beam, and when standing there could hold by this handhold or to the top of the tender, which was about as high as an ordinary man's head.

Prior to the accident to Cheatwood on July 10, 1903, he and others in the same employment repeatedly rode by the sandhouse on the steps of the engines and tenders then in use on the yard, though, in order to do so, they had to stand very close to the side of the tender, there being, if it was a 5,000-gallon tender, but one or two inches between the body and the sandhouse; and this had been without accident to him or any one, and with full knowledge on the part of plaintiff in error that it was the custom of such employees to so ride on the tenders in performing the duties of assistant hostler. Between the 1st and 10th of July, 1903, a 6,000-gallon tender appeared upon the yard at Radford; just at what time does not appear, but it is certain that Cheatwood was not called on to handle it until the night of the 10th, and on that night engine No. 771, having a 6,000-gallon tank (tender) was taken to the coal wharf, with Cheatwood

Norfolk & W. Ry. Co. v. Cheatwood's Adm'r

as assistant hostler. Returning from the wharf, with the tender in front, he was riding upon the step of the tender, where he had been in the habit of riding when performing his duties, the step being under the tender, as stated, differing in this respect only from the tenders formerly run over the yard; and this change made it impossible for a man to pass the sandhouse standing on that step, as the side of the tender was only 9½ inches from the sandhouse. As a necessary consequence, Cheatwood was mashed between the tender and the sandhouse, and received injuries from which he died the next day.

At the trial, and after the introduction of all the evidence, the court, at the instance of the defendant in error (plaintiff below), gave six instructions to the jury, all of which were objected to by plaintiff in error except No. 6; and the plaintiff in error (defendant below) asked for five instructions, to each of which defendant in error objected, and Nos. 1 and 2 were refused, and Nos. 3, 4, and 5 amended. The court also, of its own motion, gave two instructions, to the first of which plaintiff in error excepted; and after this ruling plaintiff in error asked for instructions Nos. 6 and 7, to which no objection was made, and they were also given.

Instructions Nos. 1 and 2, asked by defendant in error, are as follows:

“Instruction No. 1.

“If the jury believe from the evidence that W. J. Cheatwood came to his death by being crushed between the tender of an engine and the sandhouse of the N. & W. Railway Co. located dangerously near the coal wharf track of said railway, if they believe from the evidence it was so located, on its yard at East Radford, and at the time of the injury he was riding on said tender in the course of his employment at his post of duty, and was injured without fault on his part, they must find for the plaintiff, and assess her damages accordingly, although they may believe from the evidence that plaintiff knew of the location of said sandhouse with reference to said track.

“Instruction No. 2.

“The jury are further instructed that it was the duty of the defendant company to use reasonable care to furnish to plaintiff's intestate a reasonably safe place in which to work, and reasonably safe appliances, machinery, ways, and structures; and the knowledge by said intestate, W. J. Cheatwood, of the defective or unsafe character or condition of any machinery, ways, appliances, or structures, shall be no defense to an action for an injury caused thereby—such as an injury resulting from a sandhouse being located too near to its railway track when running engines and tenders of the size of engine and tender No. 771, should the jury believe from the evidence that the said sandhouse was located too near the said track, and was for that reason unsafe.”

Norfolk & W. Ry. Co. v. Cheatwood's Adm'r

The chief objection urged to No. 1 is that there was no evidence on which to found the second proposition contained therein, to wit, that Cheatwood at the time of his injury was at his post of duty.

We do not think that this is a valid objection to the instruction, as there was abundant evidence, as we shall see when we come to review it, tending to show that Cheatwood was at his post of duty, and certainly enough to submit the question to the jury, which was in fact the purport and effect of the instruction. The term in the instruction, "dangerously near the track," was to be considered in the light of the evidence; and, while there was in fact no defeat in the construction of the tender or sandhouse, the question submitted to the jury was whether or not the situation had been made dangerous by the enlargement of the tender upon which Cheatwood was riding, known to plaintiff in error, but not to Cheatwood, and when the instruction was read in connection with the other instructions, it was not open to the objections which plaintiff in error makes to it.

It is conceded that the first part of instruction No. 2 correctly defines a master's duty in furnishing appliances and structures. It then states that the servant's knowledge of the defects is no defense to an action for injuries caused thereby, and it was clearly the purpose of the instruction to tell the jury that it was negligence to run such an engine as No. 771 by the sandhouse if they believed from the evidence that the sandhouse was located too near the track, and was for that reason unsafe. Here again the instruction was to be interpreted in the light of the evidence, which tended to show the negligence of plaintiff in error in placing upon its yard, to be handled by its employees, an engine of so much larger size than that which Cheatwood and other employees had been in the habit of handling that it rendered the situation unsafe, while without this change of the size of the tender which Cheatwood was called upon to handle on the night of the 10th of July the sandhouse was not dangerously near the track. The evidence was all-sufficient to justify the giving of the instruction.

The court is further of opinion that there was no error in the giving of the third and fourth instructions asked for by defendant in error, which are as follows:

"Instruction No. 3.

"If the jury believe from the evidence that plaintiff's intestate, in the proper discharge of his duty, was accustomed to ride engines and tenders through the space between the sandhouse and track in question in safety, and that the defendant company, without notice to him, caused him to ride, on the night he was injured, an engine with a tender broader than engines and tenders he had been accustomed to handle, and which increased the danger, and thereby made it unsafe to ride said engine by said sandhouse to him when

Norfolk & W. Ry. Co. v. Cheatwood's Adm'r

so riding, and that this was the proximate cause of his death, without fault upon his part, then the jury must find and assess damages for the plaintiff.

"Instruction No. 4.

"If the jury believe from the evidence that for years the switching or assistant hostler, Cheatwood, of the Norfolk & Western Railway Company, all the years at Radford, had been safely riding engines and tenders by this sandhouse, moving and headed in the same direction as was the engine and tender on the night of July 10, 1903, W. J. Cheatwood received the injuries which caused his death, and believe from the evidence that said Cheatwood had had no instructions not to ride on the step of the tender when passing said sandhouse, and that he had no instructions where to ride, and that there was no rule of the company applicable to his position in the performance of his duties and that standing in that position he could most conveniently and with greatest dispatch for said railroad company perform the duties pertaining to his position; and further believe from the evidence that he was at his proper place for the performance of his duties; and without notice to said Cheatwood said company widened some of its tenders so that a man standing in the position on said step at the side of said tender, where said Cheatwood had been accustomed to stand, could not pass said sandhouse without being injured or killed; and that in the due and proper performance of his duties, using ordinary care therein, he attempted to ride said tender by said sandhouse on the night in question, and in doing so received the injuries which caused his death—then they must find for the plaintiff, although they may believe from the evidence he had knowledge of the distance and location of said sandhouse with reference to said track."

Instruction No. 5 given for the defendant in error is as follows:

"Instruction No. 5.

"The jury are instructed that, if they find damages for the plaintiff, in ascertaining such damages they should find the same with reference—First. To the pecuniary loss sustained by Sallie Cheatwood, his wife, and the three children of W. J. Cheatwood by the death of said Cheatwood, fixing the same at such sum as would be equal to the probable earnings of the said Cheatwood, taking into consideration the age, business capacity, experience, habits, health, energy and perseverance of the deceased, during what would probably have been his lifetime if he had not been killed. Second. In ascertaining the probability of life the jury have the right to determine the same with reference to recognized scientific tables relating to the expectation of human life. Third. By adding thereto compensation for the loss of his care, attention, and society to his wife and children. Fourth. By

adding such further sum as they may deem fair and just by way of solace and comfort to said wife and children for the sorrow, suffering, and mental anguish occasioned to them by his death."

The instruction is in a form which has been repeatedly passed upon by this court, as is conceded by plaintiff in error, and the objection made to it is that it told the jury that they should give the probable earnings of the deceased during what would have probably been his lifetime but for the accident, and states as the rule that they should find, as the capital to be invested, all that a man would probably earn in a lifetime, without deducting for his expenditures, and with only guesswork as to his health. The instruction is practically the same as an instruction approved by this court in *B. & O. R. Co. v. Weightman's Adm'r*, 29 Grat. 431, 26 Am. Rep. 384, and again sanctioned in *B. & O. R. Co. v. Noel*, 32 Grat. 394, and *Portsmouth St. R. Co. v. Peed's Adm'r*, 102 Va. 662, 47 S. E. 850; and in addition to this sanction of the instruction we do not feel warranted in holding that it was not a proper instruction when it is not claimed in this case that the verdict found by the jury is excessive.

This brings us to a consideration of the instructions of plaintiff in error refused by the trial court, or modified, and given as modified.

Instruction No. 1 involves a construction of section 162 of the Constitution of Virginia [Va. Code 1904, p. cclix] and the act of Assembly approved March 27, 1902 (Acts 1901-02, p. 335, c. 322 [Va. Code 1904, p. 707, § 1294k]), which provide that "knowledge by any railroad employee injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures shall be no defense to an action for injury caused thereby." Instruction No. 1 was to the effect that nothing contained in this constitutional provision or in the act of Assembly prevented plaintiff in error from making the defense of contributory negligence in the same manner and to the same effect as it could have done if such section and act had not been adopted; and, if Cheatwood's death was caused by his own neglect, they must find for the defendant.

This provision of the Constitution was taken verbatim from the Constitution of the state of Mississippi, and when adopted by our late constitutional convention it had been construed by the Supreme Court of Mississippi in the case of *Buckner v. R. & D. R. R. Co.*, 72 Miss. 873, 18 South. 449, in which case a servant was injured by defective machinery and his contributory negligence. It was in that case claimed that the Constitution of Mississippi abrogated the defense of contributory negligence, but the court held otherwise, and, after quoting the constitutional provision, said: "The effect of this is not to destroy the defense of contributory negli-

Norfolk & W. Ry. Co. v. Cheatwood's Adm'r

gence by a railroad company, but merely to abrogate the previously existing rule that knowledge by an employee of the defective or unsafe character or condition of the machinery, ways, or appliances shall not, of itself, bar a recovery. The law was that knowledge by an employee of defective appliances which he voluntarily used precluded his recovery for an injury thus received. The Constitution destroys that rule, and the mere fact that the employee knew of the defect is not a bar to recovery; but knowledge by an employee of defects is still an element or factor, and a very important one, in determining whether, with the knowledge he had, he used that degree of caution required in his situation with reference to the appliances causing his injury. The Constitution did not have the effect to free employees of railroad companies from the exercise of ordinary caution and prudence. It does not license recklessness or carelessness by them, and give them a claim to compensation for injuries thus suffered. They, like others not employees, must not be guilty of contributory negligence, if they would secure a right of action for injuries."

Under the rule laid down by this court in *N. & W. Ry. Co. v. Old Dominion Baggage Co.*, 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722, the construction placed on that clause in our Constitution by the Mississippi court must be adopted by this court.

Practically the same words occur in the Constitution of South Carolina, which were construed by the Supreme Court of that state in *Bodie v. C. & W. C. Ry. Co.*, 39 S. E. 715, and *Carson v. Southern Ry. Co.*, 46 S. E. 525. In the first named of these cases, the court expressly recognized that contributory negligence was a good defense notwithstanding the constitutional provision; and as to the second case it is sufficient to say that it can have no bearing here, as it was not rendered until after the adoption of our present Constitution.

We are of opinion that, independently of the rule laid down in *N. & W. Ry. Co. v. Old Dom. Baggage Co.*, supra, the construction put upon the language of the constitutional provision under consideration by the Supreme Court of Mississippi is a correct construction.

But we are further of opinion that the instruction No. 1 asked for by plaintiff in error was properly refused. In addition to the fact that there were other instructions given which clearly stated to the jury that the plaintiff in error had the right to rely upon the defence of contributory negligence, instruction No. 1, refused, was too broad, and was therefore calculated to confuse and mislead the jury.

While the right to make the defense of contributory negligence is not abrogated by the constitutional provision and the statute under consideration, the defense cannot rest alone upon the knowledge of an injured employee of the defective

or unsafe character or condition of any machinery, ways, appliances, or structures which may have been instrumental in causing the injury for which he sues, but such knowledge is rightly to be considered by the jury along with all the evidence in the case in determining whether the employee injured used that caution required in the situation he was placed in when the injury was received. Before the adoption of the constitutional provision and the statute, knowledge by any employee of the defective or unsafe character or condition of any machinery, ways, appliances, or structures which were instrumental in causing the injury sued for, upon the doctrine of assumed risk based on knowledge, actual or imputed, arising from the contract between the parties, the law implied that the servant assumed the risk of all danger of which he had knowledge, or by the use of proper diligence would have had knowledge, and therefore did not permit a recovery for an injury arising from defective machinery, ways, appliances, etc., where the defect was known to him. But not so now. The difference between assumed risk, actual or imputed, and contributory negligence arising from matters *ex delicto*, and consisting of wrongdoing, has been aptly expressed as "using a known defective appliance carefully and using a good appliance carelessly." An interesting and an exhaustive discussion of the cases on this subject, both where the distinction was made and where it was lost sight of, may be found in the case of *St. Louis Cordage Co. v. Miller*, 126 Fed. 495, 61 C. C. A. 477, 63 L. R. A. 551, and they are also fully discussed in *Bodie v. R. R.*, *supra*. So, as we have said, an instruction which tells the jury that the defense of contributory negligence could be made in the same manner and with the same effect as if the constitutional provision and act under consideration had never been adopted, which is, in effect, to say that the defense is unaffected, is too broad, and therefore well calculated to confuse and mislead the jury.

In the case at bar the court, at the instance of the plaintiff in error, by instructions Nos. 6 and 7, told the jury that plaintiff in error had the right to make the defense of contributory negligence, although they might believe from the evidence that the location and construction of the sandhouse and tender rendered the place defective and dangerous, and that a party is guilty of contributory negligence when he does something he ought not to have done, or omits to take some precaution which he ought to have taken under the circumstances. These instructions fully preserved to plaintiff in error the right to make the defense of contributory negligence.

Plaintiff in error's instruction No. 2, refused, was as follows:

"The defendant company was not bound to move the structures on the side of its tracks merely because it widened

Norfolk & W. Ry. Co. v. Cheatwood's Adm'r

its engines or tenders, so long as there was space for them to pass in safety, and reasonable means existed or were provided for its employees to pass such structures in safety while performing their duties, although it may have been more inconvenient for them to use such means as they did use before the widening of the engines or tenders."

The fatal objection to this instruction is that in directing the jury to consider whether the plaintiff in error had provided other safe places where Cheatwood might have in safety ridden upon the engine on the occasion of the accident to him, it ignored all consideration of the question whether such other safe places were known to Cheatwood. Cheatwood could not be held guilty of knowingly riding in an unsafe place instead of in a safe place provided for him by his employer, unless conscious at the time of the danger of the position he was taking and of the safe position provided for him; and where that is the situation the rule of law laid down in 2 Thomp. on Neg. 1059, C. & O. Ry. Co. v. Sparrow's Adm'r, 98 Va. 644, 37 S. E. 202, Street's Adm'r v. N. & W. Ry. Co., 101 Va. 746, 45 S. E. 284, that where there are two ways to do a thing, one dangerous and the other safe, both open to the servant, it is his duty to use the safe way, although it is not as convenient as the other way—and which rule is invoked by plaintiff in error—has no application.

Plaintiff in error's instructions Nos. 3 and 4, as presented, told the jury that the fact (if it was proved) that Cheatwood had ridden safely on the steps of tenders through a space so narrow they could barely pass through, and of which he had been warned because of the danger, did not justify him in assuming that he could do so on another tender, which was larger, and of different construction; but they fail to preserve for the consideration of the jury the question whether or not Cheatwood knew that the tender in question was larger and different, or could, by ordinary care, have known it. This fatal defect in the instructions was obviated by the amendments thereto made by the court, which were entirely proper.

These instructions Nos. 3 and 4, as amended by the court (the amendments appearing in italics) are as follows:

"No. 3.

"The jury are instructed, if they believe from the evidence that William Cheatwood had ridden safely by the sandhouse while standing on the steps of the tenders of smaller size and different construction from the one on which he was riding when injured, and believe that on the smaller tenders there was barely sufficient room for him to pass by being careful to stand close to the side of the tender and that he had been warned that it was dangerous for him to do so, the fact that he had so ridden did not justify or excuse him for undertaking to ride by the sandhouse on the step of a larger tender

Norfolk & W. Ry. Co. v. Cheatwood's Adm'r

of different construction, *if he knew that it was larger*; and if they believe that he attempted to do so and was killed in such attempt they must find for the defendant."

"No. 4.

"A person who has been accustomed to ride through a narrow place when there is just enough room for him to get through on tenders or engines which he was accustomed to cannot attempt to ride through the same space upon a new and different engine or tender of different construction, on the supposition that it is no wider than those he has been using, and throw the loss on his employer in case he is injured by reason of its being wider, *unless he knew it was wider and different, or by reasonable and ordinary care might have known of it*; and if the jury believe that William Cheatwood made such attempt, and was killed while doing so, they must find for the defendant; and this rule is not changed although they may believe that he did so because he was not thinking what he was doing."

The court also very properly amended plaintiff in error's instruction No. 5 in the same respect, and this instruction, as amended, is as follows:

"If the jury believe from the evidence that there were places on the engine or tender provided for that purpose, known to him, where William Cheatwood could have stood and performed his duties in safety, and believe that he had been warned against riding on the tender next to the sandhouse because it was dangerous to do so, and that he was killed while attempting to ride by the sandhouse on a tender, they must find for the defendant, although the position taken by him was the most convenient one."

The instructions given by the court, *ex mero motu*, are as follows:

Court's Instruction No. 1.

"The court instructs the jury that knowledge by any railroad employee injured of any defective or unsafe character or condition of any machinery, ways, appliances, or structures shall be no defense to an action for injury caused thereby; and if the jury believe from the evidence that Cheatwood was so injured by reason of the unsafe condition or character of defendant company's appliances and structures, viz., that the sandhouse in question was situated dangerously near the track, and was thereby rendered unsafe to the plaintiff in the performance of his duties as assistant hostler, and if they believe that deceased, Cheatwood, was attending to his accustomed duties, using ordinary care therein, at the time he received the injury which caused his death, they must find for the plaintiff, notwithstanding they may believe from the evidence that he had knowledge of said unsafe condition or character of the sandhouse."

Norfolk & W. Ry. Co. v. Cheatwood's Adm'r

Court's Instruction No. 2.

"The court instructs the jury that these instructions are to be read together, and construed in the light of each other."

The instructions in the case have been set out above, and the court is of opinion that they fully and fairly presented the legal propositions contended for by the counsel on each side.

This brings us to the consideration of the remaining assignment of error, which is the refusal of the court to set aside the verdict and award a new trial on the ground that it was contrary to the law and the evidence.

The defendant in error rested her claim for a recovery of damages upon the grounds (1) that Cheatwood was without fault; (2) that he was at his post of duty, in the only position he could assume to properly and expeditiously perform his duties; (3) that the master knew the place he occupied; (4) that he had safely occupied it for 12 years; (5) that the position on the step of a tender was absolutely safe until the 6,000-gallon tenders were put on; and (6) that he had no notice of the danger or of the change in the size of the tenders.

On the other hand, it was contended by plaintiff in error: (1) that there was no defect or unsafe condition in its tender, sandhouse, or track; that each and all, severally and collectively, were reasonably safe for the performance of all requirements of Cheatwood, if he had made a reasonably and ordinarily careful use of them. (2) That neither his instructions nor duty required him to ride on the step where he was killed, as the selection of the step as his riding place was his own choice. (3) That he had been warned not to occupy that position because it was dangerous; that the warning showed that it was unnecessary to be on the step at that place; and that, independently of the warning, his observation must have shown him the danger. And (4) that, with knowledge of the danger in riding on tenders he was accustomed to, he increased the risk by riding a tender of different construction, without attempting to ascertain whether or not it increased the danger, and was killed because the danger of doing so was materially increased.

With the very full statement of the case made at the outset of this opinion, it is unnecessary to go very fully into a review of the evidence. It unmistakably appears—and by this the negligence of the plaintiff in error is fully established—that the company had no rule specifying where the assistant hostler should ride on its engines when performing the duties performed by Cheatwood on the occasion of his injuries; that it was known to plaintiff in error that Cheatwood and others doing a like service were riding on the engines in use on its yard at Radford in the manner and at the places stated above; that in riding upon the engines in use prior to the day of this accident there was barely

room for the assistant hostler to ride upon the step of a tender in safety by the sandhouse situated near the track; that with full knowledge of these facts a 6,000-gallon tender was brought upon the yard in the nighttime, and Cheatwood was called upon to handle it as he had handled other engines, without any notice whatever to him of the change in the size of the tender, and without any opportunity on his part to have known this fact. The engineer who was running the engine to which this 6,000-gallon tank was annexed testifies that he did not know that he had a larger tank until after Cheatwood had been injured; that it would have required a very close inspection to have discovered the change which had been made; and, in effect, it was impossible for Cheatwood, in the nighttime, and under the circumstances, to have known of the increase in the size of the tender and the necessarily increased danger brought to him by the change of tenders. Upon the question whether or not Cheatwood was at his post of duty, the evidence, briefly stated, is as follows: That it was his duty to adjust the switches for the hostler, the hostler being the man in charge of the engine; that he was at the place most convenient for him and the engineer; that he was, at the time of the accident, at the post that he and other assistant hostlers had been assuming to perform their duties, which was on the steps at both ends—on the head when going west, and on the tank or tender coming east, backing; that Cheatwood had for 12 years been performing this duty, passing by the sandhouse upon the engines or tenders for 12 years without injury; that the post he occupied was where he could best discharge the duty immediately in hand, with due regard to his own safety and the business of the company. Three witnesses, experienced in the work on the yard at Radford, all of them employees of the plaintiff in error, and one of them (McGee) who was running the engine No. 771 on the occasion of this accident, testify that the duties performed by Cheatwood could best be done when backing with the tender in front, by standing on the step of the tender on the side of the engineer. In answer to the question, "Was there another place on this tender provided for him to ride, that you know of?" one of the three witnesses referred to answered: "No, sir; not that I know of. I never saw any one ride anywhere else except on the tender. Q. Except on the tender, you mean? A. Yes, sir." This witness, who states that he had been on that yard for 13 years, was asked if the place occupied by Cheatwood on the occasion of this accident to him was the best place for him to perform his duties, and answered, "Yes, sir; according to my judgment." Another of the three witnesses referred to was asked, "In the proper performance of his duties, due regard being had to facilitating the business of the company as well as to the safety of the man to discharge those

Norfolk & W. Ry. Co. v. Cheatwood's Adm'r

duties, where was the best place for a man to stand to perform them—I mean as assistant hostler?" to which he answered: "Well, both for his own advantage and that of the man he was working with, it was best to stand on the step. It was in a manner to push the business along, and as much to their interest (meaning the company) as to that of the man." The same witness states: "That was the post they had been assuming to perform that duty; that was on the step at both ends—on the head when going west, and on the tank coming east backing."

According to these and other witnesses, to sum up, the following facts appear: (1) That the position occupied by the deceased, Cheatwood, was the necessary, usual, and proper position occupied by the assistant hostler; (2) that he could, in that position, best perform the duties required of him by the master; (3) that employees always rode in that position, unless it was storming; (4) that he could not properly attend to his duties in any other position which was as safe as that one; (5) that the position occupied by him was well known to the master; (6) that he had safely ridden in that position for from 12 to 20 years on all tenders known or handled by him prior to the 10th of July, 1903, when he received his fatal injuries; (7) that it was the first time an engine with a tender of that size, and headed as that one was, was taken by Cheatwood, the deceased, to the coal wharf by the sandhouse; (8) that Cheatwood was called to assist with this engine in the nighttime, and that he did not know, nor by the exercise of ordinary care could he have known, that he was handling an engine with a tender larger than those he was accustomed to riding; (9) that he was given no notice of the change in the size of the tender, or the altered condition of the ways; (10) that he had no instructions as to the position he should occupy on a tender and engine; (11) that on the tender upon which he was sent on the night of July 10th a man standing in the position he was accustomed to occupy could not, with ever so great care, possibly pass by the sandhouse without receiving fatal injuries; (12) that it was difficult to get upon the end sill at the end of the tender, that when there it was a dangerous position, more so than that on the step, and difficult to maintain, and that one in that position could not well perform the duties required of him; and (13) that the steps were the safer place for him to occupy as compared with the sill at the end of the tender, where it is claimed that he could have ridden with greater safety; in fact, until the introduction on the night of July 10th, for the first time, of the 6,000-gallon tender, the step upon which Cheatwood was riding was a perfectly safe place.

The situation, then, was this: The plaintiff in error had no rules prescribing where its servants should ride on its engines and tenders when performing the duties of an

assistant hostler on the yard at Radford. It knew that its servants performing these duties had for years been in the habit of riding upon the engines and tenders run over the yard in the manner and places heretofore stated. It knew that it was impossible for an assistant hostler to ride upon the step of a 6,000-gallon tender, running backwards, over the yard, by the sandhouse situated near the track over which the engine and tender must necessarily pass, without certain injury or death to the assistant hostler; yet it permitted a tender of that size to be run over the yard in the nighttime on July 10, 1903, without any warning to those whose duty it was to handle it, and in consequence of this negligence on its part Cheatwood received injuries resulting in his death. Bearing in mind, as is conceded in the argument here, that the evidence does not show that Cheatwood and others repeatedly rode past the sandhouse on the steps of 5,000-gallon tenders, and in fact does not show that Cheatwood ever rode on the step of a tender of that size by the sandhouse, can it be said, in the face of the testimony of the hostler in charge of engine No. 771 on the night of July 10th, and with whom Cheatwood had worked for five years preceding, to the effect that it would have taken very close inspection to have discovered the fact that the tender attached to the engine on that occasion was larger than those formerly handled on the yard, that Cheatwood knew, or by the exercise of ordinary care and prudence could have known, that it was a larger tender than those he had formerly been handling, and that he could not with safety ride on its steps by the sandhouse, when in fact the hostler himself did not know the tender was larger until after Cheatwood had been mashed at the sandhouse? We think, as did the jury, that the question must be answered in the negative.

"No servant is presumptively chargeable with notice of a peculiar and unusual state of things. Reasonable time must be allowed to a new servant to become acquainted with his surroundings; and to an old servant to learn of changes in the situation. Servants are presumed to be aware of defects which are perfectly obvious to their sight, and the danger of which is obvious to any person of their mental capacity. But, to charge them with notice on this ground, the defect and danger must be unquestionably plain and clear, so that, if they did not see it, they must necessarily have been in fault." 1 Shearman & Red. on Neg. § 216.

The warning which it is claimed that Cheatwood had consisted merely in McGee, the hostler with whom he was working, saying to Cheatwood, "may be a year or two before he was killed: * * * 'If I was in your place, I would not ride the tanks through there,' and I told him I thought it was dangerous." In view of the fact that it does not appear when these remarks were made to Cheatwood, and that the same witness (McGee), as well as others, testify that they

Norfolk & W. Ry. Co. v. Cheatwood's Adm'r

never saw Cheatwood ride a 5,000-gallon tank by the sand house, but knew that he, as well as others, had been riding the smaller tanks by there regularly for years previous, no importance is to be attached to this so-called "warning." Nor do we concur in the view of counsel for plaintiff in error that the answer to the question asked Cheatwood the morning after his injuries, "Why on earth did you ride that big engine through there?" to which Cheatwood replied, "I don't know why; I had been riding those hogs; wasn't thinking what I was doing"—should be taken as an admission by Cheatwood that he knew that the tender which he was called upon to handle on the night of July 10th was larger than the tenders that he had theretofore been handling on the yard. When saying, "I had been riding those hogs," he must have had reference to the 4,000-gallon tenders upon which he had ridden with safety for a great number of years previous, as neither of the witnesses who testified on this point, and who were employees on the yard with Cheatwood, could say that they ever saw him ride on the steps of a 5,000-gallon tender by the sandhouse. Nor can any importance whatever, as it seems to us, be attached, under all the circumstances, to that part of Cheatwood's answer to the same witness, viz., "I wasn't thinking what I was doing."

Upon the whole case, we are of opinion that the judgment of the corporation court of Radford should be affirmed.

INDEX TO NOTES.

ABROGATION OF RULES.

See COUPLING CARS.

ABSENCE OF APPLIANCES.

See COUPLING CARS.

ABSENCE OF MIND.

See COUPLING CARS.

ACTING OUTSIDE SCOPE OF EMPLOYMENT.

See COUPLING CARS.

APPLIANCES.

See COUPLING CARS.

ASHES.

See COUPLING CARS.

ASSUMING DUTY OF ANOTHER.

See COUPLING CARS.

ASSUMPTION OF RISK.

See COUPLING CARS.

ATTENTION ABSORBED BY DUTY.

See COUPLING CARS.

ATTENTION OCCUPIED.

See COUPLING CARS.

AUTOMATIC-COUPLE ACTS.

See COUPLING CARS.

AUTOMATIC COUPLERS.

See COUPLING CARS.

BACKING TRAINS.

See COUPLING CARS.

BALLAST.

See COUPLING CARS.

BALLASTING BETWEEN TRACK.

See COUPLING CARS.

BLOCKING.

See COUPLING CARS.

BRAKEMAN.

See COUPLING CARS.

BRAKES.

See COUPLING CARS.

BUMPERS.

See COUPLING CARS.

CATTLEGUARDS.

See COUPLING CARS.

CHOICE OF PLACE TO WORK.

See COUPLING CARS.

CHOOSING DANGEROUS METHODS.

See COUPLING CARS.

CHUTES.

See COUPLING CARS.

CINDERS ON TRACK.

See COUPLING CARS.

COLLISIONS.

See COUPLING CARS.

CONDUCTORS.

See COUPLING CARS.

CONTRIBUTORY NEGLIGENCE.

See COUPLING CARS.

COUPLING BY HAND.

See COUPLING CARS.

COUPLING CARS.**Assumption of Risks.**

- Acting outside scope of employment, 218.
- Ordinary dangers, 218.
- Ordinary dangers—cars differing in height, 218.
- Ordinary dangers—cars of different patterns, 218.
- Ordinary dangers—fellow servant's negligence, 218.
- Ordinary dangers—general rule, 218.
- Ordinary dangers—incompetency of fellow servants, 218.
- Ordinary dangers—mismatched couplings, 218.
- Ordinary dangers—peculiar construction, 218.
- Ordinary dangers—projecting loads, 218.
- Unusual dangers—dangerous customs and methods, 218.
- Unusual dangers—defects and peculiar appliances and dangers, 218.
- Unusual dangers—general rule, 218.
- Unusual dangers—peculiar appliances and dangers, 218.
- Unusual dangers—risks assumed, 218.
- Unusual dangers—risks not assumed, 218.
- Unusual dangers—unsafe place to work, 218.
- Violation of automatic-coupler acts, 218.
- What are ordinary dangers, 218.

Contributory Negligence.

- Absence of bumper, coupling at night, 498.
- Absence of mind, 498.
- Abrogation of rules, 498.
- Acting outside scope of employment, 498.
- Acting outside scope of employment in emergencies, and in absence of emergencies, 498.
- Alighting between rails because of condition of side track, 498.
- Ascending cars, 498.
- Ashes on tracks, 498.
- Cattle guards, 498.
- Choosing dangerous method of doing work, 498.
- Collisions, 498.

COUPLING CARS—Continued.

- Collision while uncoupling, tight pin, and knowledge of danger, 498.
- Condition of track and roadbed, 498.
- Conductors coupling and uncoupling in emergencies, and in absence of emergencies, 498.
- Continuing in employment after promise to repair, 498.
- Contributory negligence the proximate cause, 498.
- Coupling by hand, absence of rule, 498.
- Coupling by hand because of defects, 498.
- Coupling sticks, failure to use, 498.
- Curves in tracks, 498.
- Customs, effect of, 498.
- Customs, employees estopped to complain, 498.
- Customs not objected to by officers, 498.
- Custom to disregard rules, 498.
- Danger discovered too late, 498.
- Dangerous method of doing work, 498.
- Defective appliances, 498.
- Defective automatic couplers, 498.
- Defective coupling, emergency, and danger of collision with another train, 498.
- Defective lantern, right to continue in employment after promise to repair, 498.
- Defective lever, coupling by hand in emergency, 498.
- Defective links, 498.
- Defects, 498.
- Defects, right to rely on judgment of conductor, 498.
- Directions of superiors, 498.
- Disregard of rules, 498.
- Ditches on right of way, 498.
- Drawbars of different heights, 498.
- Duty to look out for defects and obstructions, 498.
- Emergencies, 498.
- Emergency, order of superior, 498.
- Employers' liability acts, 498.
- Excavations, 498.
- Failure to examine appliances with knowledge of rule requiring examination to be made, 498.
- Failure to follow instructions, 498.
- Failure to look for defects, 498.
- Failure to use crooked links, 498.
- Familiarity with unusual appliances and construction of cars, 498.
- Frogs unblocked, 498.
- Frogs, walking over without necessity, 498.
- General rule, 498.
- Going between cars from necessity, 498.
- Going between cars instead of using lever on other side, 498.
- Going between cars on inside of curve in track, necessity of observing signals, 498.
- Going between cars to couple by hand in ignorance of rule, 498.
- Going between cars without necessity, 498.
- Going between cars without necessity, in absence of rule, 498.
- Going between moving cars, 498.
- Going between moving cars where unblocked frog, presumption as to absence of knowledge, 498.
- Going between rails where unusually large hole under switch rod, 498.
- "Gooseneck," unaccustomed use of, 498.
- Heights of appliances, 498.
- Hole in track, choice of place to make coupling, 498.
- Ignorance of rules, 498.
- Impossibility of avoiding injury after occurrence of emergency not the test, 498.

COUPLING CARS—Continued.

- Impracticable rules, 498.
- Inexperience, 498.
- In general, 498.
- Instructions of superiors, 498.
- Kneeling down on end of car, instead of lying down, to uncouple, 498.
- Knowledge of danger, 498.
- Knowledge of defect, 498.
- Knowledge of rules, 498.
- Knowledge that signal has not been observed, 498.
- Lack of time to use safe method, 498.
- Making three link couplings, 498.
- Method of doing work, 498.
- Method of doing work prescribed by company, 498.
- Mismatched couplings, 498.
- Mounting cars, 498.
- Moving cars, 498.
- Notice of danger, 498.
- Not the proximate cause, 498.
- Obeying dangerous order, 498.
- Obstructed view, 498.
- Obvious defects, 498.
- Occupying perilous positions, 498.
- Opportunity to examine track by lantern light, 498.
- Opportunity to observe defects, 498.
- Opportunity to stop train, 498.
- Patent defects, 498.
- Picking up coupling pin from track after signaling fireman, 498.
- Pre-emptory orders, 498.
- Prior opportunities to observe defects, 498.
- Projecting aprons, 498.
- Projecting loads, 498.
- Projecting loads, absence of knowledge, 498.
- Projecting loads, attention occupied with giving signals, 498.
- Projecting loads, knowledge of danger, 498.
- Projecting loads, necessity of stooping, and delay in coupling, 498.
- Projecting loads, negligence and contributory negligence, 498.
- Projecting loads, obeying pre-emptory order by lantern light, 498.
- Projecting loads, opportunity to avoid danger, 498.
- Projecting loads, pre-emptory orders, 498.
- Projecting loads, raising head after stumbling into ditch, 498.
- Projecting loads, working at night, 498.
- Proximate cause, 498.
- Proximate cause, question for jury, 498.
- Pushing cars along track without seeing an engine, 498.
- Relying on promises of other employees to keep watch, 498.
- Relying upon conductor to slacken speed, 498.
- Right to assume that master's duties have been performed, 498.
- Right to assume that track is in safe condition where opportunity to examine by lantern light, 498.
- Right to rely on judgment of superior, 498.
- Roadbed defective, 498.
- Scope of employment, 498.
- Second attempts, 498.
- Second attempt to coupling moving cars, 498.
- Short drawbars, failure to examine, 498.
- Side sills, proximity of, 498.
- Side tracks not ballasted, 498.
- Signaling from wrong side, 498.
- Snow on tracks, 498.
- Speed, 498.
- Standing on crossbars, 498.

COUPLING CARS—Continued.

Standing on footboard of engine, 498.
 Standing on ledge at end of car, 498.
 Standing with foot on bumper of each car, 498.
 Staying between cars with knowledge of danger, 498.
 Stepping upon track without seeing that signal is observed, 498.
 Sudden jerks, 498.
 Sudden jerks, inexperience, 498.
 Switchman uncoupling cars in violation of positive orders, 498.
 Tight pins, 498.
 Unballasted tracks, 498.
 Unblocked frogs, 498.
 Uncoupling by hand, 498.
 Uncoupling by hand after attempting to use lever, unblocked guard rail, 498.
 Uncoupling cars, 498.
 Unusual construction of cars and appliances, 498.
 Violation of alleged impracticable rule, 498.
 Violation of alleged unreasonable rule, 498.
 Violation of orders, 498.
 Violation of rule from necessity, 498.
 Violation of rules in obedience to orders, 498.
 Violation of rules the proximate cause, 498.
 Voluntary assumption of duty, custom not objected to by officers, 498.
 Waiver of rules, 498.
 Warnings, failure to heed, 498.
 Warnings of bystanders disregarded, 498.
 What is, 498.
 What is not, 498.
 Working at night, ballast washing from between tracks, 498.
 Working by lantern light, 498.
 Working from inside of curve, cars coming too close together, 498.

COUPLING STICKS.

See COUPLING CARS.

CREWS.

See COUPLING CARS.

CROOKED LINKS.

See COUPLING CARS.

CURVES IN TRACK.

See COUPLING CARS.

CUSTOM.

See COUPLING CARS.

CUSTOM AND USAGE.

See COUPLING CARS.

DANGEROUS CUSTOMS.

See COUPLING CARS.

DANGEROUS METHODS.

See COUPLING CARS.

DANGEROUS POSITIONS.

See COUPLING CARS.

DARKNESS.

See COUPLING CARS.

DEFECTS.

See COUPLING CARS.

DELAY IN COUPLING OR UNCOUPLING.

See COUPLING CARS.

DIFFERENT KINDS OF CARS.

See COUPLING CARS.

DIRECTIONS.

See COUPLING CARS.

DISABLED CARS.

See COUPLING CARS.

DISOBEDIENCE OF ORDERS.

See COUPLING CARS.

DISREGARD OF RULES.

See COUPLING CARS.

DITCHES.

See COUPLING CARS.

DOUBLE BUMPERS.

See COUPLING CARS.

DOUBLE DEADWOODS.

See COUPLING CARS.

DRAINS.

See COUPLING CARS.

DRAWBARS.

See COUPLING CARS.

DRAWHEADS.

See COUPLING CARS.

DUTY TO EXAMINE.

See COUPLING CARS.

DUTY TO LOOKOUT.

See COUPLING CARS.

EMERGENCIES.

See COUPLING CARS.

EMPLOYEES.

See COUPLING CARS.

EMPLOYEES ACTING OUTSIDE SCOPE OF EMPLOYMENT.

See COUPLING CARS.

EMPLOYEES OF DIFFERENT COMPANIES.

See COUPLING CARS.

EMPLOYERS' LIABILITY ACTS.

See COUPLING CARS.

ENGINES.

See COUPLING CARS.

EXAMINATION.

See COUPLING CARS.

EXCAVATIONS.

See COUPLING CARS.

FAILURE TO NOTIFY COMPANY OF DEFECTS.

See COUPLING CARS.

FISH CHUTES.

See COUPLING CARS.

FOOTBOARDS.

See COUPLING CARS.

FOREIGN CARS.

See COUPLING CARS.

FROGS.

See COUPLING CARS.

GOING BETWEEN MOVING CARS.

See COUPLING CARS.

"GOOSE NECK."

See COUPLING CARS.

GUARD RAILS.

See COUPLING CARS.

HANDHOLDS.

See COUPLING CARS.

HEIGHT OF CARS AND APPLIANCES.

See COUPLING CARS.

HOLES IN TRACK.

See COUPLING CARS.

HOOKS.

See COUPLING CARS.

IGNORANCE OF RULES.

See COUPLING CARS.

IMPRACTICABLE RULES.

See COUPLING CARS.

INCOMPETENCY OF FELLOW SERVANTS.

See COUPLING CARS.

INEXPERIENCE.

See COUPLING CARS.

INSPECTION.

See COUPLING CARS.

INSPECTION YARDS.

See COUPLING CARS.

INSTRUCTIONS.

See COUPLING CARS.

INSUFFICIENT CREW.

See COUPLING CARS.

INSUFFICIENCY OF HANDS.

See COUPLING CARS.

JERKS AND JARS.

See COUPLING CARS.

KICKING BUMPERS.

See COUPLING CARS.

KNOWLEDGE OF DANGER.

See COUPLING CARS.

KNOWLEDGE OF DEFECTS.

See COUPLING CARS.

KNOWLEDGE OF PLAINTIFF'S PERIL.

See COUPLING CARS.

LADDERS.

See COUPLING CARS.

LANTERNS.

See COUPLING CARS.

LATENT DEFECTS.

See COUPLING CARS.

LEVERS.

See COUPLING CARS.

LIGHTS.

See COUPLING CARS.

LINK PINS.

See COUPLING CARS.

LOADS.

See COUPLING CARS.

MASTER AND SERVANT.

See COUPLING CARS.

MEETING OF DRAWHEADS.

See COUPLING CARS.

METHOD PRESCRIBED BY COMPANY.

See COUPLING CARS.

METHODS.

See COUPLING CARS.

"MILLER COUPLINGS."

See COUPLING CARS.

MISMATCHED COUPLINGS.

See COUPLING CARS.

MOVEMENTS OF CARS.

See COUPLING CARS.

MOVING CARS.

See COUPLING CARS.

NECESSITY.

See COUPLING CARS.

NEGLIGENCE.

See COUPLING CARS.

NEGLIGENCE AFTER KNOWLEDGE OF PERIL.

See COUPLING CARS.

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

See COUPLING CARS.

NEW DEVICES.

See COUPLING CARS.

NIGHTTIME.

See COUPLING CARS.

NOTICE OF DANGER.

See COUPLING CARS.

NOTICE OF RULES.

See COUPLING CARS.

OBEYING ORDERS.

See COUPLING CARS.

OBSTRUCTED VIEW.

See COUPLING CARS.

OBSTRUCTIONS NEAR TRACK.

See COUPLING CARS.

OBSTRUCTIONS ON TRACK.

See COUPLING CARS.

OBVIOUS DEFECTS.

See COUPLING CARS.

OCCUPYING PERILOUS POSITION.

See COUPLING CARS.

OPPORTUNITY TO EXAMINE.

See COUPLING CARS.

ORDERS OF SUPERIOR.

See COUPLING CARS.

ORDINARY DANGERS.

See COUPLING CARS.

PASSENGERS COUPLING CARS.

See COUPLING CARS.

PINS.

See COUPLING CARS.

PRESUMPTION THAT MASTER'S DUTIES HAVE BEEN PERFORMED.

See COUPLING CARS.

PRESUMPTIONS.

See COUPLING CARS.

PROJECTING APPLIANCES.

See COUPLING CARS.

PROJECTING APRONS.

See COUPLING CARS.

PROJECTING LOADS.

See COUPLING CARS.

PROMISE TO REPAIR.

See COUPLING CARS.

PROXIMATE CAUSE.

See COUPLING CARS.

PUSHBARS.

See COUPLING CARS.

RAILS.

See COUPLING CARS.

RELIANCE ON PROMISE TO REPAIR.

See COUPLING CARS.

RELYING ON PROMISES.

See COUPLING CARS.

REMAINING BETWEEN MOVING CARS.

See COUPLING CARS.

REPAIRS.

See COUPLING CARS.

REPAIR TRACKS.

See COUPLING CARS.

RIGHT TO RELY ON JUDGMENT OF OTHER EMPLOYEE.

See COUPLING CARS.

RISKS NOT ASSUMED.

See COUPLING CARS.

ROADBED.

See COUPLING CARS.

RULES.

See COUPLING CARS.

SAGGING DRAWHEADS.

See COUPLING CARS.

SAFE PLACE TO WORK.

See COUPLING CARS.

SECOND ATTEMPTS.

See COUPLING CARS.

SERVANTS.

See COUPLING CARS.

SHIFTING OF LOADS.

See COUPLING CARS.

SHORT SHACKLES.

See COUPLING CARS.

SIDE SILLS.

See COUPLING CARS.

SIDE TRACKS.

See COUPLING CARS.

SIGNALING FROM WRONG SIDE.

See COUPLING CARS.

SIGNALS.

See COUPLING CARS.

SLIVERS.

See COUPLING CARS.

SNOW.

See COUPLING CARS.

SPACE BETWEEN CARS.

See COUPLING CARS.

SPEED.

See COUPLING CARS.

SPLIT SWITCH.

See COUPLING CARS.

SPRINGS.

See COUPLING CARS.

STANDING IN DANGEROUS POSITION.

See COUPLING CARS.

STEPPING IN FRONT OF MOVING CARS.

See COUPLING CARS.

STEPS.

See COUPLING CARS.

STRANGERS COUPLING CARS.

See COUPLING CARS.

STUMBLING.

See COUPLING CARS.

SUBSTITUTING DIFFERENT KIND OF ENGINE.

See COUPLING CARS.

SUDDEN MOVEMENTS OF CARS.

See COUPLING CARS.

SWITCHING.

See COUPLING CARS.

THREE LINK COUPLINGS.

See COUPLING CARS.

TRACK.

See COUPLING CARS.

UNBLOCKED FROGS AND RAILS.

See COUPLING CARS.

UNCOUPLING BY HAND.

See COUPLING CARS.

UNCOUPLING CARS.

See COUPLING CARS.

UNEQUAL HEIGHT OF CARS AND APPLIANCES.

See COUPLING CARS.

UNSAFE PLACE TO WORK.

See COUPLING CARS.

UNSAFE ROADBED.

See COUPLING CARS.

UNUSUAL CONSTRUCTION.

See COUPLING CARS.

VIOLATION OF AUTOMATIC-COUPLE ACTS.

See COUPLING CARS.

VIOLATION OF RULES.

See COUPLING CARS.

VOLUNTEERS.

See COUPLING CARS.

WAIVER OF RULES.

See COUPLING CARS.

WARNINGS.

See COUPLING CARS.

WHO ARE FELLOW SERVANTS.

See COUPLING CARS.

WHO ARE NOT FELLOW SERVANTS.

See COUPLING CARS.

WORKING AT NIGHT.

See COUPLING CARS.

GENERAL INDEX.

ABANDONMENT.

See RIGHT OF WAY.

ABUSIVE LANGUAGE.

See TRESPASSERS.

ABUTTERS.

See RAILROADS IN STREETS.

ACCIDENTS ON TRACK.

See CHILDREN; CROSSINGS; MASTER AND SERVANT; RAILROADS IN STREETS; TRESPASSERS.

Appliance to be used by motorman to stop car and prevent accident, instruction invading province of jury. *Memphis St. Ry. Co. v. Haynes* (Tenn.), 384.

Care required of deaf person in crossing street railway tracks. *Holden v. Missouri R. Co.* (Mo.), 440.

Company liable where both contributory negligence and subsequent negligence of motorman. *Memphis St. Ry. Co. v. Haynes* (Tenn.), 384.

Contributory Negligence.

Care required of deaf persons in crossing street railway tracks. *Portsmouth St. R. Co. v. Peed's Administrator* (Va.), 65.

Care required of person on or near track. *Garlich v. Northern Pac. Ry. Co.* (C. C. A.), 460.

Defense of not affected by fact that train was running in violation of ordinance limiting speed. *Garlich v. Northern Pac. Ry. Co.* (C. C. A.), 460.

Question for jury. *Memphis St. Ry. Co. v. Haynes* (Tenn.), 384.

Question for jury where decedent, while crossing street diagonally, facing an approaching car, in order to catch another car waiting for him, the conductor of which called upon him to hurry, was struck by the first car. *Stillings v. Metropolitan St. Ry. Co.* (N. Y.), 773.

Recovery precluded without regard to question of negligence. *Garlich v. Northern Pac. Ry. Co.* (C. C. A.), 460.

Reliance on care of driver of vehicle. *Holden v. Missouri R. Co.* (Mo.), 440.

Reliance on ordinance limiting speed. *Garlich v. Northern Pac. Ry. Co.* (C. C. A.), 460.

Damages.

Punitive damages authorized for gross negligence in running street car into another vehicle. *Louisville Ry. Co. v. Teekin* (Ky.), 785.

Duty of motorman after discovering peril of cyclist negligently riding on track. *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 91.

Engineer's negligence was a question for jury where train collided with unattended vehicle. *Mitchell v. New Orleans & N. E. R. Co.* (Miss.), 785.

Error to instruct as to failure to give warning where the negligence alleged was excessive speed. *Portsmouth St. R. Co. v. Peed's Administrator* (Va.), 65.

Error to modify instruction as to care required of deaf person crossing street railway tracks, by adding that if the jury further

ACCIDENTS ON TRACK—Continued.

found that the motorman was chargeable with notice that such person was crossing or about to cross the tracks, and thereafter used ordinary care to stop the car, they should find for defendant. *Portsmouth St. R. Co. v. Peed's Administrator* (Va.), 65.

Negligence, violation of ordinance for the prevention of accidents on street railway tracks. *Memphis St. Ry. Co. v. Haynes* (Tenn.), 384.

Nonsuit was improper, where it appeared that decedent, a deaf person, was killed while walking on track, where pedestrians were accustomed to walk, by an engine running without a headlight. *McKeown v. South Carolina & Georgia Extension R. Co.* (S. Car.), 71.

Ownership of engine sufficiently established by evidence that it bore the name of defendant and was in charge of its employees. *East St. Louis Connecting Ry. Co. v. Altgen* (Ill.), 88.

Presumption of ownership of engine bearing defendant's name and in charge of its servants not rebutted by fact that it was upon track of another company. *East St. Louis Connecting Ry. Co. v. Altgen* (Ill.), 88.

Reasonableness of ordinance for the prevention of accidents on street railway tracks. *Memphis St. Ry. Co. v. Haynes* (Tenn.), 384.

ACQUAINTANCE.

See FELLOW SERVANTS.

ACTIONS.

See DEATH BY WRONGFUL ACT; NEGLIGENCE; PERSONAL INJURIES.

AGE.

See PERSONAL INJURIES.

ALIGHTING FROM MOVING CAR.

See CARRIERS OF PASSENGERS.

ANIMALS.

See FRIGHTENING TEAMS.

Goose not an animal within statute of Tennessee for prevention of accidents on railroad tracks. *Nashville & K. R. Co. v. Davis* (Tenn.), 432.

Liability for killing trespassing geese. *Nashville & K. R. Co. v. Davis* (Tenn.), 432.

APPEAL.

See DEATH BY WRONGFUL ACT.

Review, amount of damages for personal injuries. *Stewart v. Arkansas R. Co.* (La.), 330.

APPLIANCES.

See ACCIDENTS ON TRACK.

APPORTIONMENT OF CARS.

See CARRIERS OF GOODS.

ARRESTS.

See TRESPASSERS.

ASSISTANTS.

See FELLOW SERVANTS.

ASSUMPTION OF RISKS.

See EMPLOYER'S LIABILITY ACTS.

ATTACHMENT.

Cars used in interstate business. *Connery v. Quincy, O. & K. C. R. Co.* (Minn.), 361.

ATTORNEY'S FEES.

Application of Arkansas statute allowing recovery of attorney's fees in actions against railroads. *Kansas City Southern Ry. Co. v. Marx* (Ark.), 758.

BAGGAGE.

Exemption from liability for loss of baggage of person traveling on free pass. *Holly v. Southern Ry. Co.* (Ga.), 308.

BILLS OF LADING.

Internal revenue stamps, whether they must be affixed to each duplicate. *Wright v. Michigan Cent. R. Co.* (C. C. A.), 45.

BOILERS.

See EVIDENCE; MASTER AND SERVANT.

BRAKEMAN'S AUTHORITY.

See CARRIERS OF PASSENGERS.

BRAKES.

See CARRIERS OF PASSENGERS.

BRANCH LINES.

See EMINENT DOMAIN.

Duty to construct to accommodate private enterprises. *Ulmer v. Lime Rock R. Co.* (Me.), 724.

Expediency of constructing, whether determination of directors subject to review by courts. *Ulmer v. Lime Rock R. Co.* (Me.), 724.

BREACH OF CONDITIONS.

See STREET RAILWAYS.

BRIDGES.

See MASTER AND SERVANT.

Consideration to support reciprocal covenants on part of traction company, where agreement between it and steam railroad provided for joint use of high bridge built by latter, and for sharing cost of its maintenance. *Raritan River R. Co. v. Middlesex & S. Traction Co.* (N. J.), 56.

Duty to keep in repair as part of railroad's common-law duty not to interfere with public highway. *Hicks v. Chesapeake & O. Ry. Co.* (Va.), 50.

Police power to compel railroads to construct over tracks at public crossings, application of statute where railroad was constructed before street was made or city incorporated. *City of Harriman v. Southern Ry. Co.* (Tenn.), 373.

Power of municipality to assume railroad's duty to keep in repair, under Virginia statute. *Hicks v. Chesapeake & O. Ry. Co.* (Va.), 50.

Validity of agreement between traction company and steam railroad for joint use of highway bridge built by latter not affected because made without application to chancellor to define the statutory mode of crossing. *Raritan River R. Co. v. Middlesex & S. Traction Co.* (N. J.), 56.

BURDEN OF PROOF.

See CARRIERS OF GOODS; MASTER AND SERVANT; TRESPASSERS.

CANYONS.

See FRIGHTENING TEAMS.

CAR FOR INTERMEDIATE POINT.

See CARRIERS OF PASSENGERS.

CARRIERS.

See BILLS OF LADING; LICENSEES; TICKETS AND FARES.

CARRIERS OF FREIGHT.

See TICKETS AND FARES.

CARRIERS OF GOODS.

Carrier cannot be charged with conversion of freight, for delay in delivering, if they are safely kept, unless there has been demand and refusal. *Ryland & Rankin v. Chesapeake & O. Ry. Co.* (W. Va.), 279.

Contributory Negligence.

Duty of consignee to ascertain cause of delay. *Louisville & C. Packet Co. v. Bottorff* (Ky.), 263.

Duty of consignee to obtain substitute for delayed machine. *Louisville & C. Packet Co. v. Bottorff* (Ky.), 263.

Duty of consignee to remove cause of delay in transportation. *Louisville & C. Packet Co. v. Bottorff* (Ky.), 263.

Damages.

Delay. *Ryland & Rankin v. Chesapeake & O. Ry. Co.* (W. Va.), 279.

Delay does not constitute conversion of goods so as to make carrier liable for their value. *Ryland & Rankin v. Chesapeake & O. Ry. Co.* (W. Va.), 279.

Delay in delivering machinery, measure of damages. *Louisville & C. Packet Co. v. Bottorff* (Ky.), 263.

Delay in delivering machinery, sufficiency of evidence to sustain verdict for \$250. *Louisville & C. Packet Co. v. Bottorff* (Ky.), 263.

Duty of consignee to obtain substitute for delayed machine. *Louisville & C. Packet Co. v. Bottorff* (Ky.), 263.

Delay in delivering, liability depending on prepayment of charges. *Louisville & C. Packet Co. v. Bottorff* (Ky.), 263.

Delivery.

Mere setting out car on siding was not, so as to relieve carrier from liability on account of theft. *Normile v. Northern Pac. Ry. Co.* (Wash.), 194.

Discrimination, right to apportion cars among shippers on account of unusual volume of business. *State ex rel. McComb v. Chicago, B. & Q. R. Co.* (Neb.), 336.

Duty to furnish cars as affected by unusual volume of business. *State ex rel. McComb v. Chicago, B. & Q. R. Co.* (Neb.), 336.

Duty to furnish cars without discrimination. *State ex rel. McComb v. Chicago, B. & Q. R. Co.* (Neb.), 336.

Limiting Liability.

Burden of proving negligence where carrier exempt from liability for damages caused by fire. *Cau v. Texas & Pacific Railway Company* (U. S.), 303.

Consideration. *Cau v. Texas & Pacific Railway Company* (U. S.), 303.

Loss by fire, validity of exemption where option to ship under common-law liability was not presented to shipper. *Cau v. Texas & Pacific Railway Company* (U. S.), 303.

Notice to consignee of arrival of goods need not be given where he has already obtained information. *Normile v. Northern Pac. Ry. Co.* (Wash.), 194.

CARRIERS OF GOODS—Continued.

- Notice to consignee of arrival of goods, sufficiency. *Normile v. Northern Pac. Ry. Co. (Wash.)*, 194.
- Removal of freight on the day after notice of arrival was received was made in reasonable time. *Normile v. Northern Pac. Ry. Co. (Wash.)*, 194.
- Removal of freight, reasonable time for a question for the court. *Normile v. Northern Pac. Ry. Co. (Wash.)*, 194.
- Shipper alleging loss of freight which consignee had refused to accept could not recover its value, not having first made demand on the carrier therefor. *Ryland & Rankin v. Chesapeake & O. Ry. Co. (W. Va.)*, 279.

CARRIERS OF LIVE STOCK.

See CARRIERS OF PASSENGERS.

CARRIERS OF PASSENGERS.

See ATTORNEY'S FEES; BAGGAGE; CONNECTING CARRIERS; CONTRIBUTORY NEGLIGENCE; EVIDENCE; STATIONS AND DEPOTS; TICKETS AND FARES.

- Application of Michigan statute, providing for penalties for failure to carry passengers, as affected by fact that sale of ticket resulted from failure to send notice to agent of withdrawal of certain train. *Van Camp v. Michigan Cent. Ry. Co. (Mich.)*, 260.
- Boarding moving car and negligent construction of stations and platforms, liability. *Lauterer v. Manhattan Ry. Co. (C. C. A.)*, 295.
- Burden of proof on carrier to show that sudden starting of street car while passenger was alighting could not have been prevented by the proper degree of care. *Reagan v. St. Louis Transit Co. (Mo.)*, 688.
- Burden of proving that car had stopped, in action for injury to alighting passenger. *Reagan v. St. Louis Transit Co. (Mo.)*, 688.
- Burden of proving that sudden starting of street car could not have been prevented by the exercise of the highest degree of care not thrown on plaintiff, in action for injury to alighting passenger. *Reagan v. St. Louis Transit Co. (Mo.)*, 688.
- Care due street car passengers not provided with seats. *Halverson v. Seattle Electric Co. (Wash.)*, 282.
- Care required before starting trains on elevated roads, construction of New York statute. *Lauterer v. Manhattan Ry. Co. (C. C. A.)*, 295.
- Care required of conductor, for safety of intending passenger, in starting car. *Foster v. Seattle Electric Co. (Wash.)*, 640.
- Contract of carriage, statement of company's superintendent, who was on car after arriving at intermediate point, where car stopped, that he would tell conductor on next car to pick plaintiff up, did not constitute a contract to carry him to the end of the line. *Braymer v. Seattle, R. & S. Ry. Co. (Wash.)*, 31.
- Contributory Negligence.**
- Alighting from moving street car, instruction. *Knoxville Traction Co. v. Carroll (Tenn.)*, 707.
- Alighting from slowly moving train, question for jury. *Newcomb v. New York Cent. & H. R. R. Co. (Mo.)*, 10.
- Assumption of risk from attempt to board moving street car. *Foster v. Seattle Electric Co. (Wash.)*, 640.
- Attempting to board street car after signal for starting had been given. *Foster v. Seattle Electric Co. (Wash.)*, 640.
- Boarding moving car. *Lauterer v. Manhattan Ry. Co. (C. C. A.)*, 295.
- Burden of proving on carrier where street car passenger was struck by projecting load on passing wagon. *Jones v. United Railways & Electric Co. of Baltimore (Md.)*, 631.

CARRIERS OF PASSENGERS—Continued.

- Care required of passengers standing on platform. *Magrane v. St. Louis & S. Ry. Co. (Mo.)*, 1.
- Duty of passenger on open street car to look out for danger from passing vehicles. *Jones v. United Railways & Electric Co. of Baltimore (Md.)*, 631.
- Evidence as to noise of passing wagon, a projection from which struck street car passenger, was admissible. *Jones v. United Railways & Electric Co. of Baltimore (Md.)*, 631.
- Passing from one car to another. *Dougherty v. Yazoo & M. V. R. Co. (Miss.)*, 327.
- Passing from one car to another, under coercion, or by direction, of train men. *Dougherty v. Yazoo & M. V. R. Co. (Miss.)*, 327.
- Proximate cause question for jury where passenger riding outside vestibule of crowded street car was injured in accident caused by defective couplings. *Birmingham Ry., Light & Power Co. v. Bynum (Ala.)*, 683.
- Question for jury where passenger in open street car was struck by projecting load on passing wagon. *Jones v. United Railways & Electric Co. of Baltimore (Md.)*, 631.
- Standing on platform. *Halverson v. Seattle Electric Co. (Wash.)*, 282.
- Standing on platform through necessity, sufficiency of evidence. *Halverson v. Seattle Electric Co. (Wash.)*, 282.

Damages.

- Ejection, excessive verdict. *Marx v. Louisiana Western R. Co. (La.)*, 635.
- Injury to feelings from wrongful ejection. *Georgia Ry. & Electric Co. v. Baker (Ga.)*, 259.
- Mental anguish of ejected passenger. *Coine v. Chicago & N. W. Ry. Co. (Iowa)*, 316.
- Mental suffering, from humiliation, of ejected passenger. *Marx v. Louisiana Western R. Co. (La.)*, 635.
- \$20.00 was excessive for personal injuries to man 62 years old. *Newcomb v. New York Cent. & H. R. R. Co. (Mo.)*, 10.
- Degree of care. *Magrane v. St. Louis & S. Ry. Co. (Mo.)*, 1.
- Degree of care due from those in charge of street car to boarding passenger. *Foster v. Seattle Electric Co. (Wash.)*, 640.
- Degree of care due street car passenger riding in dangerous position. *Birmingham Ry., Light & Power Co. v. Bynum (Ala.)*, 683.
- Degree of care, harmless error in instructing as to effect of fact that those in charge of street car had other duties to perform other than that of looking after safety of boarding passengers. *Foster v. Seattle Electric Co. (Wash.)*, 640.
- Degree of care, harmless error in instruction requiring too high a degree. *Magrane v. St. Louis & S. Ry. Co. (Mo.)*, 1.
- Degree of care, proper instruction where passenger was injured by reason of a collision. *Magrane v. St. Louis & S. Ry. Co. (Mo.)*, 1.
- Degree of care required of street railway. *Foster v. Seattle Electric Co. (Wash.)*, 640.
- Degree of care required to ascertain whether persons desire to take passage on street car. *Foster v. Seattle Electric Co. (Wash.)*, 640.
- Duty to direct to train. *Newcomb v. New York Cent. & H. R. R. Co. (Mo.)*, 10.
- Duty to guard against passenger's negligence. *Lauterer v. Manhattan Ry. Co. (C. C. A.)*, 295.
- Duty to provide platform gates for protection of passengers compelled to ride on platform. *Halverson v. Seattle Electric Co. (Wash.)*, 282.

CARRIERS OF PASSENGERS—Continued.**Ejection.**

Insufficiency of evidence of incapacity of intoxicated passenger to take care of himself after ejection. *Tuttle v. Cincinnati, N. O. & T. P. Ry. Co. (Ky.)*, 333.

Liability for injury to ejected intoxicated passenger. *Tuttle v. Cincinnati, N. O. & T. P. Ry. Co. (Ky.)*, 333.

Loss of ticket. *Harp v. Southern Ry Co. (Ga.)*, 342.

No cause of action for ejection of one without right to free passage, and who refuses to pay fare. *Braymer v. Seattle, R. & S. Ry. Co. (Wash.)*, 31.

Person with ticket could not recover for ejection from platform of baggage car by conductor who had no means of knowing that he had a ticket or was entitled to ride. *McGraw v. Southern Ry. Co. (N. Car.)*, 257.

Proximate cause where drunken passenger was injured by another train after being ejected. *Tuttle v. Cincinnati, N. O. & T. P. Ry. Co. (Ky.)*, 333.

When a company fails to run its train on time, and the ticket holder boards the first passenger train thereafter, he is not to be ejected on the ground that his ticket has expired. *Marx v. Louisiana Western R. Co. (La.)*, 635.

Evidence.

Conductor's character and disposition could not be shown, in action for ejection, as the employment of an incompetent conductor was not alleged. *Braymer v. Seattle, R. & S. Ry. Co. (Wash.)*, 31.

Conductor's general character and disposition could not be shown in action for ejection. *Braymer v. Seattle, R. & S. Ry. Co. (Wash.)*, 31.

Harmless error in admitting evidence as to inconvenience suffered by ejected passenger. *Coine v. Chicago & N. W. Ry. Co. (Iowa)*, 316.

In action for injury to passenger from slipping on greasy platform, evidence that shortly after the accident great crowds arrived at, and departed from the station without accident was properly excluded. *Newcomb v. New York Cent. & H. R. R. Co. (Mo.)*, 10.

Motorman's competency to testify as to proper speed to run street car into curve. *Halverson v. Seattle Electric Co. (Wash.)*, 282.

Receipt given to plaintiff when he purchased ticket, in action for ejection of passenger. *Coine v. Chicago & N. W. Ry. Co. (Iowa)*, 316.

Res gestæ, declarations of conductor made immediately after accident to passenger were not. *Nelson v. Georgia, C. & N. Ry. (S. Car.)*, 150.

Subsequent experiments in operating street car at curve. *Halverson v. Seattle Electric Co. (Wash.)*, 282.

Testimony as to frequency of cars becoming uncoupled, where accident resulted from defective couplings. *Birmingham Ry., Light & Power Co. v. Bynum (Ala.)*, 683.

Failure to direct to car, sufficiency of evidence to warrant instruction. *Newcomb v. New York Cent. & H. R. R. Co. (Mo.)*, 10.

Instruction was not objectionable on the ground that it authorized recovery upon the misdirection of the porter as to which train to take, when the petition alleged a failure to give any direction. *Newcomb v. New York Cent. & H. R. R. Co. (Mo.)*, 10.

Instruction was not objectionable on the ground that it declared that the act of the porter in misdirecting plaintiff as to which train to take was negligence as matter of law. *Newcomb v. New York Cent. & H. R. R. Co. (Mo.)*, 10.

It was immaterial that the car which plaintiff boarded, and which

CARRIERS OF PASSENGERS—Continued.

- did not go beyond an intermediate point, left the starting point at about the time a through car left. *Braymer v. Seattle, R. & S. Ry. Co.* (Wash.), 31.
- Liability for failure to so construct stations and platforms of elevated railroads as to guard against passengers' negligence in boarding moving cars. *Lauterer v. Manhattan Ry. Co.* (C. C. A.), 295.
- Liability, on account of failure to provide platform gates or railings, in action for death of street car passenger thrown from platform as car ran into curve at high speed. *Halverson v. Seattle Electric Co.* (Wash.), 282.
- Limiting Liability.**
- Burden of proving negligence sufficiently sustained by person accompanying live stock, in order to relieve him from effect of release on back of contract, by which he assumed all risks of personal injuries. *Rowdin v. Pennsylvania R. Co.* (Pa.), 672.
- Free passes. *Boering v. Chesapeake Beach Ry. Co.* (U. S.), 313.
- Loss of ticket and refusal to pay fare. *Harp v. Southern Ry. Co.* (Ga.), 342.
- Loss of ticket must be borne by passenger. *Harp v. Southern Ry. Co.* (Ga.), 342.
- Motorman in obeying signals from conductor, and who does not know that such obedience will be likely to result in injury to intending passenger, is guilty of no negligence. *Foster v. Seattle Electric Co.* (Wash.), 640.
- Negligence causing collision, sufficiency of petition. *Magrane v. St. Louis & S. Ry. Co.* (Mo.), 1.
- Negligence in failing to direct passengers to right car was not too remote to warrant recovery where plaintiff's injury was caused by fall on greasy platform after alighting from wrong train. *Newcomb v. New York Cent. & H. R. R. Co.* (Mo.), 10.
- Negligence of conductor in starting street car when intending passenger was in the act of boarding. *Foster v. Seattle Electric Co.* (Wash.), 640.
- Negligence question for jury where accident resulted from defective street car coupling. *Birmingham Ry., Light & Power Co. v. Bynum* (Ala.), 683.
- Negligence, street car passenger struck by handle of unguarded brake. *Kentucky & I. Bridge & R. Co. v. Shrader* (Ky.), 611.
- Pass, conditions printed on which were void under N. Car. Laws 1891, p. 277, c. 320, § 4, forbidding discrimination, had no application in an action for injuries received while riding on the pass. *McNeill v. Durham & C. R. Co.* (N. Car.), 647.
- Plaintiff was not entitled to ride beyond an intermediate point on the company's line, as he boarded car without asking conductor whether it went to the end of the line, and there were no system of transfers from such cars, and plaintiff did not ask for transfer. *Braymer v. Seattle, R. & S. Ry. Co.* (Wash.), 31.
- Presumption of negligence. *Cheetham v. Union R. Co.* (R. I.), 292.
- Presumption of negligence from head-on collision. *Magrane v. St. Louis & S. Ry. Co.* (Mo.), 1.
- Presumption of negligence where street car passenger was struck by projecting load on passing wagon. *Jones v. United Railways & Electric Co. of Baltimore* (Md.), 631.
- Proper time to collect street car fares so as not to interfere with duties to intending passengers, harmless error in instruction. *Foster v. Seattle Electric Co.* (Wash.), 640.
- Protection of passengers from other passengers, on train and after alighting, duty of carrier. *Spangler v. St. Joseph & G. I. Ry. Co.* (Kan.), 208.
- Proximate cause where passenger was pushed from crowded plat-

CARRIERS OF PASSENGERS—Continued.

- form in a panic caused by imminence of a collision, instruction. *Magrane v. St. Louis & S. Ry. Co. (Mo.)*, 1.
- Rebuttal of presumption of negligence from derailment. *Cheet-ham v. Union R. Co. (R. I.)*, 292.
- Sleeping car porter an employee so as to charge railroad company with his negligence in directing passengers to jump from wrong train while it was in motion. *Newcomb v. New York Cent. & H. R. R. Co. (Mo.)*, 10.

Who Are Passengers.

- Authority of brakeman to allow persons to ride on freight car, instructions not warranted by evidence. *Missouri, K. & T. Ry. Co. of Texas v. Huff (Tex.)*, 344.
- Authority of brakeman to allow person to ride on freight car not to be inferred from carrier's knowledge of custom. *Missouri, K. & T. Ry. Co. of Texas v. Huff (Tex.)*, 344.
- Failure to pay second street car fare. *Hudson v. Lynn & B. R. Co. (Mass.)*, 622.
- No presumption of authority on part of brakeman to allow person to ride on freight car. *Missouri, K. & T. Ry. Co. of Texas v. Huff (Tex.)*, 344.
- Person approaching street car with intention to board. *Duchemin v. Boston Elevated Ry. Co. (Mass.)*, 679.
- Person intending to take passage on street car was not a passenger. *Foster v. Seattle Electric Co. (Wash.)*, 640.
- Person on freight train, because misinformed by track superintendent, was not a passenger. *Garlich v. Northern Pac. Ry. Co. (C. C. A.)*, 460.
- Person riding on coal car under agreement with brakeman. *Missouri, K. & T. Ry. Co. of Texas v. Huff (Tex.)*, 344.
- Person riding on illegal pass. *McNeill v. Durham & C. R. Co. (N. Car.)*, 647.
- Person riding on outside vestibule of crowded street car before he was seen by conductor. *Birmingham Ry., Light & Power Co. v. Bynum (Ala.)*, 683.
- Shipper's employee accompanying live stock, application of statute relieving railroad from liability for injuries to any person not a passenger. *Rowdin v. Pennsylvania R. Co. (Pa.)*, 672.

CARS.

See ATTACHMENT; CARRIERS OF GOODS.

CHANGE OF GRADE.

See RAILROADS IN STREETS.

CHANGING CARS.

See CONNECTING CARRIERS.

CHARACTER AS EVIDENCE.

See CARRIERS OF PASSENGERS.

CHARGES.

See TICKETS AND FARES.

CHECKING SPEED.

See CROSSINGS.

CHILDREN.

See CROSSINGS; DEATH BY WRONGFUL ACT; PERSONAL INJURIES.

Contributory Negligence.

Care required of boy fifteen years old. *Dubiver v. City & Suburban Ry. Co. (Ore.)*, 451.

CHILDREN—Continued.

Care required of child six years old for her own protection. *Heinzle v. Metropolitan St. Ry. Co. (Mo.)*, 107.

Negligence of custodian of child, father's agent, prevents recovery in action by father. *Richmond, F. & P. R. Co. v. Martin's Adm'r (Va.)*, 435.

Of boy fifteen years of age, where collision between vehicle he was driving and street car, duty as to instructions. *Dubiver v. City & Suburban Ry. Co. (Ore.)*, 451.

Damages.

Father cannot recover for his own mental suffering due to personal injuries sustained by his son. *Bube v. Birmingham Ry., Light & Power Co. (Ala.)*, 380.

Statute of Alabama, providing for the recovery by the father for the death of his minor son, not applicable where the son merely sustains personal injuries. *Bube v. Birmingham Ry., Light & Power Co. (Ala.)*, 380.

Evidence that people trespassed on standing cars on a similar occasion not sufficient evidence that company had notice that any one was on such cars on the occasion in question. *Jordan v. Grand Rapids & I. Ry. Co. (Ind.)*, 397.

Proximate cause of injury to plaintiff's child was the act of plaintiff in placing in an insecure position a panel of defendant's snow fence, which had fallen down by reason of defendant's negligence in constructing or maintaining the fence. *Fishburn v. Burlington, etc., Ry. Co. (Iowa)*, 768.

Railroad not required, before moving cars standing on sidetrack, to examine them, to prevent injury to possible trespassers thereon. *Jordan v. Grand Rapids & I. Ry. Co. (Ind.)*, 397.

Snow fence, negligence in construction and maintenance was a question for the jury. *Fishburn v. Burlington, etc., Ry. Co. (Iowa)*, 768.

Trespasser, boy eight years of age, who climbed on car to look at sale of stock in stockyard. *Jordan v. Grand Rapids & I. Ry. Co. (Ind.)*, 397.

CIRCUMSTANTIAL EVIDENCE.

See FIRES SET BY LOCOMOTIVES.

CLIMACTERIC.

See PERSONAL INJURIES.

COASSOCIATION.

See FELLOW SERVANTS.

COERCION.

See CARRIERS OF PASSENGERS.

COLLISIONS.

See CARRIERS OF PASSENGERS; CROSSINGS; MASTER AND SERVANT.

COMBUSTIBLES.

See FIRES SET BY LOCOMOTIVES.

COMPARATIVE NEGLIGENCE.

See NEGLIGENCE.

COMPETING LINES.

See TICKETS AND FARES.

CONCURRING NEGLIGENCE.

See CROSSINGS; FELLOW SERVANTS; NEGLIGENCE.

CONDUCTORS.

See CARRIERS OF PASSENGERS.

CONNECTING CARRIERS.

See TICKETS AND FARES.

Initial carrier liable for injuries to passenger on connecting line, caused by impossibility to properly heat another car, where it had agreed that passenger should not be obliged to change cars, although it had limited its liability to its own line. *Missouri, K. & T. Ry. Co. of Texas v. Harrison* (Tex.), 617.

Initial carrier was not liable, under its contract, for failure of connecting carrier to use highest degree of care to properly use the heating appliances of a properly equipped car furnished by the former for through transportation. *Missouri, K. & T. Ry. Co. of Texas v. Harrison* (Tex.), 617.

CONSENT OF STATE.

See STREET RAILWAYS.

CONSIDERATION.

See CARRIERS OF GOODS.

CONSIGNEES.

See CARRIERS OF GOODS.

CONSTITUTIONAL LAW.

See FELLOW SERVANTS; STOCK, INJURIES TO.

Construction of constitutional provision of another state incorporated into state constitution. *Norfolk & W. Ry. Co. v. Cheatwood's Adm'x* (Va.), 850.

CONTAGIOUS DISEASES.

See DEATH BY WRONGFUL ACT.

CONTINUOUS ROUTE.

See STREET RAILWAYS.

CONTRACTS.

See CARRIERS OF PASSENGERS; STATIONS AND DEPOTS.

CONTRIBUTORY NEGLIGENCE.

See CARRIERS OF GOODS; CARRIERS OF PASSENGERS; CHILDREN; DEATH BY WRONGFUL ACT; EMPLOYER'S LIABILITY ACTS; FIRES SET BY LOCOMOTIVES; RAILROADS IN STREETS.

Effect of. *Birmingham Ry., Light & Power Co. v. Bynum* (Ala.), 683.

Instruction not erroneous. *Camp v. Chicago Great Western Ry. Co.* (Iowa), 819.

Instructions preserving defendant's right to defense. *Norfolk & W. Ry. Co. v. Cheatwood's Adm'x* (Va.), 850.

Mitigation of damages, province of court and jury. *Memphis St. Ry. Co. v. Haynes* (Tenn.), 384.

No defense to count in case for willful or wanton acts of servants. *Southern Ry. Co. v. Yancy* (Ala.), 466.

Province of court to instruct jury. *Memphis St. Ry. Co. v. Haynes* (Tenn.), 384.

Proximate cause, definition. *Kansas City Southern Ry. Co. v. Prunty* (C. C. A.), 488.

Sufficient to defeat recovery, what constitutes. *Nelson v. Georgia, C. & N. Ry.* (S. Car.), 150.

CONVERSION.

See CARRIERS OF GOODS.

COPIES.

See BILLS OF LADING.

COSTS.

See ATTORNEY'S FEES.

COUPLING CARS.

See MASTER AND SERVANT.

COUPLINGS.

See CARRIERS OF PASSENGERS.

CROSSINGS.

See ACCIDENTS ON TRACK; BRIDGES; CHILDREN; EMINENT DOMAIN; RAILROADS IN STREETS; RIGHT OF WAY; STOP, LOOK, AND LISTEN.

Application of Tennessee statute requiring lookout to be maintained on trains. *Southern Ry. Co. v. Simpson* (C. C. A.), 402.
Assumption by railroad of risk to other uses from its failure to restore highway to former condition. *Chicago, I. & L. Ry. Co. v. Leachman* (Ind.), 775.

Care required of motorman to avoid collisions with other vehicles. *Searles v. Elizabeth, P. & C. J. Ry. Co.* (N. J.), 781.

Concurrence of negligence and contributory negligence prevented recovery. *French v. Grand Trunk Ry. Co.* (Vt.), 426.

Contributory Negligence.

Attempting to drive over street car tracks in front of approaching car. *Roefeldt v. St. Louis & S. Ry. Co.* (Mo.), 470.

Burden of proof. *Coolbroth v. Pennsylvania R. Co.* (Pa.), 419.

Care required of driver of wagon in passing over defective crossing. *Chicago, I. & L. Ry. Co. v. Leachman* (Ind.), 775.

Driving wagon over crossing with knowledge of its unsafe condition. *Chicago I. & L. Ry. Co. v. Leachman* (Ind.), 775.

In stepping in front of moving street car, when it was too close for collision to be avoided by utmost care on part of those in charge of car, prevented recovery. *Portsmouth St. R. Co. v. Peed's Administrator* (Va.), 65.

No defense under Tennessee statute for the prevention of accidents on track. *Southern Ry. Co. v. Simpson* (C. C. A.), 402.

Question for jury. *Chicago & A. Ry. Co. v. Pulliam* (Ill.), 755.

Question for jury, crossing track when street car was approaching. *Conrad v. Elizabeth, P. & C. J. Ry. Co.* (N. J.), 126.

Question of fact. *Coolbroth v. Pennsylvania R. Co.* (Pa.), 419.

Right to drive wagon over defective crossing. *Chicago, I. & L. Ry. Co. v. Leachman* (Ind.), 775.

Discovered peril, doctrine not applicable. *Roefeldt v. St. Louis & S. Ry. Co.* (Mo.), 470.

Evidence.

Motorman could testify as an expert as to the distance within which a car could be checked. *Heinzle v. Metropolitan St. Ry. Co.* (Mo.), 107.

Hypothetical question as to distance within which car could have been stopped after plaintiff's peril was discovered, sufficiency. *Heinzle v. Metropolitan St. Ry. Co.* (Mo.), 107.

Instruction was defective in referring to failure to keep car under control, where no such negligence was alleged. *Heinzle v. Metropolitan St. Ry. Co.* (Mo.), 107.

CROSSINGS—Continued.

Liability for collision between backing engine and other vehicle.

Southern Ry. Co. v. Simpson (C. C. A.), 402.

Liability for failure of trainmen to be unusually careful in running train at populous places, although person injured was negligent. *Eichorn v. New Orleans & C. R., Light & Power Co.* (La.), 128.

Lookouts, instruction erroneous for imposing duty on conductor as well as motorman. *Heinzle v. Metropolitan St. Ry. Co.* (Mo.), 107.

Negligence in colliding with vehicle was a question for the jury where evidence tended to show that motorman did not have his car under proper control. *Conrad v. Elizabeth, P. & C. J. Ry. Co.* (N. J.), 128.

Negligence of motorman was a question for jury where child was injured on street crossing. *Heinzle v. Metropolitan St. Ry. Co.* (Mo.), 107.

Peremptory instruction for defendant was properly refused where failure to ring bell was not shown to have been proximate cause of injury to child on street railway crossing, but evidence was conflicting as to speed of car. *Heinzle v. Metropolitan St. Ry. Co.* (Mo.), 107.

Precautions required of railroad companies with respect to unusually dangerous crossings, where none have been prescribed by city ordinances. *Eichorn v. New Orleans & C. R., Light & Power Co.* (La.), 128.

Provision of New Jersey statute regulating the crossing of steam railroads by electric railroads, for whose benefit intended. *Raritan River R. Co. v. Middlesex & S. Traction Co.* (N. J.), 56.

Requirement of ordinance not the test as to proper speed of street car at crowded crossing. *Holden v. Missouri R. Co.* (Mo.), 440.

Signals.

Evidence of subsequent custom to blow whistle where it was not required by statute was not admissible. *Southern Ry. Co. v. Simpson* (C. C. A.), 402.

Instruction relating to failure of motorman to sound gong was properly refused, where such failure had no connection with accident. *Heinzle v. Metropolitan St. Ry. Co.* (Mo.), 107.

Negative and affirmative testimony. *Chicago & A. Ry. Co. v. Pulliam* (Ill.), 755.

Signboards.

Existence of receivership was no defense where failure to comply with Arkansas statute requiring their erection. *Arkansas Cent. R. Co. v. State* (Ark.), 418.

Speed.

Speed of street car may be negligent though not exceeding rate fixed by ordinance. *Heinzle v. Metropolitan St. Ry. Co.* (Mo.), 107.

Stop, Look and Listen.

Failure to look again, at point where view was not obstructed, question for jury. *Confer v. Pennsylvania R. Co.* (Pa.), 429.

Question for jury. *Coolbroth v. Pennsylvania R. Co.* (Pa.), 419.

Street railway crossings. *Portsmouth St. R. Co. v. Peed's Administrator* (Va.), 65.

CURSING.

See TRESPASSERS.

CURVES.

See CARRIERS OF PASSENGERS.

CUSTOM AND USAGE.

See EVIDENCE.

CUSTOM OF OTHER COMPANIES.

See MASTER AND SERVANT.

CYCLIST.

See ACCIDENTS ON TRACK.

DAMAGES.

See ACCIDENTS ON TRACK; APPEAL; CARRIERS OF GOODS; CARRIERS OF PASSENGERS; CHILDREN; CONTRIBUTORY NEGLIGENCE; DEATH BY WRONGFUL ACT; FIRES SET BY LOCOMOTIVES; STATIONS AND DEPOTS.

A father cannot recover exemplary damages for negligent injury to his minor son, in the absence of statute permitting it. *Bube v. Birmingham Ry., Light & Power Co. (Ala.)*, 380.

DANGEROUS CROSSINGS.

See CROSSINGS.

DANGEROUS WORK.

See MASTER AND SERVANT.

DEAF PERSONS.

See ACCIDENTS ON TRACK.

DEATH BY WRONGFUL ACT.

See CHILDREN; EVIDENCE.

Contributory Negligence.

Passenger carried from street car while in an unconscious condition, from liquor or other cause, and laid by side of track, and afterwards run over by a car, was not in the exercise of due diligence, within meaning of Mass. St. 1886, p. 117, c. 140. *Hudson v. Lynn & B. R. Co. (Mass.)*, 622.

Under Mass. St. 1886, p. 117, c. 140, same proof of due diligence on part of deceased is required as would be required in proceedings by indictment. *Hudson v. Lynn & B. R. Co. (Mass.)*, 622.

Damages.

Evidence of earning capacity. *Halverson v. Seattle Electric Co. (Wash.)*, 282.

Evidence that deceased left a family and had constant employment warranted an instruction that loss of his care, society, and comfort to his family, and suffering and mental anguish caused by his death might be considered. *Portsmouth St. R. Co. v. Peed's Administrator (Va.)*, 65.

Insurance benefits no ground for abatement. *Illinois Cent. R. Co. v. Prickett (Ill.)*, 139.

Probable earnings of deceased, instruction. *Norfolk & W. Ry. Co. v. Cheatwood's Adm'x (Va.)*, 850.

Remarriage of wife, error in referring to possibility was waived. *Hewitt v. East Jordan Lumber Co. (Mich.)*, 212.

Wife was competent to testify as to husband's earning capacity. *Halverson v. Seattle Electric Co. (Wash.)*, 282.

\$20,000 was an excessive verdict, and was reduced to \$10,000. *Halverson v. Seattle Electric Co. (Wash.)*, 282.

Evidence.

Particular description of injuries properly excluded. *Jordan v. Grand Rapids, etc., R. Co. (Ind.)*, 397.

Federal court without jurisdiction of common-law action to en-

DEATH BY WRONGFUL ACT—Continued.

- force liability for wrongful killing created by Mexican laws. *Slater v. Mexican National R. Co.* (U. S.), 759.
- Mass. Pub. St. 1882, c. 112, § 212, giving a remedy, applies only to steam railroads. *Hudson v. Lynn & B. R. Co.* (Mass.), 622.
- Objection that recovery was sought under wrong statute, not made below, cannot be made on appeal. *Hewitt v. East Jordan Lumber Co.* (Mich.), 212.
- Railroad not liable, under death statute of Texas, for death from smallpox communicated by nurse from its hospital, through negligence of physician employed by company. *Tennessee Coal, Iron & R. Co. v. Jarrett* (Tenn.), 589.
- Two causes of action, under Louisiana statute, where deceased left widow and minor children; one for damages which deceased might have recovered, and one founded on his death. *Eichorn v. New Orleans & C. R., Light & Power Co.* (La.), 128.
- Where widow sues alone, a judgment in her favor, under Louisiana statute, exhausts cause of action for damages which deceased might have recovered. *Eichorn v. New Orleans & C. R., Light & Power Co.* (La.), 128.

DEDUCTIONS.

See RAILROAD COMMISSIONS.

DEEDS.

See RIGHT OF WAY.

DEFECTS.

See CROSSINGS; EVIDENCE.

DEFINITIONS.

See NEGLIGENCE.

DEGREE OF CARE.

See CARRIERS OF PASSENGERS.

DEGREES.

See NEGLIGENCE.

DELAY IN REMOVING FREIGHT.

See CARRIERS OF GOODS.

DELIVERY.

See CARRIERS.

DEMAND.

See CARRIERS OF GOODS.

DEPARTMENTS.

See FELLOW SERVANTS.

DERAILMENT.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

DIFFERENT DEPARTMENT LIMITATION.

See FELLOW SERVANTS.

DIRECTING TO WRONG TRAIN.

See MASTER AND SERVANT.

DIRECTIONS.

See CARRIERS OF PASSENGERS.

DIRECTORS.

See BRANCH LINES.

DISCOVERED PERIL.

See ACCIDENTS ON TRACK; CROSSINGS; MASTER AND SERVANT; TRESPASSERS.

DISCRIMINATION.

See CARRIERS OF GOODS.

DISMISSAL OF PROCEEDINGS.

See EMINENT DOMAIN.

DROVERS' PASS.

See CARRIERS OF PASSENGERS.

DRUNKENNESS.

See DEATH BY WRONGFUL ACT.

DUAL CAPACITY.

See FELLOW SERVANTS.

DUPLICATES.

See BILLS OF LADING.

DUTY TO WARN AND INSTRUCT.

See MASTER AND SERVANT.

EARNING CAPACITY.

See PERSONAL INJURIES.

EARNINGS.

See DEATH BY WRONGFUL ACT; RAILROAD COMMISSIONS.

EJECTION.

See CARRIERS OF PASSENGERS; TRESPASSERS.

ELECTRIC SHOCKS.

See MASTER AND SERVANT.

ELEVATED RAILROADS.

See CARRIERS OF PASSENGERS.

EMINENT DOMAIN.

See RIGHT OF WAY.

Branch lines, exercise of power of acquiring right of way for as a declaration by company that they are to be open to the public and operated as a public way, and subject to public rights and control. *Ulmer v. Lime Rock R. Co. (Me.)*, 724.

Dismissal of condemnation proceedings after filing of award. *Sprague v. Northern Pac. Ry. Co. (Wis.)*, 348.

Power of town to require railroads to make crossings does not include right to exercise the power of eminent domain for the purpose of opening streets across railroad right of way. *Georgia R. & Banking Co. v. Mayor, etc., of Town of Union Point (Ga.)*, 334.

Power to condemn right of way for branch lines to accommodate private enterprises. *Ulmer v. Lime Rock R. Co. (Me.)*, 724.

Public purposes, branch lines to accommodate private enterprise. *Ulmer v. Lime Rock R. Co. (Me.)*, 724.

Public purpose, legislative determination subject to review by courts. *Ulmer v. Lime Rock R. Co. (Me.)*, 724.

Public purpose, right of way for spur track to private property. *Ulmer v. Lime Rock R. Co. (Me.)*, 724.

Public purpose, tests applicable to branch lines to accommodate

EMINENT DOMAIN—Continued.

private enterprises. *Ulmer v. Lime Rock R. Co. (Me.)*, 724.
Right should not be so abridged as to interfere with development of enterprises of a public nature. *Ulmer v. Lime Rock R. Co. (Me.)*, 724.

EMPLOYEES.

See CARRIERS OF PASSENGERS.

EMPLOYERS' LIABILITY ACTS.

See FELLOW SERVANTS.

Contributory Negligence.

Effect of employee's knowledge of defects under Va. Code 1904, p. cclix, and Va. Acts 1901-02, p. 335, c. 322. *Norfolk & W. Ry. Co. v. Cheatwood's Adm'x (Va.)*, 850.

ESTOPPEL.

See RIGHT OF WAY.

EVIDENCE.

See CARRIERS OF PASSENGERS; DEATH BY WRONGFUL ACT; FIRES SET BY LOCOMOTIVES; PERSONAL INJURIES; TICKETS AND FARES.

Admissibility of evidence to show that boiler was unsafe and composed of weak material. *Illinois Cent. R. Co. v. Prickett (Ill.)*, 139.

Experiments to determine cause of derailment. *Cheetham v. Union R. Co. (R. I.)*, 292.

Inspection of boilers, custom of other companies. *Illinois Cent. R. Co. v. Prickett (Ill.)*, 139.

Nonexpert testimony to show age of defects in boiler. *Illinois Cent. R. Co. v. Prickett (Ill.)*, 139.

Relevancy. *Lauterer v. Manhattan Ry. Co. (C. C. A.)*, 295.

Reputation of deceased engineer as to his habits and skill as tending to show his exercise of ordinary care. *Illinois Cent. R. Co. v. Prickett (Ill.)*, 139.

Speed of street car, not error to admit testimony of witness as to rate of speed eighty feet from scene of accident. *Portsmouth St. R. Co. v. Peed's Administrator (Va.)*, 65.

Speed of street car, testimony was not inadmissible because of fact that at the time witness observed car he was in his storehouse 25 feet from the door. *Portsmouth St. R. Co. v. Peed's Administrator (Va.)*, 65.

Subsequent experiments. *Halverson v. Seattle Electric Co. (Wash.)*, 282.

EXCAVATIONS.

See MASTER AND SERVANT.

EXCESSIVE VERDICT.

See CARRIERS OF PASSENGERS.

EXEMPLARY DAMAGES.

See CHILDREN.

EXEMPTION FROM LIABILITY.

See BAGGAGE.

EXITS.

See STATIONS AND DEPOTS.

EXPERIMENTS.

See EVIDENCE.

EXPERT TESTIMONY.

See CARRIERS OF PASSENGERS; CROSSINGS; EVIDENCE.

EXPIRATION OF TICKET.

See TICKETS AND FARES.

EXPLOSIONS.

See CARRIERS; LICENSEES; MASTER AND SERVANT.

EXPRESS COMPANIES.

See TAXATION.

FARES.

See TICKETS AND FARES.

FEAR.

See PERSONAL INJURIES.

FEDERAL JURISDICTION.

See DEATH BY WRONGFUL ACT.

FELLOW SERVANTS.

See MASTER AND SERVANT.

Car inspector injured through negligence of brakeman. *Fullmer v. New York Cent. & H. R. R. Co. (Pa.)*, 817.

Conductor's status as superior of brakeman is not affected by parting of train. *Cleveland, L. & W. Ry. Co. v. Shanower (Ohio)*, 147.

Construction of Va. Const., § 162, relaxing stringency of existing precedents, in favor of railroad employees. *Virginia & S. W. Ry. Co. v. Clowers' Adm'x (Va.)*, 170.

Co-operation of brakeman and switch crew, question for jury. *Chicago & E. I. Ry. Co. v. White (Ill.)*, 558.

Employee entitled to recover for injury resulting from negligence of fellow servant in failing to perform a certain act and his negligence in giving an order without having performed such act. *Illinois Southern Ry. Co. v. Marshall (Ill.)*, 95.

Employees co-operating as fellow servants though in different departments. *Chicago & E. I. Ry. Co. v. White (Ill.)*, 558.

Engineer and brakeman in same department of service, under Ohio statute. *Cleveland, L. & W. Ry. Co. v. Shanower (Ohio)*, 147.

Engineer's relation to brakeman not affected by fact that conductor is on other section of parted train. *Cleveland, L. & W. Ry. Co. v. Shanower (Ohio)*, 147.

Injury to employee from act of one having right to direct his services, application of constitutional provision. *Southern Ry. Co. v. Cheaves (Miss.)*, 803.

Nonassignable duty, station agent selecting open rack car, from which material fell upon track, and caused derailment of hand car, in which track hand was injured. *McLean v. Pere Marquette R. Co. (Mich.)*, 544.

Personal acquaintance not an essential element. *Chicago & E. I. Ry. Co. v. White (Ill.)*, 558.

Question for jury whether negligent employee was a fellow servant or a foreman. *Illinois Southern Ry. Co. v. Marshall (Ill.)*, 95.

Roundhouse hostler while on his way to take charge of locomotive was not engaged in work of operating locomotives, within meaning of Texas employers' liability act. *Gulf, C. & S. F. Ry. Co. v. Howard (Tex.)*, 175.

Station agent selecting open rack car, from which material fell upon track, was not fellow servant of track hand injured in derailment of hand car. *McLean v. Pere Marquette R. Co. (Mich.)*, 544.

FELLOW SERVANTS—Continued.

Telegraph operator's failure to transmit train order rendered railroad liable for injury to engineer, under Va. Const., § 162. *Virginia & S. W. Ry. Co. v. Clowers' Adm'x* (Va.), 170.

Under Texas statute making servants intrusted with superintendence of other servants vice principals, roundhouse hostler was a vice principal of his assistants, but they, as to him, were fellow servants. *Gulf, C. & S. F. Ry. Co. v. Howard* (Tex.), 175.

Where the master had furnished flags to be sent ahead of a hand car to signal approaching trains, the failure of the section foreman in charge of the car to have them sent ahead was the negligence of a fellow servant of a sectionman on the car. *Whittlesey v. New York N. H. & H. R. Co.* (Conn.), 104.

FENCES.

See STOCK, INJURIES TO.

FIRES.

See CARRIERS OF GOODS.

FIRES SET BY LOCOMOTIVES.

Circumstantial evidence of origin where defendant does not show a different cause from that alleged. *Clarke v. New York, N. H. & H. R. Co.* (R. I.), 53.

Damages.

Evidence as to extent of business transacted on premises by plaintiff, in action for loss of stock of merchandise. *Norfolk & W. Ry. Co. v. Briggs* (Va.), 201.

Evidence.

Error to permit witness to answer question whether he saw anything from which the fire could have started except the railroad. *Norfolk & W. Ry. Co. v. Briggs* (Va.), 201.

Other fires. *Norfolk & W. Ry. Co. v. Briggs* (Va.), 201.

Refusal to permit witness to testify, at instance of defendant, with reference to fires in the same vicinity, set out by well-equipped locomotives on the lines of other railroads, was proper. *Norfolk & W. Ry. Co. v. Briggs* (Va.), 201.

Speed at other points. *Norfolk & W. Ry. Co. v. Briggs* (Va.), 201.

Testimony as to value of stock of merchandise, based on cursory view made on day prior to fire. *Norfolk & W. Ry. Co. v. Briggs* (Va.), 201.

Contributory Negligence.

Combustibles near right of way, and failure to sweep side walk, in violation of ordinance. *Louisville & N. R. Co. v. Sullivan Timber Co.* (Ala.), 836.

Combustibles near right of way, recovery was not prevented by failure to comply with ordinance requiring sidewalk to be swept. *Louisville & N. R. Co. v. Sullivan Timber Co.* (Ala.), 836.

Failure to avoid or minimize injury. *Louisville & N. R. Co. v. Sullivan Timber Co.* (Ala.), 836.

Not liable in absence of negligence. *Louisville & N. R. Co. v. Sullivan Timber Co.* (Ala.), 836.

Presumption that company set fire did not arise from fact that its employee's assisted in extinguishing it. *Clarke v. New York, N. H. & H. R. Co.* (R. I.), 53.

Speed of trains, ordinances limiting not intended for protection of buildings against fire. *Louisville & N. R. Co. v. Sullivan Timber Co.* (Ala.), 836.

FLAGGING TRAINS.

See FELLOW SERVANTS.

FORCE.

See TRESPASSERS.

FOREIGN CARS.

See ATTACHMENT.

FOREIGN LAWS.

See DEATH BY WRONGFUL ACT.

FOREMAN.

See FELLOW SERVANTS.

FORFEITURE.

See RAILROADS; STREET RAILWAYS.

FRANCHISES.

See RAILROADS; STREET RAILWAYS.

FREE PASSES.

See BAGGAGE; CARRIERS OF PASSENGERS.

FREIGHT.

See CARRIERS.

FREIGHT CHARGES.

See TICKETS AND FARES.

FREIGHT TRAINS.

See CARRIERS OF PASSENGERS.

FRIGHT.

See PERSONAL INJURIES.

FRIGHTENING TEAMS.

Care required in running train parallel with and near highway.

Fares v. Rio Grande Western R. Co. (Utah), 76.

Insufficiency of evidence of negligence. *Fares v. Rio Grande Western R. Co. (Utah)*, 76.

Lookout from train running parallel with and near highway not required. *Fares v. Rio Grande Western R. Co. (Utah)*, 76.

No liability where trains are properly operated, without unnecessary noise or wilful disregard of a traveler's perilous position. *Fares v. Rio Grande Western R. Co. (Utah)*, 76.

Railroad has right to operate its road in lawful manner, and, when it does so, without negligence and without malice, it is not responsible for injuries occasioned thereby. *Fares v. Rio Grande Western R. Co. (Utah)*, 76.

Right to construct railroad through canyon, parallel with, and near highway. *Fares v. Rio Grande Western R. Co. (Utah)*, 76.

Signals, failure to give was not negligence, where engine was seen to start, and signals might have added to horses' fright. *Fares v. Rio Grande Western R. Co. (Utah)*, 76.

GATES.

See CARRIERS OF PASSENGERS.

GEESE.

See ANIMALS.

GOING TO WORK.

See FELLOW SERVANTS.

GONGS.

See CROSSINGS.

GRANTS.

See STREET RAILWAYS.

GRAVEL BEDS.

See MASTER AND SERVANT.

GREASE ON PLATFORM.

See CARRIERS OF PASSENGERS.

HABITS.

See EVIDENCE.

HAND CARS.

See MASTER AND SERVANT.

HEADLIGHT.

See ACCIDENTS ON TRACK.

HEATING CARS.

See CONNECTING CARRIERS.

HEIGHT OF CARS.

See MASTER AND SERVANT.

HORSES.

See FRIGHTENING TEAMS.

HOSPITALS.

See DEATH BY WRONGFUL ACT.

HOTSLERS.

See FELLOW SERVANTS.

HUMILIATION.

See CARRIERS OF PASSENGERS.

HYPOTHETICAL QUESTIONS.

See CROSSINGS.

INDEPENDENT CONTRACTORS.

Duty to furnish safe tools to workman rests upon the contract of employment. *Omaha Bridge & Terminal Co. v. Hargadine (Neb.)*, 827.

Liability of owner of premises for negligence of contractor, distinction between liability to latter's employees and others. *Omaha Bridge & Terminal Co. v. Hargadine (Neb.)*, 827.

Liability of railroad for injury to employee of contractor caused by defective tool furnished by latter. *Omaha Bridge & Terminal Co. v. Hargadine (Neb.)*, 827.

Liability of railroad for injury to employee of contractor, caused by defective tool furnished by latter, as affected by fact that railroad reserved right to oversee and inspect work. *Omaha Bridge & Terminal Co. v. Hargadine (Neb.)*, 827.

INJUNCTIONS.

See RAILROADS IN STREETS; RIGHT OF WAY; STREET RAILWAYS; TAXATION.

INSTRUCTIONS.

See NEGLIGENCE.

INSULTS.

See TRESPASSERS.

INSURANCE.

See DEATH BY WRONGFUL ACT.

INTERNAL REVENUE.

See BILLS OF LADING.

INTERSTATE BUSINESS.

See RAILROAD COMMISSIONS.

INTOXICATION.

See CARRIERS OF PASSENGERS; DEATH BY WRONGFUL ACT.

JOINT JUDGMENTS.

See TRESPASSERS.

JUDGMENTS.

See TRESPASSERS.

JURISDICTION.

See TICKETS AND FARES.

JURISDICTIONAL AMOUNT.

See RIGHT OF WAY.

LANGUAGE.

See TRESPASSERS.

LEASES AND RUNNING POWERS.

See RAILROAD COMMISSIONS.

Liability of lessor for injury to lessee's servant caused by negligence of lessee. *Chicago & G. T. Ry. Co. v. Hart* (Ill.), 579.

LEGISLATIVE DETERMINATION.

See EMINENT DOMAIN.

LICENSEES.

Care due licensees on depot premises. *Means v. Southern California Ry. Co.* (Cal.), 411.

Care due to prevent injuries to, on depot premises, from explosion of sulphuric acid. *Means v. Southern California Ry. Co.* (Cal.), 411.

Not liable, on account of mere passive negligence, for injury to licensee from explosion of sulphuric acid tank on depot premises. *Means v. Southern California Ry. Co.* (Cal.), 411.

Who are mere licensees on depot premises. *Means v. Southern California Ry. Co.* (Cal.), 411.

LIGHTS.

See MASTER AND SERVANT.

LIMITING LIABILITY.

See BAGGAGE; CARRIERS OF GOODS; CARRIERS OF PASSENGERS; CONNECTING CARRIERS.

LOCAL BUSINESS.

See RAILROAD COMMISSIONS.

LOCATION.

See STATIONS AND DEPOTS.

LOCATION OF ROAD.

See FRIGHTENING TEAMS.

LOCATION OF ROUTE.

See STREET RAILWAYS.

LOOKOUTS.

See CROSSINGS; FRIGHTENING TEAMS.

LOST TICKETS.

See CARRIERS OF PASSENGERS.

MACHINERY.

See CARRIERS OF GOODS.

MANDAMUS.

See RAILROAD COMMISSIONS.

MASTER AND SERVANT.

See EMPLOYER'S LIABILITY ACTS; EVIDENCE; FELLOW SERVANTS; INDEPENDENT CONTRACTORS; LEASES AND RUNNING POWERS; NEGLIGENCE; TRESPASSERS.

Assumption of Risk.

Brakeman injured by reason of negligence of switching crew. *Chicago & E. I. Ry. Co. v. White* (Ill.), 558.

Brakeman, ordinary and unusual risks. *McCabe v. Montana Central Ry. Co.* (Mont.), 564.

Brakeman, when coupling, did not, as matter of law, assume risk from negligent construction of truck platform. *Hewitt v. East Jordan Lumber Co.* (Mich.), 212.

Contributory negligence rendered immaterial. *McCabe v. Montana Central Ry. Co.* (Mont.), 564.

Doing dangerous work in obedience to orders. *Weed v. Chicago, St. P., M. & O. Ry. Co.* (Neb.), 797.

Employee who obeys foreman not chargeable with having assumed peril when it does not appear that the employee was aware of the great danger to which he was exposing himself. *Stewart v. Texas & P. Ry. Co.* (La.), 158.

Engineer killed by boiler explosion, instructions. *Illinois Cent. R. Co. v. Prickett* (Ill.), 139.

Implied notice of proximity of switch stand to track, insufficiency of evidence. *McCabe v. Montana Central Ry. Co.* (Mont.), 564.

Motorman killed by electric shock while trying to fix trolley pole. *Harrison v. Detroit, Y. A. A. & J. Ry.* (Mich.), 187.

Obvious dangers. *Harrison v. Detroit, Y. A. A. & J. Ry.* (Mich.), 187.

Overhead bridge, brakeman absorbed in his duties, on rapidly moving train; and absence of "telltales." *Hailey v. Texas & P. Ry. Co.* (La.), 153.

Overhead bridge, notice to brakeman as affected by fact that there were more low cars than high. *Hailey v. Texas & P. Ry. Co.* (La.), 153.

Overhead bridge, passing under on unusually high car. *Hailey v. Texas & P. Ry. Co.* (La.), 153.

Proximity of switch stand to track. *McCabe v. Montana Central Ry. Co.* (Mont.), 564.

Speed in violation of ordinance. *Camp v. Chicago Great Western Ry. Co.* (Iowa), 819.

"Telltales," absence of. *Hailey v. Texas & P. Ry. Co.* (La.), 153.

Track hand injured in derailment of hand car, caused by material falling from open rack car. *McLean v. Pere Marquette R. R. Co.* (Mich.), 544.

MASTER AND SERVANT—Continued.

- Burden of proving negligence on servant. *Cully v. Northern Pac. Ry. Co.* (Wash.), 165.
- Care due employees. *Weed v. Chicago, St. P., M. & O. Ry. Co.* (Neb.), 797.
- Care due in running train to avoid collision with section hands. *Hinzeman v. Missouri Pac. Ry. Co.* (Mo.), 178.
- Care required in furnishing appliances. *Turner v. Detroit Southern R. Co.* (Mich.), 163.

Contributory Negligence.

- Attempting to mount engine near switch stand too close to track. *McCabe v. Montana Central Ry. Co.* (Mont.), 564.
- Brakeman, injured by reason of negligent construction of truck platform, was not necessarily guilty of contributory negligence in attempting to couple from inside of curve. *Hewitt v. East Jordan Lumber Co.* (Mich.), 212.
- Care required of employee for his own protection. *Illinois Cent. R. Co. v. Prickett* (Ill.), 139.
- Choosing dangerous methods of doing work. *Weed v. Chicago, St. P., M. & O. Ry. Co.* (Neb.), 797.
- Failure to duck head in time caused by absence of "telltales." *Hailey v. Texas & P. Ry. Co.* (La.), 153.
- Going between moving cars to make coupling, defective appliance and track. *Kansas City Southern Ry. Co. v. Prunty* (C. C. A.), 488.
- Insufficiency of evidence where fireman was injured in collision resulting from engineer going to sleep. *Southern Ry. Co. v. Cheaves* (Miss.), 803.
- Riding past building near track in switch yard on larger tender. *Norfolk & W. Ry. Co. v. Cheatwood's Adm'x* (Va.), 850.
- Switchman entitled to rely on presumption that road and appliances are properly constructed. *McCabe v. Montana Central Ry. Co.* (Mont.), 564.
- Trackman's failure to look again for trains while walking on ends of ties. *Camp v. Chicago Great Western Ry. Co.* (Iowa), 819.
- Degree of care required of master. *McCabe v. Montana Central Ry. Co.* (Mont.), 564.
- Duty to furnish safe place to work. *McCabe v. Montana Central Ry. Co.* (Mont.), 564.
- Duty to warn and instruct servant. *Stewart v. Texas & P. Ry. Co.* (La.), 158; *Tennessee Coal, Iron & R. Co. v. Jarrett* (Tenn.), 589.
- Duty to warn and instruct servant, instructions as to effect of servant's knowledge of duties. *Tennessee Coal, Iron & R. Co. v. Jarrett* (Tenn.), 589.
- Duty to warn and instruct servant ordered to do dangerous work outside scope of his regular duties. *Tennessee Coal, Iron & R. Co. v. Jarrett* (Tenn.), 589.
- Duty to warn experienced employee of dangers incident to business. *Weed v. Chicago, St. P., M. & O. Ry. Co.* (Neb.), 797.

Evidence.

- Manager's knowledge of incompetency of motorman, in action for injury to conductor. *Havens v. Rhode Island Suburban Ry. Co.* (R. I.), 549.
- Res gestæ, conductor's statement as to incompetency of motorman was not. *Havens v. Rhode Island Suburban Ry. Co.* (R. I.), 549.
- Statement of general manager to foreman of car barns, as to incompetency of motorman, was not admissible, in action for injury to conductor, on the ground that it was made while acting within scope of authority, and to a subordinate in the course

MASTER AND SERVANT—Continued.

- of business. *Havens v. Rhode Island Suburban Ry. Co. (R. I.)*, 549.
- Fact of injury to section hand from projecting car step not evidence to show that company should have anticipated danger. *Turner v. Detroit Southern R. Co. (Mich.)*, 163.
- Gravel beds, rule as to duty to furnish safe place to work not applicable. *Cully v. Northern Pac. Ry. Co. (Wash.)*, 165.
- Liability for death of engineer caused by boiler explosion. *Illinois Cent. R. Co. v. Prickett (Ill.)*, 139.
- Liability for running train against section foreman did not depend upon willfulness, wantonness, or recklessness. *Hinzeman v. Missouri Pac. Ry. Co. (Mo.)*, 178.
- Master not liable as an insurer against dangers ordinarily incident to the operation of locomotive boilers, proper modification of instruction in action for death of engineer resulting from an explosion. *Illinois Cent. R. Co. v. Prickett (Ill.)*, 139.
- Medical attendance, conductor was without authority to make railroad responsible for care and maintenance of sick employee where no emergency existed. *Hunt v. Illinois Cent. R. Co. (Ind.)*, 607.
- Negligence, application of rule for protection of passengers, where employee was injured by explosion of torpedo placed on track at station. *Illinois Cent. R. Co. v. Burton (Ky.)*, 794.
- Negligence in loading open rack car, so that material fell on track and caused derailment of hand car. *McLean v. Pere Marquette R. Co. (Mich.)*, 544.
- Negligence in using unusually large tender in switch yard, where employee riding on it was crushed against building near track. *Norfolk & W. Ry. Co. v. Cheatwood's Adm'x (Va.)*, 850.
- Negligence not shown by evidence that section hand was injured by projecting car step, which had been in use for four years, and was such as those in common use on other railroads. *Turner v. Detroit Southern R. Co. (Mich.)*, 163.
- Negligence, ordering brakeman to board moving car. *Weed v. Chicago, St. P., M. & O. Ry. Co. (Neb.)*, 797.
- Ordinances limiting speed was for protection of employees on track also. *Camp v. Chicago Great Western Ry. Co. (Iowa)*, 819.
- Proximate cause, where brakeman failed to close switch, whereby brake inspector was injured, absence of signal target was not the proximate cause. *Fullmer v. New York Cent. & H. R. R. Co. (Pa.)*, 817.
- Question for jury whether "hostler" was at his post of duty while riding on tender in switch yard. *Norfolk & W. Ry. Co. v. Cheatwood's Adm'x (Va.)*, 850.
- Question for jury whether section foreman was seen in time to avoid running engine against him. *Hinzeman v. Missouri Pac. Ry. Co. (Mo.)*, 178.
- Release, agreement to re-employ as consideration. *Missouri, K. & T. Ry. Co. of Texas v. Smith (Tex.)*, 573.
- Right of master to determine how work shall be done. *Tennessee Coal, Iron & R. Co. v. Jarrett (Tenn.)*, 589.
- "Telltale," statutory duty of master. *Hailey v. Texas & P. Ry. Co. (La.)*, 153.
- Torpedoes, where the rule forbade the placing of them at stations where they might injure passengers, a violation of the rule was negligence per se entitling an employee injured by a torpedo so placed to recover. *Illinois Cent. R. Co. v. Burton (Ky.)*, 794.
- Where employee was crushed against building near track, while riding on an unusually large tender in switch yard, negligence in using such tender in the yard was a question for jury. *Norfolk & W. Ry. Co. v. Cheatwood's Adm'x (Va.)*, 850.
- Where the only ground of negligence pleaded was failure to protect

MASTER AND SERVANT—Continued.

the hand car while running, there could be no recovery on the ground of negligence in starting it out. *Whittlesey v. New York, N. H. & H. R. Co.* (Conn.), 104.

Who are Employees.

Sleeping car porter an employee so as to charge railroad company with his negligence in directing passengers to jump from wrong train while it was in motion. *Newcomb v. New York Cent. & H. R. R. Co.* (Mo.), 10.

MATERIAL.

See RIGHT OF WAY.

MEDICAL ATTENDANCE.

See MASTER AND SERVANT.

MENTAL SUFFERING.

See CARRIERS OF PASSENGERS.

MERCHANDISE.

See FIRES SET BY LOCOMOTIVES.

MEXICAN STATUTES.

See DEATH BY WRONGFUL ACT.

MILEAGE BASIS.

See TAXATION.

MINERALS.

See RIGHT OF WAY.

MINIMIZING DAMAGE.

See CARRIERS OF GOODS; FIRES SET BY LOCOMOTIVES.

MINORS.

See CHILDREN.

MITIGATION OF DAMAGES.

See CONTRIBUTORY NEGLIGENCE.

MOTORMEN.

See MASTER AND SERVANT.

MOVING CARS.

See MASTER AND SERVANT.

MOVING TRAINS.

See TRESPASSERS.

MUNICIPAL CORPORATIONS.

See BRIDGES.

MUTUAL DUTIES.

See STREET RAILWAYS.

NEGATIVE AND AFFIRMATIVE TESTIMONY.

See CROSSINGS.

NEGLIGENCE.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; FRIGHTENING TEAMS; LICENSES; MASTER AND SERVANT; PERSONAL INJURIES.

Comparative negligence, doctrine does not obtain in Alabama. *Birmingham Ry., Light & Power Co. v. Bynum* (Ala.), 683.

NEGLIGENCE—Continued.

Count relying on willful acts of defendant's servants, as distinguished from its acts, in case. *Southern Ry. Co. v. Yancy* (Ala.), 466.

Definition, harmless error in instruction. *Memphis St. Ry. Co. v. Haynes* (Tenn.), 384.

Definition, instruction. *Kentucky & I. Bridge & R. Co. v. Shrader* (Ky.), 611.

Duty to instruct as to what constitutes. *Magrane v. St. Louis & S. Ry. Co.* (Mo.), 1.

No degrees of negligence. *Magrane v. St. Louis & S. Ry. Co.* (Mo.), 1.

Proper instruction as to what constitutes. *Magrane v. St. Louis & S. Ry. Co.* (Mo.), 1.

Recovery barred where negligence and contributory negligence concur to produce proximate cause. *Memphis St. Ry. Co. v. Haynes* (Tenn.), 384.

The term "slightest neglect or negligence" should be avoided in instructions, as there are no degrees of negligence. *Magrane v. St. Louis & S. Ry. Co.* (Mo.), 1.

Variance. *Southern Ry. Co. v. Yancy* (Ala.), 466.

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CROSSINGS; NEGLIGENCE.

NEWSBOYS.

See STREET RAILWAYS.

NONASSIGNABLE DUTIES.

See FELLOW SERVANTS.

NONEXPERT TESTIMONY.

See EVIDENCE.

NONRESIDENTS.

See TAXATION.

NON SUI JURIS.

See CHILDREN.

NOTICE OF ARRIVAL.

See CARRIERS OF GOODS.

NURSING.

See MASTER AND SERVANT.

OBEDIENCE TO ORDERS.

See MASTER AND SERVANT.

OBVIOUS DANGERS.

See MASTER AND SERVANT.

OPENING STREETS.

See RIGHT OF WAY.

OPINION EVIDENCE.

See EVIDENCE.

OPTION.

See CARRIERS OF GOODS.

ORDERS.

See MASTER AND SERVANT.

ORDINANCES.

See ACCIDENTS ON TRACK; CROSSINGS; FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT.

ORIGIN.

See FIRES SET BY LOCOMOTIVES.

OTHER FIRES.

See FIRES SET BY LOCOMOTIVES.

OVERHEAD BRIDGES.

See MASTER AND SERVANT.

OWNERSHIP.

See RAILROADS.

PAIN AND SUFFERING.

See PERSONAL INJURIES.

PANIC.

See CARRIERS OF PASSENGERS.

PARENT AND CHILD.

See CHILDREN.

PAROLE EVIDENCE.

See TICKETS AND FARES.

PARTIES.

See RIGHT OF WAY; STREET RAILWAYS.

PARTING OF TRAIN.

See FELLOW SERVANTS.

PASSENGERS.

See CARRIERS OF PASSENGERS; CONNECTING CARRIERS; DEATH BY WRONGFUL ACT; TICKETS AND FARES; TRESPASSERS.

PASSES.

See BAGGAGE; CARRIERS OF PASSENGERS.

PASSIVE NEGLIGENCE.

See LICENSES.

PENALTIES.

See CARRIERS OF PASSENGERS.

PERSONAL INJURIES.

See CARRIERS OF PASSENGERS.

Damages.

Excessive verdict. *Kentucky & I. Bridge & R. Co. v. Shrader* (Ky.), 611.

Excessive verdict, new trial because of evidence as to probable effect of operation. *Searles v. Elizabeth, P. & C. J. Ry. Co.* (N. J.), 781.

Future disability, sufficiency of evidence. *Cotant v. Boone Suburban Ry. Co.* (Iowa), 320.

Probable future earnings of injured child, father's testimony as to his own earnings admissible. *Fishburn v. Burlington, etc., Ry. Co.* (Iowa), 768.

Woman's climacteric likely to occur before recovery. *Keefe v. Norfolk Suburban St. Ry. Co.* (Mass.), 792.

PERSONAL INJURIES—Continued.**Evidence.**

Pain and suffering, appearance of child's face and its complaints and cries. *Fishburn v. Burlington, etc., Ry. Co. (Iowa)*, 768.
Fright, negligence causing is actionable. *Stewart v. Arkansas Southern R. Co. (La.)*, 330.
Release, admissibility of evidence to show fraud. *Keefe v. Norfolk Suburban St. Ry. Co. (Mass.)*, 792.
Venue, action against railroad company under Georgia statutes. *Coakley v. Southern Ry. Co. (Ga.)*, 371.

PHYSICIANS.

See DEATH BY WRONGFUL ACT.

PLATFORM GATES.

See CARRIERS OF PASSENGERS.

PLATFORMS.

See CARRIERS OF PASSENGERS.

PLEADING.

See NEGLIGENCE.

PLEADING AND PROOF.

See MASTER AND SERVANT.

POLICE OFFICERS.

See TRESPASSERS.

POLICE POWER.

See BRIDGES; STOCK, INJURIES TO.

POPULOUS PLACES.

See CROSSINGS.

PORTERS.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

POST OF DUTY.

See MASTER AND SERVANT.

POWERS.

See RAILROAD COMMISSIONS.

PREPAYMENT OF CHARGES.

See CARRIERS OF GOODS.

PRESCRIPTION.

See RIGHT OF WAY.

PRESUMPTIONS.

See CARRIERS OF PASSENGERS; FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT.

PRIVATE USE.

See EMINENT DOMAIN.

PROCESS.

See PERSONAL INJURIES.

PROJECTING CAR STEPS.

See MASTER AND SERVANT.

PROTECTION OF PASSENGERS.

See CARRIERS OF PASSENGERS.

PROVINCE OF COURT.

See BRANCH LINES; CONTRIBUTORY NEGLIGENCE;
EMINENT DOMAIN; TICKETS AND FARES.

PROVINCE OF JURY.

See CONTRIBUTORY NEGLIGENCE.

PROXIMATE CAUSE.

See CARRIERS OF PASSENGERS; CHILDREN; CON-
TRIBUTORY NEGLIGENCE; NEGLIGENCE.

PUBLIC POLICY.

See TICKETS AND FARES.

PUBLIC USE.

See EMINENT DOMAIN.

PUNITIVE DAMAGES.

See ACCIDENTS ON TRACK.

QUO WARRANTO.

See RAILROADS.

RAILROAD COMMISSIONS.

Power of commission, under Florida statute, to regulate rates to
be charged by lessee of road. *State ex rel. Railroad v. Seaboard*
Air Line Ry. (Fla.), 266.

Rates, reasonableness of how determined. *State v. Seaboard Air*
Line Ry. (Fla.), 266.

Return to alternative writ of mandamus seeking to compel com-
pany to put into effect schedule of rates, sufficiency of to tender
issue as to reasonableness of rates. *State v. Seaboard Air Line*
Ry. (Fla.), 266.

RAILROADS.

See ATTACHMENT; FRIGHTENING TEAMS; RIGHT OF
WAY.

Control of property not in stockholders. *Ulmer v. Lime Rock R.*
Co. (Me.), 724.

Forfeiture of franchise. *Ulmer v. Lime Rock R. Co. (Me.)*, 724.

Forfeiture of franchise, quo warranto in behalf of state. *Ulmer v.*
Lime Rock R. Co. (Me.), 724.

Franchises must be exercised by corporation alone. *Ulmer v. Lime*
Rock R. Co. (Me.), 724.

Ownership, sole stockholder. *Ulmer v. Lime Rock R. Co. (Me.)*,
724.

RAILROADS IN STREETS.

See CROSSINGS; EMINENT DOMAIN; RIGHT OF WAY.

Abutter's right to enjoin raising of grade of crossing. *Dean v.*
Ann Arbor R. R. (Mich.), 365.

City without authority to allow grade of railroad crossing to be
raised so as to practically vacate part of street. *Dean v. Ann*
Arbor R. R. (Mich.), 365.

Contributory Negligence.

Width of space between tracks, pedestrian not required to take
in at a glance, but may assume that he may stand on it in
safety while cars are passing each other. *Eichorn v. New Or-*
leans & C. R., Light & Power Co. (La.), 128.

RAILROAD WORK.

See FELLOW SERVANTS.

RATES.

See RAILROAD COMMISSIONS; TICKETS AND FARES.

REBUTTAL OF PRESUMPTION OF NEGLIGENCE.

See CARRIERS OF PASSENGERS.

RECEIVERS.

See CROSSING.

RE-EMPLOYMENT.

See MASTER AND SERVANT.

REFUSAL OF CONSIGNEE TO ACCEPT.

See CARRIERS OF GOODS.

RELEASE.

See MASTER AND SERVANT; PERSONAL INJURIES.

REMARriage.

See DEATH BY WRONGFUL ACT.

REPUTATION.

See EVIDENCE.

REPUTATION AS EVIDENCE.

See CARRIERS OF PASSENGERS.

RES GESTÆ.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

REVENUE.

See BILLS OF LADING.

REVERSION.

See RIGHT OF WAY.

REVIEW BY COURTS.

See BRANCH LINES; EMINENT DOMAIN.

RIGHT OF WAY.

See EMINENT DOMAIN.

Abandonment, application of statute permitting another railroad to condemn the property. *Knoxville Traction Co. v. Carroll* (Tenn.), 707.

Abandonment of land condemned for railroad purposes. *Knoxville Traction Co. v. Carroll* (Tenn.), 707.

Acquired by prescription. *Louisville & N. R. Co. v. Smith* (C. C. A.), 716.

Estoppel to recover possession of land by implied acquiescence in construction of railroad. *Indiana Ry. Co. v. Morgan* (Ind.), 750.

Injunction to prevent interference with railroad's use, joinder of defendants. *Louisville & N. R. Co. v. Smith* (C. C. A.), 716.

Injunction to prevent interference with railroad's use, jurisdictional amount. *Louisville & N. R. Co. v. Smith* (C. C. A.), 716.

Injunction to prevent interference with railroad's use, sufficiency of bill. *Louisville & N. R. Co. v. Smith* (C. C. A.), 716.

Material from, what may be used without further compensation. *Hendler v. Lehigh Valley R. Co.* (Pa.), 40.

RIGHT OF WAY—Continued.

Minerals, what are, and are not, within provision of deed reserving all coal and minerals. *Hendler v. Lehigh Valley R. Co. (Pa.)*, 40.

Opening new street across railroad right of way, authority to do so, without making compensation, not included in power of town to require railroad to make crossings. *Georgia R. & Banking Co. v. Mayor, etc., of Town of Union Point (Ga.)*, 354.

Opening street across railroad right of way as an exercise of the power of eminent domain. *Georgia R. & Banking Co. v. Mayor, etc., of Town of Union Point (Ga.)*, 354.

Reversion to fee owner where public use becomes impossible or is abandoned. *Knoxville Traction Co. v. Carroll (Tenn.)*, 707.

ROUNDHOUSES.

See FELLOW SERVANTS.

ROUTE.

See STREET RAILWAYS.

SAFE PLACE TO WORK.

See MASTER AND SERVANT.

SCHEDULES.

See CARRIERS OF PASSENGERS.

SCOPE OF EMPLOYMENT.

See TRESPASSERS.

SEATS.

See CARRIERS OF PASSENGERS.

SECTION HANDS.

See MASTER AND SERVANTS.

SERVICE OF PROCESS.

See PERSONAL INJURIES.

SICKNESS.

See MASTER AND SERVANT.

SIGNALS.

See CROSSINGS; FRIGHTENING TEAMS.

SIGNBOARDS.

See CROSSINGS.

SLEEPING CAR PORTERS.

See CARRIERS OF PASSENGERS; MASTER AND SERVANT.

SMALLPOX.

See DEATH BY WRONGFUL ACT.

SNOW FENCES.

See CHILDREN.

SOBRIETY.

See EVIDENCE.

SOLE STOCKHOLDER.

See RAILROADS.

SPEED.

See CARRIERS OF PASSENGERS; CROSSINGS; EVIDENCE; FIRES SET BY LOCOMOTIVES.

SPUR TRACKS.

See BRANCH LINES; EMINENT DOMAIN.

STAMPS.

See BILLS OF LADING.

STANDING ON PLATFORMS.

See CARRIERS OF PASSENGERS.

STARTING TRAINS.

See CARRIERS OF PASSENGERS.

STATE REGULATIONS.

See CARRIERS OF PASSENGERS.

STATIONS AND DEPOTS.

See CARRIERS OF PASSENGERS; DAMAGES; LICENSEES.

Damages.

Measure of for breach of condition to locate station. *Louisville, etc., Ry. Co. v. Whipps* (Ky.), 744.

Degree of care required in constructing. *Lauterer v. Manhattan Ry. Co.* (C. C. A.), 295.

Existence of another, and proper, means of exit was a question for jury. *Cotant v. Boone Suburban Ry. Co.* (Iowa), 320.

Liability because of defective exit stile constructed on adjoining property by third person. *Cotant v. Boone Suburban Ry. Co.* (Iowa), 320.

STATUTES.

See CARRIERS OF PASSENGERS; CROSSINGS; DEATH BY WRONGFUL ACT.

STOCK AND STOCKHOLDERS.

See RAILROADS.

STOCK, INJURIES TO.

See ANIMALS.

Exception in Virginia statute requiring roadbed to be fenced does not release railroad from duty of fencing right of way, but merely gives a defense to action for killing stock. *Sanger v. Chesapeake & Ohio Ry. Co.* (Va.), 482.

Fact that animals were trespassing cannot be invoked as defense to action under Virginia statute requiring right of way to be fenced. *Sanger v. Chesapeake & Ohio Ry. Co.* (Va.), 482.

Virginia statute requiring roadbed to be fenced applicable in action for killing stock of person who owned no land either at the place where the accident happened, nor where the stock went on the right of way. *Sanger v. Chesapeake & Ohio Ry. Co.* (Va.), 482.

Va. Code 1887, §§ 1250, 1259, as amended by Acts 1897-98, c. c. 250, 283, requiring railroad rights of way to be fenced, is a valid exercise of the police power. *Sanger v. Chesapeake & Ohio Ry. Co.* (Va.), 482.

STOPPING CAR.

See CROSSINGS.

STREET RAILWAYS.

See ACCIDENTS ON TRACK; CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS.

Abutting owners not proper parties to restrain company from charging greater rate of fares than that stipulated in its contract with township authorities. *Millcreek Tp. v. Erie Rapid Transit St. Ry. Co. (Pa.)*, 36.

Forfeiture of franchise, without action on part of township authorities, for failure to build road within time designated. *Millcreek Tp. v. Erie Rapid Transit St. Ry. Co. (Pa.)*, 36.

Franchises, consent of state necessary to validity of surrender of. *Thompson v. Schenectady Ry. Co. (C. C. A.)*, 351.

Misleading instruction as to duties of pedestrian, and mutual rights of pedestrian and company. *Portsmouth St. R. Co. v. Peed's Administrator (Va.)*, 65.

Mutual duties of motorman and other users of streets. *Conrad v. Elizabeth, P. & C. J. Ry. Co. (N. J.)*, 126.

Newsboy jumping on moving street car was a trespasser, to whom company owed no duty except to refrain from willfully or recklessly and wantonly exposing him to injury. *Albert v. Boston Elevated Ry. Co. (Mass.)*, 779.

No continuous route, within charter provision, where portion of it is on street which company has no right to occupy. *Altoona Belt Line St. Ry. Co. v. City Pass. Ry. Co. (Pa.)*, 52.

STREETS AND HIGHWAYS.

See RIGHT OF WAY.

STRUCTURES NEAR TRACK.

See MASTER AND SERVANT.

STUPOR.

See DEATH BY WRONGFUL ACT.

SUBSEQUENT PRECAUTIONS.

See CROSSINGS.

SULPHURIC ACID.

See LICENSEES.

SUPERINTENDENCE.

See FELLOW SERVANTS.

SUPERIOR SERVANT LIMITATION.

See FELLOW SERVANTS.

SURRENDER OF FRANCHISES.

See STREET RAILWAYS.

SURVIVOR.

See DEATH BY WRONGFUL ACT.

SWEEPING SIDEWALKS.

See FIRES SET BY LOCOMOTIVES.

SWITCH STANDS.

See MASTER AND SERVANT.

TAKING WRONG CAR.

See CARRIERS OF PASSENGERS.

TAXATION.

Injunction proper relief from assessment made upon constitutional principles. *Fargo v. Hart (U. S.)*, 737.

TAXATION—Continued.

Personal property of nonresident express company, situated outside of state, could not be taken into account in assessing its property within state, on mileage basis. *Fargo v. Hart* (U. S.), 737.

Tender not a prerequisite to injunctive relief against an assessment for taxation made upon unconstitutional principles. *Fargo v. Hart* (U. S.), 737.

TEAMS.

See FRIGHTENING TEAMS.

TELEGRAPH OPERATORS.

See FELLOW SERVANTS.

"TELLTALES."

See MASTER AND SERVANT.

TERMINATION OF LIABILITY.

See CARRIERS OF GOODS.

THEFT.

See CARRIERS OF GOODS.

THREATS.

See TRESPASSERS.

TICKETS AND FARES.

See STREET RAILWAYS.

Competing lines, agreement between that one of them, "will not reduce its present rates of fare, unless required by law," not against public policy. *Raritan River R. Co. v. Middlesex & S. Traction Co.* (N. J.), 56.

Courts have no general supervisory jurisdiction over the question of freight and passenger rates. *Raritan River R. Co. v. Middlesex & S. Traction Co.* (N. J.), 56.

Discretion of railroad company, under New Jersey statute, to establish rates of freight and fare. *Raritan River R. Co. v. Middlesex & S. Traction Co.* (N. J.), 56.

Duty of conductor to respect explanations of passenger presenting expired ticket where right train was not run on time, and passed station without stopping. *Marx v. Louisiana Western R. Co.* (La.), 635.

Parol evidence of contents of ticket. *Coine v. Chicago & N. W. Ry. Co.* (Iowa), 316.

Parol stipulation did not entitle plaintiff to be carried over connecting lines in same car. *Missouri, K. & T. Ry. Co. of Texas v. Harrison* (Tex.), 617.

Right to ride on expired ticket where trains were not run on time. *Marx v. Louisiana Western R. Co.* (La.), 635.

TOOLS.

See INDEPENDENT CONTRACTORS.

TORPEDOES.

See MASTER AND SERVANT.

TRANSFERS.

See CARRIERS OF PASSENGERS.

TRESPASSERS.

See ACCIDENTS ON TRACK; ANIMALS; CHILDREN; STOCK, INJURIES TO; STREET RAILWAYS.

As in the joint action against the company and its special police

TRESPASSERS—Continued.

officer there was one verdict, which neither defendant asked to have disturbed, the supreme court could not reverse the judgment of nonsuit, though it was of the opinion that the officer was acting within the scope of his authority. *Higby v. Pennsylvania R. Co. (Pa.)*, 479.

Burden of proof on plaintiff to show reckless and wanton misconduct to trespasser on freight car. *Bjornquist v. Boston & A. R. Co. (Mass.)*, 786.

Care due person asleep on track. *Maysville & B. S. R. Co. v. McCabe (Ky.)*, 459.

Care due trespasser on cars. *Bjornquist v. Boston & A. R. Co. (Mass.)*, 786.

Company liable for conduct of conductor in cursing trespasser on ejecting him. *Alabama & V. R. Co. v. Livingston (Miss.)*, 464.

Contributory Negligence.

Jumping on or off moving trains. *Powell v. Erie R. Co. (N. J.)*, 615.

Damages.

Excessive verdict for ejection with abuse, on a stormy night, after offer to pay fare. *Alabama & V. R. Co. v. Livingston (Miss.)*, 464.

Duty of railroad company. *Jordan v. Grand Rapids & I. Ry. Co. (Ind.)*, 397.

Duty to trespasser upon track after discovery of his peril. *Rawitzer v. St. Paul City Ry. Co. (Minn.)*, 91.

Ejection.

Not liable for injury to trespasser who let go moving train because of threats. *Powell v. Erie R. Co. (N. J.)*, 615.

Right to use force in ejecting trespasser climbing upon moving train. *Powell v. Erie R. Co. (N. J.)*, 615.

Person wrongfully on freight train, because misinformed by employee, was a trespasser, but not a willful trespasser. *Alabama & V. R. Co. v. Livingston (Miss.)*, 464.

Recklessness and wantonness to trespassers on cars, when to be inferred from language used by trainmen. *Bjornquist v. Boston & A. R. Co. (Mass.)*, 786.

Scope of employment of special railroad police officer arresting trespasser after he had jumped from car. *Higby v. Pennsylvania R. Co. (Pa.)*, 479.

Scope of employment to keep trespassers away from cars. *Bjornquist v. Boston & A. R. Co. (Mass.)*, 786.

UNCONSCIOUSNESS.

See DEATH BY WRONGFUL ACT.

UNCOUPLING CARS.

See MASTER AND SERVANT.

UNUSUAL DANGERS.

See CROSSINGS.

USE BY OTHER COMPANIES.

See MASTER AND SERVANT.

VACATION OF STREETS.

See RAILROADS IN STREETS.

VARIANCE.

See NEGLIGENCE.

VENUE.

See PERSONAL INJURIES.

VICE PRINCIPALS.

See FELLOW SERVANTS.

WANTONNESS.

See CONTRIBUTORY NEGLIGENCE; NEGLIGENCE.

WARNINGS.

See MASTER AND SERVANT.

"WHIPPING STRAPS."

See MASTER AND SERVANT.

WHO ARE EMPLOYEES.

See MASTER AND SERVANT.

WHO ARE PASSENGERS.

See CARRIERS OF PASSENGERS.

WIDTH BETWEEN TRACKS.

See RAILROADS IN STREETS.

WILLFULNESS.

See CONTRIBUTORY NEGLIGENCE; NEGLIGENCE.

WRONG CAR.

See CARRIERS OF PASSENGERS.

WRONGFUL DEATH.

See DEATH BY WRONGFUL ACT.

YARDS.

See MASTER AND SERVANT.



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